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# EXTRAORDINARY SESSION OF THE ASSEMBLY OF THE AFRICAN UNION
# 12 OCTOBER 2013
# ADDIS ABABA, ETHIOPIA

**Ext/Assembly/AU/Dec.1-2(Oct.2013)**
**Ext/Assembly/AU/Decl.1-4(Oct.2013)**

## DECISIONS AND DECLARATIONS

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# DECISION ON AFRICA'S RELATIONSHIP WITH THE INTERNATIONAL CRIMINAL COURT (ICC)

**The Assembly,**

1. **TAKES NOTE** of the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.482(XXI) on the International Jurisdiction, International Justice and the International Criminal Court (ICC) and the Presentation made by the Republic of Kenya as well as the recommendations of the Executive Council thereon;

2. **REITERATES,** in accordance with the Constitutive Act of the African Union (AU), the AU 's unflinching commitment to fight impunity, promote human rights and democracy, and the rule of law and good governance in the continent;

3. **REAFFIRMS** its previous Decisions on the abuse of the principles of Universal Jurisdiction adopted in Sharm El Sheikh in July 2008 as well as the activities of the ICC in Africa, adopted in January and July 2009, January and July 2010, January and July 2011, January and July 2012, and May 2013 wherein it expressed its strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace;

4. **REITERATES** AU's concern on the politicization and misuse of indictments against African leaders by ICC as well as at the unprecedented indictments of and proceedings against the sitting President and Deputy President of Kenya in light of the recent developments in that country;

5. **UNDERSCORES** that this is the first time that a sitting Head of State and his deputy are being tried in an international court and **STRESSES** the gravity of this situation which could undermine the sovereignty, stability, and peace in that country and in other Member States as well as reconciliation and reconstruction and the normal functioning of constitutional institutions;

6. **RECOGNIZES** that Kenya is a frontline state in the fight against terrorism at regional, continental and international levels and, in this regard, **STRESSES** the threat that this menace poses to the region in particular and the continent in general, and the proceedings initiated against the President and the Deputy President of the Republic of Kenya will distract and prevent them from fulfilling their constitutional responsibilities, including national and regional security affairs;

7. **RECALLS** that following the 2007 Post Election Violence (PEV), the mediation process in Kenya was initiated by AU which led to the enactment of the National Accord and Reconciliation Act and the Agreement establishing the coalition government, and **EXPRESSES** concern that the ongoing process before the ICC may pose a threat to the full implementation of the National Accord of 2008 and prevent the process of addressing the challenges leading to the post-election violence;

**8.** **EXPRESSES** its deep appreciation for the full cooperation that the President and Deputy President of Kenya have demonstrated to the ICC process and **CALLS UPON** the ICC to show the same level of cooperation in the process;

**9.** **REAFFIRMS** the principles deriving from national laws and international customary law by which sitting Heads of State and other senior state officials are granted immunities during their tenure of office;

**10.** **NOW DECIDES**:

(i) That to safeguard the constitutional order, stability and, integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office;

(ii) That the trials of President Uhuru Kenyatta and Deputy President William Samoei Ruto, who are the current serving leaders of the Republic of Kenya, should be suspended until they complete their terms of office;

(iii) To set up a Contact Group of the Executive Council to be led by the Chairperson of the Council, composed of five (5) Members (one (1) per region) to undertake consultations with the Members of the United Nations Security Council (UNSC), in particular, its five (5) Permanent Members with a view to engaging with the UNSC on all concerns of the AU on its relationship with the ICC, including the deferral of the Kenyan and the Sudan cases in order to obtain their feedback before the beginning of the trial on 12 November, 2013;

(iv) To fast track the process of expanding the mandate of the African Court on Human and Peoples' Rights (AfCHPR) to try international crimes, such as genocide, crimes against humanity and war crimes;

(v) That the Commission expedites the process of expansion of AfCHPR to deal with international crimes in accordance with the relevant decision of the Policy Organs and **INVITES** Member States to support this process;

(vi) That African States Parties propose relevant amendments to the Rome Statute, in accordance with Article 121 of the Statute;

(vii) To request African States Parties to the Rome Statute of the ICC, in particular the Members of the Bureau of the Assembly of States Parties to inscribe on the agenda of the forthcoming sessions of the ASP the issue of indictment of African sitting Heads of State and Government by the ICC and its consequences on peace, stability and reconciliation in African Union Member States;

(viii) That any AU Member State that wishes to refer a case to the ICC may inform and seek the advice of the African Union;

(ix) That Kenya should send a letter to the United Nations Security Council requesting for deferral, in conformity with Article 16 of the Rome Statute, of the proceedings against the President and Deputy President of Kenya that would be endorsed by all African States Parties;

(x) Pursuant to this Decision, to request the ICC to postpone the trial of President Uhuru Kenyatta, scheduled for 12 November 2013 and suspend the proceedings against Deputy President William Samoei Ruto until such time as the UN Security Council considers the request by Kenya, supported by the AU, for deferral;

(xi) That President Uhuru Kenyatta will not appear before the ICC until such time as the concerns raised by the AU and its Member States have been adequately addressed by the UN Security Council and the ICC;

(xii) To convene, an Extraordinary Session, towards the end of November 2013, to review the progress made in the implementation of this Decision of the AU Assembly (Ext/Assembly/AU/Dec.1(Oct.2013)).

11. **FINALLY REQUESTS** the Commission to report on the implementation of this Decision to the next Ordinary Session of the Assembly in January 2014.

# DECISION ON THE APPOINTMENT OF THE NEW COMMISSIONER FOR PEACE AND SECURITY
## Doc. Ext/EX.CL/3(XV)

**The Assembly,**

1. **TAKES NOTE** of the election by the Executive Council of the new Commissioner for Peace and Security;

2. **APPOINTS Mr. Smail Chergui (Algeria)** as Commissioner for Peace and Security of the African Union for the remaining term of Amb. Ramtane Lamamra and **CONGRATULATES** him on his appointment;

3. **DECIDES** that Mr. Chergui takes the Oath of Office during the current Extraordinary Session of the Assembly.

# DECLARATION ON THE LAMPEDUSA (ITALY) TRAGIC BOAT INCIDENT

**We**, the Heads of State and Government of the African Union, meeting at our Extraordinary Session, held in Addis Ababa, Ethiopia, on 12 October 2013:

***Recognizing*** the magnitude and impact of migration on development and over the growing number of migrants in Africa and beyond, and the brain drain syndrome that is increasingly becoming a global scourge affecting all countries around the world, especially in Africa;

***Gravely concerned*** with the serious economic and social impact of the recurrence of the phenomenon of illegal or irregular migration currently taking alarming proportions that threaten peace, security and stability which should be adequately addressed through a comprehensive approach to effective border management and within the context of strict observance of human rights and human dignity;

***Recalling*** the Assembly Decision Assembly/AU/Dec.125 (VII) adopted at the Banjul Summit in July 2006 on the African Common Position on Migration and Development;

***Underscoring*** that African inter-state collaboration and discourse can strengthen the capacity of States in migration management, including the development of common approaches towards harmonization of policies, laws and strategies on migration;

1. **DEEPLY REGRET** the loss of life of over 300 migrants that occurred on 3rd October 2013 in a boat accident in Lampedusa Island and **EXPRESS** our sincere condolences and deep sympathy to the families of the victims of this incident;

2. **COMMIT** itself to addressing the root causes of this phenomena of irregular migration from Africa to Europe;

3. **REQUEST** the Commission to investigate the root causes of migration of young people from Africa so as to recommend appropriate action to be taken by Member States with a view to finding a lasting solution to this persistent problem;

4. **URGE** Member States, the Regional Economic Communities (RECs) and other stakeholders to take active part in the implementation of Common Position on Migration and Development and promote appropriate policies towards lasting peace, stability, democratic governance, sustainable growth, youth employment opportunities and greater regional integration;

5. **APPEAL** to the International Community to continue to collaborate and increase their involvement in addressing migration and development issues for the attainment of the objectives contained in the African Common Position on Migration and Development;

6. **UNDERLINE** the need for a comprehensive review of the issue of migration between Africa and Europe and **REQUEST** that this item be inscribed on the agenda of the 3rd Africa-EU Summit scheduled to be held in Brussels, Belgium, on 2nd and 3rd April 2014;

7. **DECLARE** the 3 November 2013 as a day of mourning to be observed by all Member States of the African Union, in memory of the victims of the Lampedusa tragedy.

# DECLARATION ON AFRICA'S SOLIDARITY WITH AND SUPPORT TO LIBYA BY THE EXTRAORDINARY SESSION OF THE ASSEMBLY OF THE UNION

**We**, the Heads of State and Government of the African Union, meeting at our Extraordinary Session, held in Addis Ababa, Ethiopia, on 12 October 2013:

1. **EXPRESS** our concern on the situation in Libya particularly following the kidnapping of Prime Minister Ali Zeidan, by armed men in Tripoli, on 10 October 2013;

2. **STRONGLY CONDEMN** this criminal and unacceptable act and express relief at the release of the Prime Minister, few hours after his kidnapping;

3. **EXPRESS** our solidarity with the Libyan leaders and our support to the legitimate Libyan institutions in their efforts to stabilize the situation in the country, address the other challenges at hand and bring to a successful end the ongoing transition process;

4. **STRESS** the need for all Libyan stakeholders to seek solutions to their differences within the framework of the existing institutions and a comprehensive process of national dialogue and **CALL ON** the Libyan people to extend their support to their legitimate institutions;

5. Mindful of the need for sustained support and solidarity with Libya in this challenging time, **REQUEST** the Commission, building on the initiatives already taken, to take all necessary steps to facilitate a coordinated and enhanced continental support to Libya; in this regard, we **CALL ON** Africa's partners to extend similar support;

6. **ALSO STRESS** the right of Libya to put in trial, in Libya, its own citizens charged with committing crimes, in conformity with Decision Assembly/AU/Dec.419(XIX) adopted in Addis Ababa, Ethiopia, in July 2012.

**Ext/Assembly/AU/Decl.3(Oct.2013)**

# DECLARATION OF SOLIDARITY WITH THE REPUBLIC OF KENYA FOLLOWING THE TERRORIST AL-SHABAB/AL-QUAEDA ATTACK ON THE WESTGATE SHOPPING MALL IN NAIROBI, KENYA

**We**, the Heads of State and Government of the African Union, meeting in our Extraordinary Session, held in Addis Ababa, Ethiopia, on 12 October 2013:

***Deeply concerned*** about the terrorist Al-Shabab/Al-Qaeda attack on the Westgate Shopping Mall in Nairobi on 21 September 2013;

Hereby,

1. **CONDEMN** with utmost firmness this cowardly and vicious act of aggression against a Member State of the African Union;

2. **COMMEND** the prompt and firm response by the Kenyan authorities, which frustrated the criminal designs of the terrorist Al-Shabab/Al-Qaeda gangs and thereby saved hundreds of human lives and prevented incalculable material damage;

3. **EXPRESS** our full solidarity with the Government and people of Kenya;

4. **EXPRESS** our sincere condolences and deep sympathy to the Government and people of Kenya and the families of the victims of this despicable terrorist act;

5. **NOTE** that the terrorist aggression against Kenya is not only an act against Kenya but also against the security and stability of Africa as a whole. It testifies to the terrorist threats which target Member States in various parts of Africa. The response demonstrates the determination and unwavering approach of the African Union in combatting the scourge of terrorism and other related phenomena such as organized international crime;

6. **SEIZE** this opportunity to reaffirm the full commitment of the African Union to spare no effort to permanently avert these threats to the security, stability and development of the African continent and to combine its efforts with the East African region and the rest of the international community in the fight against the terrorist Al-Shabab/Al-Qaeda group in Somalia and in the region.

**Ext/Assembly/AU/Decl.4(Oct.2013)**

# DECLARATION OF SOLIDARITY WITH THE FEDERAL REPUBLIC OF SOMALIA FOLLOWING THE TERRORIST AL-SHABAB/AL QAEDA ATTACK, ON A MARKET IN MOGADISHU

**We**, the Heads of State and Government of the African Union, meeting in our Extraordinary Session, held in Addis Ababa, Ethiopia, on 12 October 2013:

***Deeply concerned*** about the persistent terrorist Al-Shabab/Al Qaeda attacks on innocent people in Somalia, in particular the heinous bombardment of a market in Mogadishu on 21st September 2013,

Hereby,

1. **CONDEMN** with utmost firmness these cowardly and vicious acts of aggression against a Member State of the African Union;

2. **COMMEND** the efforts of the Somali security forces to counteract the continuous aggression of the terrorist Al-Shabab/Al Qaeda gangs;

3. **EXPRESS** our full solidarity with the Government and people of Somalia in their efforts to consolidate the gradual return to stability in their country and **REAFFIRM** their commitment to increase their support through the AMISOM;

4. **EXPRESS** our sincere condolences and deep sympathy to the Government and people of Somalia and the families of the victims of these continuous terrorist acts;

5. **SEIZE** this opportunity to reaffirm the full commitment of the African Union to spare no effort to permanently avert these threats to the security, stability and development of the African continent and to combine its efforts with the East African region and the rest of the international community in the fight against the terrorist Al-Shabab/Al Qaeda group in Somalia and in the region.

ICC-02/05-01/09-370-Anx1 16-07-2018 12/1408 RH PT OA2

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# The Position of Heads of State and Senior Officials in International Law

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respect of official acts carried out while they were in office. A former head of State continues to be entitled to the latter after he has left office but it is far less extensive than the personal immunity enjoyed by an incumbent head of State. The differences between these two types of immunity are discussed in section 1 above.

## *Personal immunity of incumbent head of State*

### (a) Criminal proceedings

It has long been accepted that, under customary international law, a serving head of State enjoys absolute immunity from the criminal jurisdiction of foreign courts.[191] Moreover, the ICJ has held that this type of immunity applies not only in relation to official acts but also in relation to private acts and regardless of whether the head of State is on official business or on a private visit.[192] Similarly, the immunity will apply whether the act concerned was carried out before the head of State assumed office or during the period of office.[193] The extensive nature of a sitting head of State's personal immunity in this regard has long been acknowledged by national courts. In 1989 the Swiss Supreme Court agreed with the following proposition:

> Heads of State are absolutely exempt *ratione personae* from all measures of constraint and exercise of jurisdiction on the part of a foreign State for acts committed by them, anywhere in the world, in the exercise of their official functions. By contrast with immunity from civil jurisdiction... immunity from criminal jurisdiction of heads of State is absolute... This immunity would appear to cover, without reservation, to private acts.[194]

The ICJ's conclusion in *Arrest Warrant of 11 April 2000 (DRC v Belgium)* was based upon the view that such full immunity is necessary to protect the head of State against any act of authority of another State which would hinder that individual in the performance of his or her duties. Before that decision, it had been argued that an exception to this rule of absolute inviolability and immunity from criminal jurisdiction should be accepted in the case of serious crimes under international law. However, the relatively sparse State practice that existed did not support such a contention and, even in the *Pinochet* case, where an exception was admitted to the functional immunity enjoyed by a former head of State in relation to the crime of torture, the Court emphasized that the personal immunity to which an incumbent head of State was

[191] See eg *Re Honecker* (1984) 80 ILR 365.

[192] This is in contrast to the type of personal immunity enjoyed by a person on special mission which applies only when the individual concerned is on official business and for the duration of the special mission.

[193] See *Arrest Warrant of 11 April 2000 (DRC v Belgium)* (2002) ICJ Rep 3 at para [55].

[194] See *Marcos v Federal Department of Police* (1989) 102 ILR 53 at 57.

Oxford Public International Law

# Gaddafi case, General Prosecutor at the Court of Appeal of Paris, Appeal judgment, Appeal No 00-87215, Decision No 64, (2001) 125 ILR 490, (2001) RGDIP 474, ILDC 774 (FR 2001), 13th March 2001, France; Court of Cassation [Cass]; Criminal Division

**Date:** 13 March 2001
**Content type:** Domestic court decisions
**Jurisdiction:** France [fr]; Court of Cassation [Cass]; Criminal Division

**Citation(s):** Appeal No 00-87215 (Application No)
Decision No 64 (Decision No)
(2001) 125 ILR 490 (Other Reference)
(2001) RGDIP 474 (Other Reference)
ILDC 774 (FR 2001) (OUP reference)
**Product:** Oxford Reports on International Law [ORIL]
**Module:** International Law in Domestic Courts [ILDC]

**Parties:** General Prosecutor at the Court of Appeal of Paris (France [fr])

**Judges/Arbitrators:** Cotte (President); Chanet (Reporter)

**Procedural Stage:** Appeal judgment

**Previous Procedural Stage(s):**
Court of Appeal of Paris, indictment division, unreported, 20 October 2000

**Related Development(s):**
*Judgment of six Libyan nationals, Abdallah Senussi and ors*, unreported, 10 March 1999 ('10 March Judgment')
Agreement between the Gaddafi International Foundation for Charity Associations, SOS attentats, the victim's family, and the Bank for Official Deposits, 9 January 2004
*Association SOS attentats et Béatrix de Boëry v France*, Decision as to admissibility, App no 76642/01, 4 October 2006
(Application was filed with the European Court of Human Rights but the case was struck off the list by the court because an agreement was reached between the parties and Libya, and because of the 10 March Judgment .)

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**Subject(s):**

Diplomatic immunity — Heads of state and other senior officials — Privileges — Immunity from jurisdiction, state officials — Terrorism — Customary international law — General principles of international law — Reparation

**Core Issue(s):**

Whether an incumbent foreign head of state enjoyed immunity from jurisdiction in a criminal action brought before a French court for complicity in an act of terrorism.

**Oxford Reports on International Law in Domestic Courts is edited by:**

Professor André Nollkaemper, University of Amsterdam and August Reinisch, University of Vienna.

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### *Facts*

**F1** This case originated from the 19 September 1989 bomb attack committed against a DC 10 aircraft operated by the French company UTA that killed 170 people, including several French nationals, above the Tenere desert. After a judicial investigation in France, six Libyan nationals were committed for trial. In Judgment, 10 March 2001, the Paris Assize Court sentenced them *in absentia* to life imprisonment and ordered them to pay compensation to members of the victims' families who had participated in the trial as civil parties.

**F2** On 16 June 1999, a civil-party complaint was lodged against Colonel Muammar Gaddafi, the Libyan head of state, for complicity in the bomb attack. On 6 October 1999, the investigating judge ruled that there was a case to answer and decided to bring a case against Gaddafi for complicity in destruction of property by use of an explosive substance which caused loss of life in relation to a terrorist conspiracy.

**F3** The prosecutor's office applied for review of the investigating judge's decision in Judgment, 20 October 2000 and upheld the decision to proceed with the case. The court of appeal recognized that a head of state enjoyed immunity from jurisdiction. However, it considered that the principle of immunity for heads of state had, since the end of World War II, undergone some modifications which would indicate that it was no longer absolute, and admitted exceptions when the act committed would not be considered part of the normal duties of heads of state. Considering the nature and gravity of the crime charged, the court of appeal ruled that Colonel Gaddafi, though an incumbent head of state, could not enjoy immunity from jurisdiction, and it remitted the case for trial.

**F4** The general prosecutor at the Court of Appeal of Paris filed an appeal on a point of law with the court of cassation, arguing that the court of appeal had misinterpreted international law. The general prosecutor argued that immunity from jurisdiction was an absolute principle for incumbent heads of state and that no exception could be made to it—however grave the crime charged.

### *Held*

**H1** Sitting foreign heads of state enjoyed immunity from jurisdiction before French courts by application of customary international law. The crime charged in this case, regardless of its gravity, did not constitute an exception to the principle of immunity from jurisdiction internationally recognized for incumbent heads of state in foreign courts. (paragraph 9)

**H2** The court of appeal had misinterpreted international law by recognizing an exception to this principle in light of the gravity of the crime alleged. As a consequence, its judgment was quashed. (paragraph 9)

**H3** There was no ground to proceed further with the case. (paragraph 11)

Date of Report: 28 October 2008

**Reporter(s):** Thomas Margueritte

### *Analysis*

**A1** France, being a civil law country, mainly relies on written law; it is generally reluctant vis-à-vis customary law. As far as criminal law is concerned, France attaches great importance to the principle of *nullum crimen sine lege, nulla poena sine lege praevia*. As a result, French criminal courts are even more reluctant when it

comes to the application of customary rules (Roulot, p 2631 Find it in your Library and Massé, p 898 Find it in your Library, see Further Analysis).

**A2** In this case, the court of cassation, the final instance for civil and criminal matters, did apply customary law. The apparent audacity of the court of cassation should not, however, be overestimated. This case referred to a procedural matter, not to substantive law. It is not clear whether the court's willingness to apply customary law would extend to substantive rules—see Michel Massé, 'La coutume internationale dans la jurisprudence de la chambre criminelle—(Affaire *Kadhafi et Aussarès*)', (2003–4) Revue de science criminelle et de droit pénal comparé 894 p 402 Find it in your Library; and also *The Movement Against Racism and for Peoples' Friendship v Aussaresses*, Appeal no 02-80719, Decision no 122; ILDC 775 (FR 2003), 17 June 2003.

**A3** Treaties and conventions come under Article 55 of the Constitution, 4 October 1958 (France), which provides that, when regularly ratified and published, treaties and conventions prevail over statutory law. The Constitution remained silent as to the reception of international customary law, but the Preamble of the Constitution, 1946 (France) ('1946 Constitution') which is referenced in the Constitution and has been declared by the French Constitutional Court as having constitutional value, provides in Article 14 of the 1946 Constitution that France, faithful to its traditions, abides by rules of international law. Article 14 could be a constitutional ground for the application of international customary law by a French court (Roulot, p 2632 Find it in your Library, see Further Analysis).

**A4** In this case, the main bone of contention between the court of appeal and the court of cassation did not lie in the recognition of the principle of immunity from jurisdiction of a head of state, but in its exceptions.

**A5** For the Paris Court of Appeal, immunity from jurisdiction was no longer absolute and conduct that could not be attached to the normal duties of a head of state prevented the head of state from enjoying the protection given to him by international law. According to the court of appeal, new international obligations have been created for states, among which is the obligation to judge international criminals regardless of their position. The court of appeal concluded that there were accordingly exceptions to the principle of immunity from jurisdiction.

**A6** The court of cassation took a different approach, ruling that, at the time of the decision, the alleged crime had not been an exception to the principle of immunity from jurisdiction of foreign incumbent heads of state. The court of cassation did not say, however, that immunity from jurisdiction of foreign heads of state was absolute, but that an exception had to be established under international law. It added that immunity applied only to incumbent heads of state.

**A7** The decision of the French Supreme Court later found support in the *Yerodia case, Congo, Democratic Republic of the v Belgium*, (2002) ICJ 121, 11 April 2000 ('*Yerodia case*'), in which the International Court of Justice held that immunity from jurisdiction for state officials was absolute and protected them against 'any act of authority of another State which would hinder him or her in the performance of his or her duties' (*Yerodia case* (54)). It added that 'no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity", and those claimed to have been performed in a "private capacity…"' (*Yerodia case* (55)). This holding thus supported the conclusion that the exception applied by the Paris Court of Appeal had no basis in international law.

**A8** The decision of the court of cassation appeared audacious for applying international customary law in a civil law country usually reluctant to do so. Despite criticisms from victims' associations and NGOs (see eg FIDH, 13 March 2001, this decision also appeared right in that it applied the correct legal regime of the

international customary principle at issue.

**A9** On 11 September 2001, an application was filed with the European Court of Human Rights, on the ground that that this judgment had violated their right of access to a court. A chamber relinquished jurisdiction to the Grand Chamber. On 9 January 2004, before the Grand Chamber had considered the case, an agreement was signed between the Gaddafi International Foundation for Charity Associations, the families of the victims, and the Bank for Official Deposits, which provided for compensation. In view of the agreement and the fact that six Libyan officials had been convicted, the court struck the case from the list on the basis of Article 37(1) (c) of the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953. (See Agreement between the Gaddafi International Foundation for Charity Associations, SOS attentats, the victim's family, and the Bank for Official Deposits, 9 January 2004.)

Date of Analysis: 29 October 2008
Analysis by: Yann Kerbrat, Thomas Margueritte

**Further analysis:**

Michel Massé, 'La coutume internationale dans la jurisprudence de la chambre criminelle—(Affaire *Kadhafi et Aussarès*)', (2003–4) Revue de science criminelle et de droit pénal comparé 894 Find it in your Library
Carlo Santulli, 'Coutume internationale et juge national: qui peut quoi? A propos de l'immunité du chef de l'Etat étranger dans l'affaire Khadafi', (2002–3) Journal du droit international 805 Find it in your Library
Florence Poirat, 'Immunité de juridiction pénale du chef de l'Etat étranger en exercice et règle coutumière devant le juge judiciaire', (2001–2) Revue générale de droit international public 473 Find it in your Library
Jean-François Roulot, 'La coutume du droit international pénal et l'affaire "Kadhafi"', (2001) 32 Recueil Dalloz 2631 Find it in your Library

## *Instruments cited in the full text of this decision:*

*Constitutions*

Constitution, 4 October 1958 (France)

To access full citation information for this document, see the Oxford Law Citator record

## Decision - full text

Paragraph numbers have been added to this decision by OUP

## Republique Francaise au nom du Peuple Francais

**1** CASSATION sans renvoi sur le pourvoi formé par le procureur général près la cour d'appel de Paris, contre l'arrêt de la chambre d'accusation de ladite cour d'appel, en date du 20 octobre 2000, qui a confirmé l'ordonnance du juge d'instruction disant y avoir lieu à informer sur la plainte de l'association X... et de Y..., épouse Z..., contre A..., du chef de complicité de destruction d'un bien par l'effet d'une substance explosive ayant entraîné la mort d'autrui, en relation avec une entreprise terroriste.

**2** LA COUR,

**3** Vu l'ordonnance du président de la chambre criminelle en date du 22 novembre 2000 prescrivant l'examen immédiat du pourvoi ;

**4** Vu les mémoires produits en demande et en défense ;

**5** Sur le moyen unique de cassation, pris de la violation du droit pénal coutumier international relatif à l'immunité de juridiction reconnue aux chefs d'Etat étrangers :

**6** Vu les principes généraux du droit international ;

**7** Attendu que la coutume internationale s'oppose à ce que les chefs d'Etat en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, faire l'objet de poursuites devant les juridictions pénales d'un Etat étranger ;

**8** Attendu que l'association X... et Z... ont porté plainte avec constitution de partie civile du chef de complicité de destruction d'un bien par l'effet d'une substance explosive ayant entraîné la mort d'autrui, en relation avec une entreprise terroriste, contre A..., chef d'Etat en exercice de la Jamahiriya Arabe Libyenne, à qui elles reprochent son implication dans l'attentat commis le 19 septembre 1989 contre un avion DC 10 de la compagnie UTA, lequel, en explosant au-dessus du Niger, a causé la mort de 170 personnes, plusieurs d'entre elles étant de nationalité française ;

**9** Attendu que, pour confirmer l'ordonnance du juge d'instruction disant y avoir lieu à informer, nonobstant des réquisitions contraires du ministère public, les juges du second degré retiennent que, si l'immunité des chefs d'Etat étrangers a toujours été admise par la société internationale, y compris la France, aucune immunité ne saurait couvrir les faits de complicité de destruction d'un bien par l'effet d'une substance explosive ayant entraîné la mort d'autrui, en relation avec une entreprise terroriste ;

**9** Whereas, to uphold the Investigating Judge's order stating an investigation be carried out, notwithstanding the contrary submissions of the public prosecutor, the judges at second instance held that, while the immunity of foreign heads of State was still accepted by international society, including France, no immunity could cover the facts of complicity in the destruction of property using an explosive substance leading to the death of others, in relation with a terrorist enterprise;

**10** Mais attendu qu'en prononçant ainsi, alors qu'en l'état du droit international, le crime dénoncé, quelle qu'en soit la gravité, ne relève pas des exceptions au principe de l'immunité de juridiction des chefs d'Etat étrangers en exercice, la chambre d'accusation a méconnu le principe susvisé ;

**10** But whereas in delivering this verdict, as in international law, the reported crime, regardless of its gravity, does not provide exceptions to the principle of the immunity from jurisdiction of foreign heads of State in office, the indictment division failed to consider the abovementioned principle;

**11** D'où il suit que la cassation est encourue ; qu'elle aura lieu sans renvoi, la Cour de Cassation étant en mesure d'appliquer la règle de droit et de mettre fin au litige ainsi que le permet l'article L. 131-5 du Code de l'organisation judiciaire ;

**11** It was on this basis that the quashing will occur, without remitting the case to an appeal court, the Court of Cassation being able to apply the rule of law and put an end to the dispute as is permitted by Article L. 131-5 of the Judicial Organisation Code;

**12** Par ces motifs :

**12** For these reasons:

**13** CASSE ET ANNULE, en toutes ses dispositions, l'arrêt de la chambre d'accusation de la cour d'appel de Paris, en date du 20 octobre 2000 :

**13** QUASHES AND ANNULS all the provisions of the Decision of the Indictment Division of the Paris Court of Appeal of 20 October 2000:

**14** DIT n'y avoir lieu à informer ;

**14** DECLARES that there is no need for investigation;

**15** DIT n'y avoir lieu à renvoi.

**15** DECLARES there is no need for appeal.

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**State immunity — Head of State — Scope of immunity from criminal jurisdiction — Whether absolute — Whether differing from scope of immunity from civil jurisdiction — Waiver—Conditions—Rules of customary international law —Vienna Convention on Diplomatic Relations, 1961, Article 32 — Application to head of State by analogy**

**State immunity — Head of State — Former head of State — Whether entitled to immunity from the criminal jurisdiction of courts in other States — Whether immunity subsisting in relation to acts performed in exercise of functions — Rules of customary international law — Vienna Convention on Diplomatic Relations, 1961, Article 39 — Application to head of State by analogy — The law of Switzerland**

## MARCOS AND MARCOS *v.* FEDERAL DEPARTMENT OF POLICE

*Switzerland, Federal Tribunal. 2 November* 1989

SUMMARY: *The facts*:—The United States authorities instituted proceedings against Ferdinand Marcos, former President of the Philippines, and his wife Imelda, who had been a Minister in the Philippine Government. They were accused of having abused their positions to acquire for themselves public funds and works of art. In 1988 a request for mutual legal assistance was sent by the United States authorities to their Swiss counterparts seeking, in particular, to obtain banking and other documents in order to clarify the nature of certain transactions which were the subject of investigation. Marcos and his wife objected to the request, arguing that the United States authorities had no jurisdiction to institute proceedings against them. Their objection was rejected and they lodged an administrative law appeal before the Federal Tribunal.

*Held*:—The appeal was dismissed.

(1) In an earlier judgment of 1 July 1987[1] also concerning former President Marcos, the Federal Tribunal had held that the immunity from execution enjoyed by a Head of State could not be relied upon once he was no longer in office since that immunity was a privilege granted in the interests of that State and could not be invoked for personal reasons against the interests of the State concerned (pp. 200-1).

(2) Under customary international law, heads of State and their families enjoyed absolute immunity from criminal jurisdiction which, by contrast with immunity from civil jurisdiction, was not restricted to acts performed *jure imperii*. It appeared that immunity from criminal jurisdiction covered all the private activities of Heads of State. Whilst this immunity of Heads of State had not been codified in the Vienna Convention on Diplomatic Relations, 1961, which applied only to heads of missions and other diplomatic staff,

[1] 82 *ILR* 53.

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there was no evidence from other treaties concluded under the auspices of the United Nations of any intent to grant lesser protection to foreign Heads of State than to diplomatic representatives. Accordingly, Articles 32 and 39 of the Vienna Convention were applicable by analogy to Heads of State, limiting their immunity to the period for which the sending State was prepared to grant it (possibility of express waiver) and to the duration of their functions (acts performed in the exercise of official functions, however, continued to be covered by immunity) (pp. 201-3).

(3) The immunity in relation to their functions enjoyed by the appellants therefore subsisted for those criminal acts allegedly committed while they were still exercising their powers in the Philippines. Accordingly, the proceedings in the United States courts could only be pursued because the State of the Philippines had expressly waived the immunity of Mr and Mrs Marcos. The Federal Tribunal had therefore enquired into the position and ascertained from the Swiss authorities that the Philippine Foreign Ministry had written a *note verbale* to the United States Embassy in Manila in October 1988, stating that the Philippine Government waived all State and diplomatic immunity, as well as the immunity of Head of State, which former President Marcos and his wife might enjoy or have enjoyed under American or international law. The *note verbale* also stated that the Philippine Government considered that the appellants should not be able to benefit from the doctrine of act of State in the United States. This declaration, emanating from one of the organs of the Philippine Government, was decisive. It was not the task of the Federal Tribunal to resolve questions of the procedural correctness of the waiver from the standpoint of Philippine law or the scope which it might be given by the United States courts (pp. 203-5).

The following is the text of the judgment of the Court:

On 2 February 1988 the United States Department of Justice communicated to the [Swiss] Federal Office of Police a request for international mutual assistance in a criminal matter based on the Treaty concluded on 25 May 1973 between the Swiss Confederation and the United States of America (hereafter "the Treaty"). This request was made for the purposes of an enquiry instituted by the United States Public Prosecutor for the State of New York against, *inter alia*, Ferdinand and Imelda Marcos, Philippine citizens who had been resident in Honolulu in Hawaii since February 1986. The offences being investigated consisted in the diversion of large amounts of funds (in particular an unlawful repayment of Philippine treasury bonds) and works of art (paintings from the "Samuels collection") which Marcos and his wife allegedly committed to the detriment of the United States of America and the Republic of the Philippines between 1981 and 1986, while they were respectively the President of the Republic and Minister for Social Affairs and Governor of the Metropolitan District of Manila.

The requesting State asked, in particular, that Switzerland should

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obtain for it documents held in banking, fiduciary and brokerage institutions based in Geneva, in order to facilitate clarification of the nature of transactions which were the subject matter of the enquiry by the United States Public Prosecutor.

The Federal Office having decided to consider the request for mutual assistance, Marcos and his wife lodged an objection arguing, *inter alia*, that the American authorities had no jurisdiction to institute proceedings in relation to the offences alleged in the request for mutual assistance. This objection was rejected and Marcos and his wife then lodged an administrative law appeal before the Federal Tribunal.

In the course of the proceedings, the Federal Office was asked to verify whether the requesting State was in possession of a declaration made by the competent authorities of the Republic of the Philippines with regard to the waiver of the immunity of President and Mrs Marcos. The Federal Office of Police lodged with the Court a diplomatic note of 17 October 1988 addressed to the Embassy of the United States in Manila, whose text will be reproduced below to the extent necessary.

The Federal Tribunal allowed the administrative law appeal in part, accepting the request for mutual assistance to the extent that it related to the prosecution of offences consisting in the repayment of Philippine treasury bonds and the appropriation of paintings belonging to the Republic of the Philippines and situated on the territory of the United States.

*From the grounds of the judgment*

5.—The appellants dispute the jurisdiction of the requesting State by invoking the immunity which they claim to enjoy as the former leaders of a foreign State.

(a) In the judgment of principle rendered on 1 July 1987,[2] on the basis of an administrative law appeal lodged by President and Mrs Marcos against provisional measures adopted in accordance with Article 18 of the Federal Law on International Mutual Assistance in Criminal Matters (EIMP), following a request for mutual assistance by the Republic of the Philippines, the Federal Tribunal has already considered the scope of the personal immunity recognized to heads of State under international law. The Court pointed out that such personal immunity is the counterpart of the immunity enjoyed by a foreign State acting *jure imperii*, that is to say in the exercise of its sovereign powers. The Vienna Convention on Diplomatic Relations of 18 April 1961 (hereafter the Vienna Convention) simply codifies a concept based on customary international law. In that decision the Federal Tribunal was concerned with the *immunity from execution* which a former Head of State and his wife sought to rely upon against the State which they had governed. The Federal Tribunal considered that

[2 82 *ILR* 53.]

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such immunity was a privilege granted in the interests of that State and that it would be contrary to the whole system if an individual who was no longer responsible for representing a State could nevertheless invoke his personal immunity against the very interests of that State. In the same judgment, the Federal Tribunal held that it was not for the requested State to decide whether or not a former Head of State, following his removal from office, should still be given the benefit of immunity guaranteed to him by the law of his country for official acts performed in the exercise of his mandate. That question could only be resolved in the light of the independent municipal law of the requesting State (*ATF* 113 Ib 275, ground 7).[3]

(b) In the present case, the question at issue is whether or not the appellants enjoy *immunity from criminal jurisdiction* constituting an obstacle to the proceedings which the Government of the United States of America intends to institute against them in relation to acts which they committed in the performance of their official functions as office bearers in the Republic of the Philippines.

According to the case law of the Swiss Federal Tribunal concerning the jurisdictional immunity of foreign States, the principles of international law form an integral part of Swiss municipal law. The Swiss courts therefore apply the rules of customary international law in the same manner as if they were contained in an international treaty (*ATF* 106 Ia 142;[4] 82 I 75;[5] 56 I 237;[6] *cf.* Egli, *L'immunité de juridiction et d'exécution des Etats étrangers et de leurs agents dans la jurisprudence du Tribunal Fédéral, Centenaire de la LP*, Zurich, 1989, p. 201 *et seq.*, especially pp. 202-3; *Caflisch, La pratique suisse en matière de droit international public*, 1983, p. 183).

Customary international law has always granted to Heads of State, as well as to the members of their family and their household visiting a foreign State, the privileges of personal inviolability and immunity from criminal jurisdiction (Seidl-Hohenveldern, *Völkerrecht*, 6th ed., Cologne, 1987, p. 303 *et seq.*). This jurisdictional immunity is also granted to a Head of State who is visiting a foreign State in a private capacity and also extends, in such circumstances, to the closest accompanying family members as well as to the senior members of his household staff. Accordingly, such persons cannot be the subject of criminal proceedings or even of a summons to appear before a court (Caflisch, *op. cit.*, p. 183). Customary public international law grants such privileges *ratione personae* to Heads of State as much to take account of their functions and symbolic embodiment of sovereignty as by reason of their representative character in inter-State relations.

[3 82 *ILR* 57.]
[4 62 *ILR* 228 at 233.]
[5 23 *ILR* 195 at 196.]
[6 *Ann Dig* 121 at 122.]

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Although the theory of extraterritoriality has long been criticized and abandoned as the justification for the immunity of Heads of State or diplomatic agents (Quoc Dinh, Daillier and Pellet, *Droit international public*, 3rd ed., Paris, 1987, p. 661), Heads of State are absolutely exempt *ratione personae* from all measures of constraint and any exercise of jurisdiction on the part of a foreign State for acts committed by them, anywhere in the world, in the exercise of their official functions. By contrast with immunity from civil jurisdiction, which has constantly been a source of discussion and restriction, the immunity from criminal jurisdiction of Heads of State is absolute (Cahier, *Le droit diplomatique contemporain*, 2nd ed., in *Publications de l'Institut Universitaire des Hautes Etudes Internationales*, No 40, Geneva, 1964, pp. 333 *et seq.*, especially pp. 338-9; Delbrück and Wolfrun, *Völkerrecht*, vol. I/1, Berlin and New York 1989, pp. 253 *et seq.*). This immunity would also appear to cover, without reservation, the private activities of Heads of State (Kimminich, in *Archiv des Völkerrechts*, vol. 26, Tubingen 1988, pp. 129 *et seq.*, especially p. 160; Verdross and Simma, *Universelles Völkerrecht*, 3rd ed., Berlin 1984, pp. 640 *et seq.*, paragraph 1027; Rousseau, *Droit international public*, vol. IV, Paris 1980, pp. 124-6).

(c) The privilege of the immunity from criminal jurisdiction of Heads of State, deduced from international custom, has not been fully codified in the Vienna Convention. Articles 31 *et seq.* of the Convention deal exclusively with the jurisdictional immunity of diplomatic agents who, pursuant to the interpretative rule contained in Article 1(e), are defined as heads of missions or members of the diplomatic staff of missions. But it cannot be concluded that the texts of the conventions drafted under the aegis of the United Nations grant a lesser protection to Heads of foreign States than to the diplomatic representatives of the States which those Heads of States lead or universally represent. The Convention on Special Missions, concluded in New York on 8 December 1969, ratified by Switzerland on 3 November 1977 and which entered into force for Switzerland on 21 June 1985, provides in Article 21, for example, that the Head of the sending State is one of the persons entitled to immunity from criminal jurisdiction in relation to the authorities of the receiving State (Article 31) when he is on an official visit. The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, signed in New York on 14 December 1973, defines "internationally protected person" as including any Head of State including any member of a collegiate body fulfilling, pursuant to the provisions of the Constitution of the State concerned, the functions of Head of State (Article 1(1)(a), first phrase; see the commentary to this provision in the *Yearbook of the International Law Commission of the United Nations*, 1972, vol. 2, pp. 339-40). In its report presented in 1986 to the Thirty-eighth

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Session of the General Assembly, devoted in part to the "Jurisdictional Immunities of States and their Property", the International Law Commission stressed, in its commentary to Article 4 of its draft on this problem, the scope of the privileges and immunities recognized by international law *ratione personae* to Heads of State, for which that draft article expressly makes a reservation (*Yearbook of the International Law Commission*, 1986, vol. 2, second part, pp. 7 *et seq.*, especially pp. 15-16). Heads of State therefore enjoy absolute jurisdictional immunity in all foreign States for all acts which would ordinarily be subject to the jurisdiction of those States, whatever the connection in which those acts were committed. This privilege, granted for the benefit of foreign States to their highest dignitaries, is limited by both the willingness of that State [to accord it] and the duration of the functions of the Head of State. Articles 32 and 39 of the Vienna Convention must therefore apply by analogy to Heads of State. According to Article 32, the sending State may waive the immunity from jurisdiction of its agents, but it must always do so expressly. Acts evincing such an intention are therefore insufficient. Article 39 provides that, when the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities cease at the moment when he leaves the receiving State. However, immunity subsists with respect to those acts which he performed in the exercise of his functions as a member of the diplomatic mission (sub-Section 2). The conditions in which a Head of State abandoned his powers, and the fact that he has left the State over which he was ruling in order to live abroad in exile in the State which intends to prosecute him, are without importance (see, in this regard, Decaux, *Le statut du chef d'Etat déchu in Annuaire français de droit international*, vol. 26, 1980, pp. 101 *et seq.*), especially pp. 101-4 and 138-9; Fiedler, *Das Staatsoberhaupt im Exil* in *Archiv des Völkerrechts* 1988, vol. 26, pp. 181 *et seq.*).

(d) The immunity in relation to their functions which the appellants enjoyed therefore subsisted for those criminal acts which were allegedly committed while they were still exercising their powers in the Republic of the Philippines. The proceedings brought against them before the United States courts could therefore only be pursued pursuant to an express waiver by the State of the Philippines of the immunity which public international law grants them not as a personal advantage but for the benefit of the State over which they ruled (*cf.* Delbrück/Wolfrum, *op. cit.*, p. 254). For this reason, the Federal Tribunal requested the Federal Office of Police on 7 July 1989 to ascertain whether the United States of America had received a declaration from the competent authorities in the Republic of the Philippines regarding waiver of the immunity of President and Mrs Marcos. In response to that enquiry by the requested authorities, the

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requesting State produced a *note verbale* written on 17 October 1988 by the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the United States of America in Manila, of which the following is an extract in translation:

> Taking note of this Treaty (on mutual assistance concluded between the two States), the Philippine Government hereby waives all immunity (1) of the State, (2) of the Head of State and (3) diplomatic immunity which the former Philippine President Ferdinand Marcos and his wife Imelda Marcos might enjoy or might have enjoyed on the basis of American law or international law, including but not exclusively immunity under Article 39(2) of the Vienna Convention, by virtue of the functions which those persons lately occupied in the Government of the Republic of the Philippines. This waiver covers the proceedings brought against Ferdinand and Imelda Marcos in the case mentioned above (enquiry conducted by the Public Prosecutor for the State of New York), as well as any criminal act or other connected matter in relation to which the persons in question might seek to invoke their immunity. This waiver does not, however, affect the Philippine Government itself or any former or present member of that Government.
>
> With regard to the possible application of the American doctrine of act of State, the Philippine Government wishes to stress that, from its standpoint, the acquisition of any personal wealth by President and Mrs Marcos cannot constitute public, governmental or official action by the Philippine Government, even if such enrichment was achieved by the use or the purported use of governmental authority. It follows that it would be contrary to the interests of the Philippines and the interests of justice for the persons in question to be able to benefit from the doctrine of act of State . . .

This declaration was transmitted to the agent of the appellants. In submissions made on 1 September 1989, the appellants argued that the waiver of immunity did not follow the proper procedure, that the act in question was at any rate contrary to the Philippine Constitution and to the principles of customary international law, that it did not mean that the Philippine authorities had waived their jurisdiction over the acts listed in the United States request for mutual assistance, and that the declaration of waiver of immunity had not been produced by the Government of the United States in the course of the proceedings currently pending before the District Court of the State of New York.

These objections are not relevant. From a substantive standpoint, the declaration contained in the diplomatic note of 17 October 1988 was made in response to the desire, expressed by the Federal Tribunal at its session on 28 June 1989, not to cooperate in a possible violation of the law of nations by the requesting State. From a formal standpoint, it is decisive that this declaration emanated from one of the governing organs of the Philippines, which the Federal Tribunal is entitled to consider as a qualified representative of that State. The

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question of whether the waiver at issue is in conformity with the procedural and substantive law of the Republic of the Philippines is a question of foreign law which it is not for the Federal Tribunal to resolve. The same consideration applies to the question of the scope which the American courts should give to the declaration in question. The proper place for such arguments to be developed by the parties is before the trial court before which, if appropriate, judgments rendered in the meantime can be invoked in this regard.

[Reports: *ATF* 115 Ib 496; *Revue Suisse de droit international et de droit européen,* 1991, p. 533 (in French)]

**Diplomatic relations—Immunity—Attachment and execution — Bank account — Requirement that funds identifiably allocated for financing of diplomatic mission — Burden of proof**

**State immunity — Attachment and execution — Bank account — Funds allocated for diplomatic functions — Whether immunity extending to funds designated for payment of accommodation costs of diplomatic mission — The law of Switzerland**

## Z *v.* GENEVA SUPERVISORY AUTHORITY FOR THE ENFORCEMENT OF DEBTS AND BANKRUPTCY

*Switzerland, Federal Tribunal.* 31 *July* 1990

SUMMARY: *The facts:*—The Permanent Mission of State X to the United Nations leased a villa in Geneva for which it had not paid rent since the beginning of 1989. In 1990 the lessor obtained an attachment order against a bank account held in the name of State X at a Swiss bank. The competent cantonal authority vacated the attachment on the ground that the funds affected were allocated exclusively for the performance of sovereign functions. The lessor lodged a public law appeal before the Federal Tribunal.

*Held:*—The appeal was dismissed.

(1) Assets allocated for the financing of a diplomatic mission of a foreign State enjoyed immunity from attachment. This included funds allocated to cover the payment of accommodation costs for the personnel of a permanent

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REPORTER(S)

Roger O'Keefe

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# Application for a Warrant for the Arrest of Robert Mugabe, First instance, ILDC 96 (UK 2004), 14th January 2004

**Date:** 14 January 2004
**Content type:** Domestic court decisions

**Citation(s):** ILDC 96 (UK 2004) (OUP reference)
**Product:** Oxford Reports on International Law [ORIL]
**Module:** International Law in Domestic Courts [ILDC]

**Additional parties:** (Third Party) Peter Tatchell

**Judges/Arbitrators:** Tim Workman (Senior District Judge)

**Procedural Stage:** First instance

**Subject(s):**

Heads of state and other senior officials — Privileges — Torture — Immunity from jurisdiction, state officials — Human trafficking — Responsibility of individuals

**Core Issue(s):**

Whether a visiting foreign head of state was immune from criminal process in the United Kingdom in respect of allegations of torture.

**Oxford Reports on International Law in Domestic Courts is edited by:**

Professor André Nollkaemper, University of Amsterdam and August Reinisch, University of Vienna.

## *Facts*

**F1** Mr Peter Tatchell sought a warrant for the arrest of Robert Mugabe, President of Zimbabwe, on charges relating to torture allegedly ordered to be committed by him in Zimbabwe.

## *Held*

**H1** The application for an arrest warrant was refused.

**H2** Although international law evolved over a period of time, in light of the judgment of the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)*, (2000) 1 AC 147 and that of the International Court of Justice in *Arrest Warrant of 11 April 2000, Congo, the Democratic Republic of the v Belgium*, (2002) ICJ Rep 3, customary international law which was part of United Kingdom common law currently provided absolute immunity to any head of state. (paragraph 5)

**H3** In addition to the common law, the State Immunity Act, 1978 which extended the Diplomatic Privileges Act, 1964 granted a foreign head of state immunity from the criminal jurisdiction of the UK courts. (paragraph 6)

**H4** Robert Mugabe was head of state of Zimbabwe and was entitled while he was head of state to that immunity. As such, he was not liable to any form of arrest or detention. (paragraph 7)

Date of Report: 31 August 2006

**Reporter(s):** Roger O'Keefe

## *Analysis*

**A1** Although it was very likely, it was not clear from the brief judgment whether the crime in respect of which the warrant was sought was that recognized in Section 134 (Torture) of the Criminal Justice Act, 1988, over which the United Kingdom asserted universal jurisdiction pursuant to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, entered into force 26 June 1987. In accordance with Section 135(a) of the Criminal Justice Act, proceedings for an offence under Section 134 shall not be begun in England and Wales except by, or with the consent of, the Attorney-General. But Section 25(2)(a) of the Prosecution of Offences Act, 1985 provided that the requirement of the Attorney-General's consent shall not prevent the issue of a warrant for the arrest of a person for any offence.

**A2** The present decision—which did not emanate from a superior court of record and, as such, has no formal precedential value in the English courts—was the only one Judge Workman could have come to, given Section 20 of the State Immunity Act, which operated by reference to the Diplomatic Privileges Act, which in turn incorporated by way of schedule the Vienna Convention on Diplomatic Relations (18

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April 1961) 500 UNTS 95, entered into force 24 April 1964. By this tortuous route, English law recognized the inviolability from measures of constraint and the absolute immunity from criminal process of a foreign head of state. Moreover, in *Pinochet Ugarte (No 3)*, most of the Lords stressed that a serving head of state continues to enjoy immunity from criminal process even in respect of torture within the meaning of the Convention Against Torture, a dictum consonant with the later decision of the French Court of Cassation (Chambre criminelle) in *SOS Attentats et Béatrice Castelnau d'Esnault c Gaddafy*, French Court of Cassation, 00-87.215, Arrt no 1414, 125 ILR 490, 508, 13 March 2001, the dicta of the ICJ in *Arrest Warrant of 11 April 2000*, and the ruling of the Belgian Court of Cassation in *Abbas Hijazi v Sharon*, Belgian Court of Cassation, 127 ILR; ILDC 5 (BE 2003), 12 February 2003.

Date of Analysis: 31 August 2006
Analysis by: Roger O'Keefe

***Instruments cited in the full text of this decision:***

Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, entered into force 24 April 1964

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, entered into force 26 June 1987

***Cases cited in the full text of this decision:***

***International Court of** Justice*

*Arrest Warrant of 11 April 2000, Congo, Democratic Replublic of the v Belgium*, (2002) ICJ Rep 3

*Belgium **domestic courts***

*Abbas Hijazi v Sharon*, Court of Cassation, ILDC 5 (BE 2003), 127 ILR, 12 February 2003

*France **domestic courts***

*SOS Attentats et Béatrice Castelnau d'Esnault c Gadaffy*, Court of Cassation, 00-87.215, Arrt no 1414, 125 ILR 490, 508, 13 March 2001

*United Kingdom **domestic courts***

*R v Bow Street Metropolitan Stipendiary Magistrate,* ex p *Pinochet Ugarte (No 3)*, (2000) 1 AC 147

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## Decision - full text

Paragraph numbers have been added to this decision by OUP

## Robert Mugabe

Robert Mugabe

**1** Mr Tatchell has most thoroughly and carefully prepared this application for a warrant for the arrest of Robert Mugabe on allegations of torture in Zimbabwe.

**2** He has provided me with a wealth of information both factually and on issues of international law. I have read Mr Tatchell's submissions and the supporting documentation. I have also considered the case of *Pinochet* and the International Court of Justice ruling in *The Democratic Republic of Congo v Belgium* including the separate and dissenting opinions in that case.

**3** The issue to which I have directed my mind is whether President Mugabe has immunity from prosecution as a Head of State, It is accepted that he is presently the Head of State of Zimbabwe.

**4** Mr Tatchell has argued persuasively that the doctrine of State immunity is not one which sits comfortably with the State's obligation under international law to prosecute grave crimes of universal jurisdiction. Mr Tatchell has sought to persuade me that the principal [*sic*] of universal jurisdiction should be extended to override the immunity afforded to a Head of State.

**5** Whilst international law evolves over a period of time international customary law which is embodied in our Common Law currently provides absolute immunity to any Head of State.

**6** In addition to the Common Law our State Immunity Act of 1978 which extends the Diplomatic Privileges Act of 1964 provides for immunity from the criminal jurisdiction for any Head of State.

**7** I am satisfied that Robert Mugabe is President and Head of State of Zimbabwe and is entitled whilst he is Head of State to that immunity. He is not liable to any form of arrest or detention and I am therefore unable to issue the warrant that has been applied for.

(signed) Tim Workman

*Senior District Judge*

*14 January 2004*

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**Minister of Justice and Constitutional Development and others v Southern African Litigation Centre (Helen Suzman Foundation and others as *amici curiae*)**
**2016 (4) BCLR 487 (SCA)**

| | |
|---|---|
| **Division:** | Supreme Court of Appeal |
| **Date:** | 15/03/2016 |
| **Case No:** | **867/15** |
| **Before:** | CH Lewis, SA Majiedt, VM Ponnan, JB Shongwe and MJD Wallis, Judges of Appeal |

***International agreements*** *- international agreements enacted into law by national legislation - Rome Statute of the International Criminal Court - Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 - obligations of the RSA under the Rome Statute and Act 27 of 2002 to arrest a person against whom the International Criminal Court has issued an arrest warrant - foreign head of state against whom warrant for arrest issued by the International Criminal Court in respect of war crimes, crimes against humanity, and genocide entering the RSA for purpose of attending African Union Summit - Cabinet having taken decision to grant him immunity from arrest - government parties failing to take steps to arrest and detain such person - such failure unlawful and inconsistent with the RSA's obligations in terms of the Rome Statute and section 10 of Act 27 of 2002.*

***International law*** *- diplomatic immunity - head of state immunity - apparent conflict between section 4(1)(a) of the Diplomatic Immunities and Privileges Act 37 of 2001 and section 4(2) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 - head of state immunity does not constitute a bar to the RSA's co-operating with the International Criminal Court by way of the arrest and surrender of persons charged with such crimes before the International Criminal Court where an arrest warrant has been issued and a request for co-operation made.*

***Practice and procedure*** *- Supreme Court of Appeal - amicus curiae submissions - process to be followed by a prospective amicus - admission as an amicus not automatically entitling the amicus to make oral submissions - whether an amicus will be entitled to make oral submissions will be determined by the Court hearing the appeal - admission as an amicus will be granted only to parties that show that they have new contentions to advance - an amicus will not be permitted to traverse ground already covered by other parties, but will be confined to making submissions on the new contentions that it wishes to place before the Court.*

**Editor's Summary**

President Al Bashir of Sudan attended the African Union ("AU") Summit hosted by the RSA Government in June 2015. At the time there were warrants for his arrest issued by the International Criminal Court ("the ICC") in respect of war crimes, crimes against



humanity, and genocide. The Statute of the International Criminal Court was adopted in Rome on 17 July 1998. The RSA is a State Party to the Rome Statute. As a State Party, the RSA was obliged to bring about the domestication of the provisions of the statute into RSA law. It did so by enacting the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("the Implementation Act"). This obliges the government to co-operate with the ICC to effect the arrest of persons suspected of war crimes, genocide and crimes against humanity. The ICC had requested State Parties to the Statute including South Africa to arrest Bashir in the event that he entered their jurisdictions.

When Bashir was in the RSA on 14 and 15 June 2015 the Government failed to arrest him. The Southern Africa Litigation Centre, a human rights organisation, brought an urgent application aimed at requiring the RSA Government to arrest Bashir and surrender him to the ICC. The Government opposed the application, contending that Bashir, as a foreign head of state attending the AU summit, was immune from arrest. The Government relied on a hosting agreement that it had concluded with the AU which provided that the RSA would grant members and staff of the AU Commission, delegates, and representatives of intergovernmental organisations attending the meeting certain privileges and immunities. The Government also relied on the AU Convention which conferred immunity from arrest or detention on representatives of member states. This purported recognition of immunity was formalised by the adoption of a Cabinet minute and the publication of a Government Notice issued under section 5(3) of the Diplomatic Immunities and Privileges Act 37 of 2001. The Notice stated the terms of the hosting agreement.

On 14 June 2015 when the urgent application first came before the High Court an interim order was made prohibiting Bashir from leaving the RSA and ordering the Government to enforce that prohibition. The matter was postponed until the next day to give the Government an opportunity to file answering affidavits. However, Bashir left the RSA at about 11:30am on 15 June 2015 from Waterkloof Air Base while the matter was still being argued. At the commencement of the hearing, Counsel for the Government, upon being asked by the Court, gave an assurance that Bashir was still in the country. The Court made an order at about 1pm declaring that the conduct of the Respondents to the extent that they had failed to take steps to arrest and detain Bashir was inconsistent with the Constitution, and an order requiring Respondents forthwith to take all reasonable steps to prepare to arrest Bashir and detain him, pending a formal request from the International Criminal Court for his surrender. After this order was made Counsel for the Government informed the Court that Bashir had left the RSA earlier that day.

The High Court refused the Government leave to appeal against its order, considering that Bashir's departure had rendered the litigation moot. On petition to the Supreme Court of Appeal, the application for leave to appeal was set down for argument in terms of section 17(2)(d) of the Superior Courts Act 10 of 2013.

In the Supreme Court of Appeal the Government abandoned its earlier argument that the hosting agreement

provided for certain immunities and privileges which prevented the Government from arresting Bashir "during the duration of the Summit and an additional two days after the conclusion of the Summit". Instead, the Government pointed to section 4(1)(a) of the Diplomatic Immunities and Privileges Act 37 of 2001 ("the DIPA") which provides that "a head of state is immune from the criminal and civil jurisdiction of the Courts of the Republic, and enjoys such privileges as heads of state enjoy in accordance with the rules of customary international law". The Government contended that the general immunity that a head of state enjoys under customary international law and section 4(1) of the DIPA qualified the obligation of the RSA, that would otherwise exist

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as a State party to the Rome Statute, to arrest and surrender a head of state for whom the ICC had issued an arrest warrant in respect of the commission of international crimes.

A question therefore arose of the relationship between the Implementation Act and the head of state immunity conferred by customary international law and the DIPA.

A further issue was whether there was now an international crimes exception to the principle of head of state immunity, enabling a State or national court to disregard such immunity when called upon by the ICC to assist in implementing an arrest warrant. It was accepted that once a head of state had been brought before the ICC no plea of head of state immunity could be invoked. However, this did not necessarily mean that a State was entitled to ignore head of state immunity when requested to co-operate with the ICC to bring such a person before it. A question of an international crimes exception to head of state immunity arose in this context. In the absence of a binding treaty or other international instrument creating such an exception guidance had to be sought in the decisions of international courts. After a survey and consideration of such decisions, the majority found that it was unable to hold that at this stage of the development of customary international law there was an international crimes exception to the immunity and inviolability that heads of state enjoyed when visiting foreign countries and before foreign national courts.

The Court then turned to the question of whether the enactment of the Implementation Act altered the position.

Whether the Implementation Act had the effect of removing the immunity that Bashir would otherwise enjoy was a matter of the proper construction of the Implementation Act. The principles to be followed in that regard were settled, and were in the present case strongly influenced by the fact that the Implementation Act was a statute that incorporated an international agreement into South African law. The Court was required by section 233 of the Constitution to construe it in a manner consistent with international law. An interpretation of the Implementation Act that resulted in the RSA not complying with its obligations under the Rome Statute was to be avoided if possible. Furthermore, section 39(2) of the Constitution obliged the Court to interpret the Implementation Act in a way that promoted the spirit, purport and objects of the Bill of Rights. There were a number of provisions of the Bill of Rights that informed its spirit, purport and objects in this context.

Section 4(2) of the Implementation Act provides that "[d]espite any other law to the contrary, including customary and conventional international law, the fact that a person is or was a head of State or government . . . is neither a defence to a crime nor a ground for any possible reduction of sentence once a person has been convicted of a crime". This was relevant to the interpretational exercise. It was an indication that the RSA did not support immunities when people were charged with international crimes. Recognition of head of state immunity alongside the provisions of section 4(2) to preclude someone from being brought to trial in South Africa would create an anomaly. Under the Criminal Procedure Act an accused was brought to court either by arrest or indictment. Either procedure would compel the accused to submit to the criminal jurisdiction of a South African Court, which was inconsistent with immunity. Under section 4(3)(c) a South African Court had jurisdiction to try someone for an international crime if they were present in the territory of the RSA. In such a trial it would be no answer for the accused to raise immunity. But on the argument for the Government this would not matter because it would be impossible for the accused to be brought before the Court in terms of the Criminal Procedure Act. A construction of section 4(2) that would exclude claims of immunity if a person were being tried before a South African Court, but would not

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exclude immunity in seeking to bring that person to trial before that Court would be a serious anomaly.

The Court was driven to conclude that when the RSA decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in the RSA or to the RSA co-operating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for co-operation made.

The Court accepted that the relief granted by the High Court (having to deal with the matter as an urgent application) was not as well-formulated as more mature consideration would have permitted. An appropriate order to have made would have read: "The conduct of the Respondents in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful."

Accordingly, the application for leave to appeal was granted and the order of the High Court was varied to read as set out in the preceding paragraph.

Ponnan JA (with Lewis JA concurring) produced a separate judgment concurring in this order.

Several entities had applied for admission as *amici curiae*. All but one of such applications were dismissed. The majority judgment dealt at some length with the process to be followed by a party desirous of admission as an *amicus curiae*, the requirements to be admitted as such, and the rights that such admission conferred. In particular, admission as an *amicus* does not automatically entitle the *amicus* to make oral submissions. Whether an *amicus* will be entitled to make oral submissions will be determined by the Court hearing the appeal. Only those parties which show that they have new contentions to advance will be considered for admission as *amici*. An *amicus* will not be permitted to traverse ground already covered by other parties, but will be confined to making submissions on the new contentions that it wishes to place before the Court. New contentions are those that may materially affect the outcome of the case. Prospective *amici* and their advisers must consider the nature and scope of the dispute between the parties and, on that basis, determine whether they have distinct submissions to make that may alter the outcome or persuade the Court to adopt a different line of reasoning in determining the outcome of the appeal.

**Judgment**

**Wallis JA:**

**Introduction**

[1] The International Criminal Court ("ICC") was established by the Rome Statute of the International Criminal Court (the "Rome Statute") to exercise jurisdiction over the most serious crimes of concern to the international community as a whole. Article V identifies them as genocide, crimes against humanity and war crimes - collectively international crimes - and defines them in articles VI, VII and VIII respectively. Article V also foreshadows the crime of aggression, which remains to be



defined. The Rome Statute affirms that these crimes must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation.1 In addition to the jurisdiction of national courts to prosecute these crimes the Rome Statute confers jurisdiction on the ICC to try such crimes and convict and sentence those who commit such crimes. It is a matter of pride to citizens of this country that South Africa was the first African state to sign the Rome Statute. It did this on 17 July 1998 and ratified it on 27 November 2000. It incorporated it into the domestic law of South Africa in terms of section 231(4) of the Constitution by enacting the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the "Implementation Act"). The Rome Statute is annexed to the Implementation Act as a matter of information.

[2] Chapter 4 of the Implementation Act provides the mechanism whereby South Africa co-operates with the ICC in regard to the arrest and surrender of persons accused of international crimes. The failure by the applicants, to whom I will, in accordance with the terminology of their Counsel, refer collectively as the Government, to pursue those mechanisms to arrest the president of Sudan, Omar Hassan Ahmad Al Bashir ("President Al Bashir"), when he was in Johannesburg on 14 and 15 June 2015 to attend the 25th ordinary session of the Assembly of the Africa Union ("AU"), gave rise to the present litigation.

[3] President Al Bashir is a controversial figure as a result of the actions of his government and their supporters, such as the Janjaweed Militia, principally in Darfur, but also elsewhere in Sudan. On 31 March 2005, the Security Council of the United Nations adopted Resolution 1593 (2005). It noted the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur, and decided to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC. As a result of the investigations by the ICC, President Al Bashir stands accused of serious international crimes. The Pre-Trial Chamber of the ICC has issued two warrants for his arrest. The first warrant was issued on 4 March 2009 and related to charges of war crimes and crimes against humanity. The second warrant was issued on 12 July 2010 and related to charges of genocide. The warrants have been forwarded to all countries that are parties to the Rome Statute, including South Africa, with a request that they co-operate under the Rome Statute and cause President Al Bashir to be arrested and surrendered to the ICC. Sudan is not a party to the Rome Statute.



[4] When President Al Bashir arrived in South Africa to attend the AU assembly in June 2015 the Government took no steps to arrest him. Indeed it adopted, and continues to adopt, the stance that it was obliged not to do so as President Al Bashir enjoyed immunity from such arrest. I will revert to the grounds for it taking this stance in due course. Its failure to do so resulted in the respondent, the South African Litigation Centre ("SALC"), bringing an urgent application on Sunday 14 June 2015, in the Gauteng Division of the High Court, Pretoria (to which I shall refer as the "High Court"), seeking orders declaring the failure to take steps to arrest President Al Bashir to be in breach of the Constitution and to compel the Government to cause President Al Bashir to be arrested and surrendered to the ICC to stand trial pursuant to the two warrants.

[5] The Government opposed the urgent application and sought and obtained a postponement until 11:30am on Monday, 15 June 2015 to enable affidavits to be prepared. But there was an obvious concern that President Al Bashir might leave the country in the interim in order to escape arrest. Accordingly, in granting the postponement, the High Court made the following order:

"1. President Omar Al Bashir of Sudan is prohibited from leaving the Republic of South Africa until a final order is made in this application, and the respondents are directed to take all necessary steps to prevent him from doing so;

2. The eighth respondent, the Director-General of Home Affairs is ordered:

2.1 to effect service of this order on the official in charge of each and every point of entry into, and exit from, the Republic; and

2.2 once he has done so to provide the applicant with proof of such service, identifying the name of the person on whom the order was served at each point of entry and exit."

[6] At the hearing the following day before a specially constituted Full Court of three judges presided over by Judge President Mlambo, it stood down further because the affidavits were not yet ready. The hearing commenced at about 1pm and the Court sought the assurance from Counsel then leading for the Government, Mr W Mokhari SC, that President Al Bashir was still in the country. He informed the Court that according to his instructions President Al Bashir was still in the country and this was repeated during the course of the argument. At about 3pm, the Court made the following order:

"1. That the conduct of the Respondents to the extent that they have failed to take steps to arrest and/or detain the President of the Republic of Sudan Omar Hassan Ahmad Al Bashir (President Bashir), is inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;

2. That the respondents are forthwith compelled to take all reasonable steps to prepare to arrest President Bashir without a warrant in terms of section 40(1)(k) of the Criminal Procedure Act 51 of 1977 and detain him, pending a formal request for his surrender from the International Criminal Court;

3. That the applicant is entitled to the cost of the application on a *pro-bono* basis."

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[7] Immediately after this order was made, Counsel for the Government told the Court that President Al Bashir had left the country earlier that day. According to an affidavit later filed by the Director-General: Home Affairs, the eighth applicant, he appears to have left on a flight from Waterkloof Air Base at about 11:30 am that morning. The affidavit failed to explain how a head of state, using a military air base reserved for the use of dignitaries, could possibly have left the country unobserved. The Director-General said that President Al Bashir's passport was not among those shown to officials of his department, but as an explanation that is simply risible. Senior officials representing Government must have been aware of President Al Bashir's movements and his departure, the possibility of which had been mooted in the press. In those circumstances, the assurances that he was still in the country given to the Court at the commencement and during the course of argument were false. There seem to be only two possibilities. Either the representatives of Government set out to mislead the Court and misled Counsel in giving instructions, or the representatives and Counsel misled the Court. Whichever is the true explanation, a matter no doubt being investigated by the appropriate authorities, it was disgraceful conduct.

[8] Largely because of President Al Bashir's departure the High Court refused leave to appeal, saying that the litigation had become moot. On petition to this Court it ordered that the application for leave to appeal be set down for argument in terms of the provisions of section 17(2)(d) of the Superior Courts Act 10 of 2013. The President of this Court directed that it be set down as an urgent matter before the commencement of the Court's term. The parties were directed to deliver a full record and to be prepared to address full argument to us on the merits of the case. It is on that basis that the case is before us.

**Litigation history**

[9] The foundation for SALC's argument before the High Court was the obligations undertaken by South Africa in terms of the Rome Statute and the Implementation Act. It contended that, by virtue of these, South Africa was obliged to give effect to the request of the ICC to enforce the two warrants for President Al Bashir's arrest and surrender to the ICC for prosecution in respect of the charges of war crimes, genocide and crimes against humanity. Perhaps anticipating resistance by the Government, it annexed to its founding affidavit a judgment delivered by the Pre-Trial Chamber of the ICC on 13 June 2015 declaring that South Africa was obliged to arrest and surrender President Al Bashir.2

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[10] The Government did not make any attempt to challenge these propositions. Instead, it founded its defence to the application on certain special arrangements that it had made with the AU for the holding of the Assembly in Johannesburg. These were explained in detail in affidavits by Ms Sindane, the second applicant and the Director-General of Justice and Constitutional Development, and Dr Lubisi, the Director-General of the Presidency and the Secretary of Cabinet.

[11] Ms Sindane said that after South Africa agreed to host the AU Summit in June 2015 it entered into an agreement (the "hosting agreement") with the Commission of the AU relating to the material and technical organisation of the various meetings that were to take place at the Summit including the 25th Assembly of the AU. Based on this agreement she said that President Al Bashir had been invited to attend by the AU and not by the South African Government. She then referred to article VIII of the hosting agreement, which was headed "Privileges and Immunities", and read:

"The Government shall afford the members of the Commission and Staff Members, delegates and other representatives of Inter-Governmental Organisations attending the Meetings the privileges and immunities set forth in Sections C and D, Article V and VI of the General Convention on the Privileges and Immunities of the OAU."

[12] On 5 June 2015, and pursuant to section 5(3) of the Diplomatic Immunities and Privileges Act 37 of 2001 ("DIPA"), the Minister of International Relations and Co-operation, the fifth applicant, published GN 470 in the *Government Gazette*3 recognising the hosting agreement for the purposes of granting the immunities and privileges as provided for in article VIII, which was annexed to the notice. Dr Lubisi testified that the matter

was discussed at a Cabinet meeting where it was decided, after seeking the advice of the Chief State Law Adviser, that "the South African government as the hosting country is first and foremost obliged to uphold and protect the inviolability of President Bashir *in accordance with the AU terms and conditions*".[4] He added that "Cabinet collectively appreciated and acknowledged that the aforesaid decision can only apply for the duration of the AU Summit."

[13] On this basis, and this basis alone, Ms Sindane claimed that the immunities and privileges referred to in article VIII of the hosting agreement prevented the Government from arresting President Al Bashir "during the duration of the Summit and an additional two days after the conclusion of the Summit". The application was argued on this basis and the High Court quite correctly summarised the issue before it as being "whether a Cabinet resolution coupled with a Ministerial Notice are capable of suspending this country's duty to arrest a head of state against whom the International Criminal Court (ICC) has issued arrest warrants for war crimes, crimes against humanity and genocide".



[14] With the advent of new Counsel, led by Mr JJ *Gauntlett* SC, an entirely different argument emerged in the application for leave to appeal to this Court. It was now based upon what were said to be the provisions of customary international law and the provisions of section 4(1)(a) of DIPA, which reads:

> "(1) A head of state is immune from the criminal and civil jurisdiction of the Courts of the Republic, and enjoys such privileges as -
>
> (a) heads of state enjoy in accordance with the rules of customary international law . . . "

[15] The previous argument about the provisions of the hosting agreement and the ministerial notice under section 5(3) of DIPA was relegated to a backseat. Indeed, it was not pursued in that form. Instead, it was said that as the ministerial notice had not been set aside on application to a competent court it continued to be effective to confer immunity on President Al Bashir, even if misconceived.[5]

[16] This change of tack by the Government effectively challenged the foundation of SALC's claim that the Government was under an obligation, by virtue of its accession to the Rome Statute and the enactment of the Implementation Act, to arrest President Al Bashir and surrender him to the ICC. The Government contended that the general immunity that a head of state enjoys under customary international law and section 4(1) of DIPA qualified the obligation of South Africa, that would otherwise exist as a state party to the Rome Statute, to arrest and surrender a head of state for whom the ICC has issued an arrest warrant in respect of the commission of international crimes. The response by SALC was two pronged. It said that the provisions of sections 4(2) and 10(9) of the Implementation Act dealt specifically with these issues and affirmed the obligations of arrest and surrender assumed by South Africa under the Rome Statute. That alone would be decisive, as Mr *Trengove* SC emphasised in oral argument, but, if not, SALC joined issue with the Government on whether the rules of customary international law relied on by the Government in support of the claim to immunity afforded immunity to a head of state charged with international crimes before the ICC.

[17] Five parties applied to be admitted as *amici curiae* and permitted to present written and oral submissions to the Court. One, the Helen Suzman Foundation (the "Foundation"), was granted such leave in advance of the hearing. The applications by the other four[6] were not submitted timeously as required by rule 16 of the rules of this Court. Nor were they dealt with by the President or Acting President as contemplated by the same rule. As



this created uncertainty, the presiding judge, in consultation with the remaining members of the Court, permitted them to deliver written argument and to make oral submissions at the hearing encompassing both whether they should be admitted as *amici* and the merits. An application by two of them, the African Centre for Justice and Peace Studies and the International Refugee Rights Initiative, to submit extensive evidence of what they alleged were atrocities still being committed by and at the behest of President Al Bashir, was however dismissed.[7] It is not and never has been a function of this litigation to determine whether the allegations made against President Al Bashir are well-founded and, even if admissible, evidence concerning his alleged conduct would not assist the Court to resolve the legal issues that confront it.

**The issues**

[18] The following issues fall to be determined:

(a) Did the departure of President Al Bashir render the issues moot?

(b) Should leave to appeal be granted?

(c) Should the four *amici* other than the Foundation, or any of them, be given leave to intervene as *amici*?

(d) Did article VIII of the hosting agreement, together with the ministerial proclamation, provide President Al Bashir with such immunity, at least for so long as the proclamation was not set aside?

(e) If not, was President Al Bashir entitled to immunity from arrest and surrender in terms of the arrest warrants issued by the ICC by virtue of customary international law and section 4(1) of DIPA?

(f) If President Al Bashir would ordinarily have been entitled to such immunity did the provisions of the Implementation Act remove that immunity?

(g) If not, have Security Council Resolution 1593 (2005) and the Genocide Convention (1948) removed his immunity?

(h) If the appeal does not succeed, should the order stand or should it be varied in certain respects?

(i) What orders should be made in respect of costs?

**Is the appeal moot?**

[19] The High Court based its refusal of leave to appeal on section 16(2)(a)(i) of the Superior Courts Act 10 of 2013 (the "Superior Courts Act"), which provides that when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the court may dismiss the appeal on that ground alone. The High Court reasoned that because President Al Bashir had left the country the case no longer presented a live controversy. It cited *Janse van Rensburg NO v*

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*Minister of Trade and Industry and another NNO*[8] in support of that proposition. But that case and others like it[9] dealt with situations where the legislation, the constitutional validity of which was the subject of the litigation, had been repealed or replaced by different legislation. That is very different from the present case. Here a declaration had been made that the Government's conduct breached the Constitution and the legislation in point is very much in force. The central issue is what effect it has on the important question whether South Africa is obliged to arrest and surrender to the ICC the head of state of a foreign nation, who has been charged with international crimes before the ICC.

[20] It is correct that no present effect can be given to the order that the Government take steps to prepare to arrest President Al Bashir, because he is not in South Africa. But the order remains in existence and SALC indicated that any attempt by President Al Bashir to return to this country would prompt it to seek its enforcement. As such the order had a continuing effect that would have to be taken into account by the Government in the future conduct of its diplomatic relations. This was well illustrated by certain newspaper reports that were annexed to the opposing affidavit in the application for leave to appeal. These indicated that the South African government had wanted to invite President Al Bashir to a Forum on China-Africa Co-operation to be held in this country in December 2015, but in view of the High Court's decision had suggested to Sudan that it send someone else to represent it. Any invitation to host future gatherings of AU heads of state, for example, would have to bear the judgment of the High Court in mind and could preclude this country from extending such an invitation.

[21] In those circumstances, the High Court erred in holding that there had ceased to be a live and justiciable controversy between the parties.

**Leave to appeal**

[22] Apart from its finding that the appeal had become moot the High Court also referred to section 17(1)(a)(i) of the Superior Courts Act and held that an appeal had no reasonable prospect of success. But in reaching that conclusion it did not consider the new basis upon which the Government sought to justify its opposition to SALC's claim. So we do not have the benefit of the High Court's view in regard to those contentions.

[23] After expressing its conclusion on prospects of success the High Court also said that it had no discretion once it reached that conclusion to grant

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leave to appeal. But it failed to consider the provisions of section 17(1)(a)(ii) of the Superior Courts Act which provide that leave to appeal may be granted, notwithstanding the Court's view of the prospects of success, where there are nonetheless compelling reasons why an appeal should be heard. This is linked to the question of mootness. In that regard there is established jurisprudence in this Court that holds that even where an appeal has become moot the Court has a discretion to hear and dispose of it on its merits. The usual ground for exercising that discretion in favour of dealing with it on the merits is that the case raises a discrete issue of public importance that will have an effect on future matters.[10] That jurisprudence should have been considered as a guide to whether, notwithstanding the High Court's view of an appeal's prospects of success, leave to appeal should have been granted. In my view, it clearly pointed in favour of leave to appeal being granted.

[24] That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive. Furthermore, where the purpose of the appeal is to raise fresh arguments that have not been canvassed before the High Court, consideration must be given to whether the interests of justice favour the grant of leave to appeal. It has frequently been said by the Constitutional Court that it is undesirable for it as the highest court of appeal in South Africa to be asked to decide legal issues as a court of both first and last instance. That is equally true of this Court. But there is another consideration. It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of a legal error on the part of one of the parties in failing to identify and raise the point at an appropriate earlier stage.[11] But the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued.[12]

[25] In the present case SALC accepted that the fresh argument advanced by the Government was foreshadowed by the factual material before the Court. No prejudice would be caused by permitting it to be raised at this stage. It is undoubtedly a point of substantial public importance. The new arguments cannot be said to lack

reasonable prospects of success and they

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were forcefully and cogently argued before us. In those circumstances, leave to appeal should be granted.

***Amici***

[26] Applications for admission as *amici curiae* in this Court have hitherto been dealt with *ad hoc* and the provisions of the rule governing such applications have not yet been the subject of detailed consideration in a judgment. It is as well therefore to deal shortly with this topic. Such applications are made in terms of rule 16 of the rules of this Court.[13] In

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terms of rule 16(1) if all parties agree to the admission of an *amicus* they are admitted as such.[14] The rule contemplates that the parties when agreeing to the admission of an *amicus* will agree on the terms on which the *amicus* is to be admitted. Under rule 16(2) those are then the terms that govern their admission, subject to the power of the President of the Court to amend or vary those terms under rule 16(3). It is apparent that the terms can relate only to the delivery of written argument, which is limited to 20 pages, because rule 16(8) provides that no *amicus* has a right to address oral submissions to the Court unless the Court so orders. Given the wording of the rule it is plain that this is a reference to the Court hearing the appeal and not the President when dealing with an application for admission as an *amicus*. The general experience of the members of this Court is that the President leaves the question of oral argument to the presiding judge or Court hearing the appeal. Accordingly, leave to make oral submissions can only be sought after the written submissions have been delivered and the Court has the opportunity of considering whether hearing oral submissions from the *amicus* will assist in its deliberations. If an *amicus* seeks leave to make oral submissions it must set out the grounds therefor in its written argument.

[27] Adherence to this procedure will ensure that the written argument of the *amicus* can be considered along with the reading of the record and the consideration of the heads of argument of the parties when the members of the Court are engaged in preparing the appeal. It is only then that it will be possible to determine whether the *amicus* can add anything by way of oral submissions. But the Court will nonetheless consider its argument. Whether it will permit the *amicus* to make oral submissions will depend upon its assessment of whether those submissions can add anything to an argument already before it in written form.

[28] Where there is no agreement among the parties as to the admission of an *amicus* it is entitled to seek its admission by way of an application to the President of the Court in terms of rule 16(4). The basis upon which such an application shall be made is set out in rules 16(5) and (6). The rule does not make provision for any opposition to such an application, but the general practice is for the President to invite a response from other parties who oppose the admission. The President then determines the application in accordance with rule 16 and, if the *amicus* is admitted, determine the terms upon which they are admitted and permitted to deliver written

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argument. The rule's constraints on the length of written argument apply unless relaxed by the President.[15]

[29] An *amicus* is not entitled to submit further evidence to the Court but is confined to the record. That is expressly provided in rule 16(8). It is unnecessary to consider whether there are exceptional circumstances in which the Court hearing the appeal may relax that rule.[16] In making submissions the *amicus* is not permitted to traverse ground already covered by other parties, but is confined to making submissions on the new contentions that it wishes to place before the Court.[17] In that regard it is apposite to point out that adding additional references, whether to case law or to academic writings, on the matters canvassed in the heads of argument of the litigants, does not amount to advancing new contentions. That obviously does not exclude placing material before the Court to demonstrate that a point of controversy between the parties has been settled by way of an authoritative judgment. It would only be if there had, for example, been an authoritative decision placing a legal issue thought to be controversial beyond dispute that an *amicus* may include that in its argument. Otherwise it is confined to its new and different contentions and these must be clearly stated.

[30] Finally, new contentions are those that may materially affect the outcome of the case. It is not feasible to be prescriptive in this regard but prospective *amici* and their advisers must start by considering the nature and scope of the dispute between the parties and, on that basis, determine

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whether they have distinct submissions to make that may alter the outcome or persuade the Court to adopt a different line of reasoning in determining the outcome of the appeal. Obvious examples would be urging the Court to adopt reasoning based on provisions of the Constitution in construing a statute, where the parties have not taken that course, or a submission that the fundamental legal principles to be applied in determining the dispute are other than those submitted by the parties where their adoption would materially affect the outcome of the case. No doubt others can be imagined.[18]

[31] It is appropriate to comment that the applications appear to have paid little heed to the language of rule 16. In the first place other than that of the Foundation, none of the letters addressed to the Government and

SALC sought to define with any clarity the new contentions that the prospective *amici* wanted to raise or why they would be of assistance to the Court. The complaints concerning this by the Government in its responses to the requests were in my view generally well-founded.

[32] An even clearer difficulty is that, again with the exception of the Foundation, the letters did not spell out the terms on which the prospective *amici* sought admission as such. Nor in every case did the response from SALC. It merely indicated its willingness to agree to admit the *amici* without dealing with the terms upon which they should be admitted. When applications were brought they overlooked the fact that an application to the President of the Court is an application for admission as an *amicus*, but not an application to be permitted to make oral submissions. It is the Court hearing the appeal that makes that decision. If an *amicus* wishes to make oral submissions it should indicate that when it submits its written submissions.

[33] The Deputy President of this Court granted the Foundation leave to intervene as an *amicus* prior to the hearing. While there was some procedural confusion about that order and the Government indicated that it would have opposed it had it been afforded the opportunity to do so,19 it was in my judgment an order that was properly made. The Foundation's approach to the dispute was wholly distinct from that of SALC. The latter approached the case on the basis of its view of the content of customary

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international law and an interpretation of the relevant provisions of the Implementation Act and DIPA. The Foundation's starting point was the constitutional provisions that make international law part of South African law and from that foundation developed submissions as to the proper construction of section 4(1) of DIPA and its relationship to the obligations undertaken by this country under the Rome Statute and the Implementation Act. These contentions were clearly new and of assistance to the Court in dealing with the merits of the appeal.

[34] Notwithstanding the refusal of their application to submit further evidence to the Court, the African Centre for Justice and Peace Studies and the International Refugee Rights Initiative submitted heads of argument in support of the dismissal of the appeal and Counsel appeared on their behalf. It was unclear from their application that in addition to the further evidence they had any new contentions to advance, because they said that the legal arguments would be addressed by SALC "and there is no need for the applicants to address it any further". The stated purpose of their intervention was to place "vital evidence" before the Court in order "to make it plain to the Court that the only real hope of justice for the victims of Sudan is for President Al-Bashir and the members of his government who have been indicted by the ICC to be arrested and surrendered to the ICC by a third state". Nonetheless on 8 February 2016, four days before the hearing they delivered heads of argument and a bundle of authorities running to some 750 pages.

[35] The purpose of this, according to the heads of argument and as explained by Counsel, was to stress that, in the absence of a remedy before the ICC, victims of international crimes perpetrated by President Al Bashir and persons for whose actions he might be held responsible, would have no effective remedy. But that added nothing to the resolution of the issues before us. The principle of complementarity that underpins the Rome Statute20 makes it clear that the ICC exists to provide a forum for prosecution of international crimes where national courts are unable or unwilling to do so. So, it is apparent that where victims are unable to proceed in their own national court the ICC will necessarily be the tribunal to which they will turn for justice and protection,21 as well as reparations for crimes of which they have been the victims.22

[36] Not only were the matters that these parties sought to raise apparent to the Court from the terms of the Rome Statute itself, but no indication was given of how knowledge of them would affect the determination of the issues in the case. Those involved the construction of a South African statute, DIPA, and the question whether it afforded President Al Bashir

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immunity against arrest under the Implementation Act pursuant to the warrants issued by the ICC. For those reasons, the application for admission as *amici curiae* by the African Centre for Justice and Peace Studies and the International Refugee Rights Initiative must be refused. In view of the valuable work that these organisations perform in their field of activities, and their genuine concern in regard to the issues raised in this case and the background facts giving rise to the ICC's decision to charge President Al Bashir with international crimes, it would be inappropriate to order them to pay any costs incurred by other parties arising out of their application.

[37] Then there is the application by the Peace and Justice Initiative and the Centre for Human Rights. Again there is no doubting their legitimate concerns about events in Sudan and the continuing inability of the ICC to bring President Al Bashir to trial in respect of the charges he faces of having committed international crimes. But legitimate concern over issues providing the background to an appeal is not of itself a justification for admission as an *amicus curiae*. The prospective *amicus* must either have the agreement of the other parties, which was not forthcoming in this case, or must satisfy the President of the Court that it is entitled to be so admitted in terms of rule 16.

[38] These two bodies sought to advance argument on five matters set out in their heads of argument. These heads were accompanied by a bundle of documents amounting to a little short of 1000 pages delivered on 8 February 2016. The contentions advanced in the heads of argument differed somewhat from the matters described in their application, but the differences did not appear to be significant. The five matters were the international nature of the crimes and the ICC; the import of Security Council Resolution 1593 (2005); the effect of Sudan and South Africa being a signatory to the Genocide Convention (1948);23 the interpretation of articles 27 and 98 of the Rome Statute, especially in the light of the *travaux préparatoires* and "the original

intent of the drafters"; and the unavailability of fora akin to the ICC with international jurisdiction, in Africa or elsewhere, to prosecute the alleged perpetrators in this case.

[39] The last of these overlapped with the contentions by the African Centre for Justice and Peace Studies and the International Refugee Rights Initiative and does not provide a ground for the admission of these parties as *amici*. Proof of the content of the *travaux préparatoires* and "the original intent of the drafters" would require evidence, which is impermissible and leave to lead which was neither sought nor granted. As regards the other three matters they were all dealt with in the arguments of the Government and SALC. They were not new contentions. For those reasons the application for their admission as *amici curiae* must be refused, but again and for similar reasons no adverse order for costs should follow.



**Article VIII of the hosting agreement**

[40] This was not only the principal, but also the only, argument advanced by Government before the High Court. It assumed secondary importance when the application for leave to appeal was brought. It was pursued in this Court principally on the footing that until the ministerial proclamation was set aside it afforded President Al Bashir immunity from arrest and surrender under the Implementation Act. I deal with it first in order to stress that, contrary to the Government's criticism, the High Court's understanding of the issue argued before it was undoubtedly correct and to affirm the correctness of its conclusions on that issue.

[41] The High Court gave the argument short shrift. It said that on its terms the hosting agreement conferred immunity on members or staff of the AU Commission and on delegates and other representatives of Inter-Governmental Organisations. This did not include member states or their representatives or delegates. Furthermore the section of DIPA relied on by the Minister in making her proclamation was section 5(3). That section empowered the Minister to confer immunity on:

> "Any organisation recognised by the Minister for the purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of section 7(2)."

Plainly, so the High Court held, the section did not cover heads of state or representatives of states attending meetings of the AU, but only the AU itself and other organisations such as the Inter-Governmental Organisations referred to in article VIII. The definition of an organisation in section 1 of DIPA demonstrates that it does not apply to member states but to intergovernmental organisations.

[42] There is little that can be added to that reasoning. I mention the following. Section 5 has the heading "Immunities and privileges of United Nations, specialised agencies and other international organisations". That fortifies the conclusion that a proclamation under the section does not apply to other persons. Second, the hosting agreement is one between South Africa as the host nation and the AU. It is intended to deal with the representatives and officials of the AU and organisations with which it has relationships, not with the position of heads of state and state delegations. If there is to be a special agreement for immunity in respect of such persons it must be made under section 7. Otherwise their right to immunity, if any, will arise by virtue of customary international law and, in South Africa, DIPA. Although section 4(1)(c) of DIPA contemplates the possibility of a section 7 agreement applying to a head of state a careful reading suggests that this relates only to the conferral of additional privileges that the head of state would not otherwise enjoy by virtue of section 4(1)(a).

[43] Counsel for the Government endeavoured to circumvent these difficulties in the following way. Prior to President Al Bashir coming to South Africa



Sudan had requested that he be afforded the privileges and immunities of a delegate attending the AU Summit. The provisions of article VIII of the hosting agreement were promulgated for this purpose. Even if the Minister exceeded her powers in doing so the proclamation remained in force until set aside in terms of the *Oudekraal* principle.[24] As it had not been set aside it remained effective to confer immunity on President Al Bashir notwithstanding any underlying legal defects in its proclamation.

[44] The difficulty with this contention is that it demands in the first instance that article VIII of the hosting agreement covered President Al Bashir. If it did not it was irrelevant that the Minister thought, or had been advised, that it did. And that in turn depended in the first instance upon President Al Bashir being a delegate to the AU Assembly. But a head of state attending an AU Assembly does not do so as a delegate but as the embodiment of the member state itself. That is apparent from the AU's description of the Assembly on its website as:

> "The Assembly is the African Union's (AU's) supreme organ and comprises Heads of State and Government from all Member States."

[45] The Constitutive Act of the AU makes this perfectly clear. In article 1 it defines "Member State" as being "a Member State of the Union" and the "Assembly" as "the Assembly of Heads of State and Government of the Union". The "Union" is the AU. In terms of article 6.1 it is composed of Heads of State and Government "or their duly accredited representatives". Under article 7.1 decisions of the Assembly are taken by consensus, or failing that by a two-thirds majority of Member States. The AU is composed of member states and the Assembly is its governing body composed of the heads of state or heads of government of the member states. They are the embodiment of the member states not delegates from them. Without the heads of state and heads of government or their representatives there can be no Assembly.

[46] Over and above that difficulty there is no basis for saying that heads of state attending the Assembly were encompassed by the reference to "delegates" in article VIII.1 of the hosting agreement. The agreement was concluded between the AU and the South African government. There is nothing to indicate that the AU was representing the heads of state of member states or their delegations in concluding the agreement or was concerned with their entitlement to immunity when visiting South Africa. That was a matter for the diplomatic relationship between South Africa and other member states, not the AU. It is an agreement relating to the "material and technical organisation" of various meetings including the Assembly. It makes no reference to heads of state in any of its provisions. The key words in article VIII.1 are "the delegates and other representatives of Inter-Governmental Organizations attending the Meetings". That relates only to persons who are there because of their entitlement to be

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there on behalf of one or other inter-governmental organisation, not to those who are there on behalf of a member state.25

[47] The necessary conclusion is that President Al Bashir was not a person included in the reference to "delegates" in article VIII.1 of the hosting agreement. As such the hosting agreement did not confer any immunity on President Al Bashir and its proclamation by the Minister of International Relations and Co-operation did not serve to confer any immunity on him. The fact that the Cabinet may have thought that it would is neither here nor there. An erroneous belief cannot transform an absence of immunity into immunity. And, that being so, it was unnecessary for SALC to seek to set the proclamation aside before bringing its application.

[48] The High Court was accordingly correct in the conclusion it reached on the arguments placed before it. It cannot be criticised for not dealing with an argument that was never raised or suggested before it. It was proper therefore for it to make an order in favour of SALC on the issues before it. Whether its order was correct in the light of the new arguments now raised is the matter to which I now turn.

**Was there immunity under customary international law and section 4(1) of DIPA?**

[49] The argument on behalf of Government ran as follows. It is a well established principle of customary international law that heads of state enjoy immunity *ratione personae,* that is, by virtue of the office they hold, and are not subject to the criminal or civil jurisdiction of the Courts of other countries or any other form of restraint. In the usual terminology they are regarded as inviolable. This immunity is embodied in section 4(1)(a) of DIPA, which provides:

"A head of state is immune from the criminal and civil jurisdiction of the Courts of the Republic, and enjoys such privileges as -

(a) heads of state enjoy in accordance with the rules of customary international law . . . "

It follows that before the enactment of the Implementation Act President Al Bashir would have enjoyed immunity from arrest and surrender to the ICC notwithstanding South Africa's accession to the Rome Statute.

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[50] The Government submitted that the Implementation Act does not remove this immunity. On a proper construction of section 4(2) of the Implementation Act it has nothing to do with immunity from arrest in terms of the ICC warrants, but precludes immunity being advanced as a defence or in mitigation of sentence in a prosecution for international crimes before a South African Court. It does not therefore remove the immunity that a head of state enjoys from arrest in South Africa even for international crimes to be prosecuted before the ICC. As to section 10(9) of the Implementation Act it is concerned only with the surrender of a person properly arrested pursuant to an ICC warrant. It precludes such a person from raising immunity to preclude surrender. But it is silent on the question whether such person may be arrested in the first place. If they were immune from arrest then they should not be arrested and there is no room for an inquiry in terms of section 10(5) of the Implementation Act and therefore no room for applying the exclusion of immunity in section 10(9).

[51] SALC countered this argument in the following way. The Implementation Act was intended to give effect to South Africa's accession to the Rome Statute and South Africa's obligations thereunder. These included the obligation to co-operate with the ICC in causing persons in respect of whom the ICC has issued arrest warrants and requested assistance to be arrested and surrendered. Properly construed, in the light of these obligations, the provisions of sections 4(2) and 10(9) of the Implementation Act preclude anyone, whether in a prosecution before a South African Court, or when arrested pursuant to an ICC warrant, from raising as defence to their prosecution or ground for resisting their arrest and surrender, any form of immunity.

[52] In the alternative, SALC joined issue with the Government on the contents of customary international law. It contended that whatever the position may be in relation to a national court, in the case of an international tribunal, such as the ICC, set up to deal with international crimes, there is no immunity from arrest or prosecution. In regard to the specific situation in Sudan SALC contended that the effect of Security Council Resolution 1593 (2005) was to subject Sudan to the provisions of the Rome Statute, notwithstanding the fact that it has not acceded to it and thereby to compel it to cooperate with the ICC. A consequence of that, and the fact that Sudan was obliged to co-operate fully with the ICC, was that it could not invoke immunity to prevent President Al Bashir from being arrested and surrendered to face trial before the ICC. In regard to the second arrest warrant, which dealt with the crime of genocide, SALC pointed out that Sudan was a party to the Genocide Convention (1948) and as such it contended that it had waived any immunity that its citizens would otherwise have enjoyed for prosecution of crimes falling within the scope of the Convention.

[53] The Foundation's argument took the Constitution as its starting point. It said that under the Constitution the

Government is required to take steps to ensure that persons accused of international crimes are detained, arrested and prosecuted before an appropriate tribunal. This duty is reinforced by the fact that under section 232, customary international law is law in South Africa unless it is inconsistent with the Constitution

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or an Act of Parliament.[26] Section 231 deals with the legal effect of international agreements, such as the Rome Statute, to which South Africa is a party. Under section 231(4) an international agreement becomes law in South Africa when it is enacted into law by national legislation. So customary international law is to be read in the light of legislation under which South Africa has enacted international agreements into law. When construing section 4(1)(a) of DIPA and its reference to customary international law, it must be read in the light of these constitutional obligations and provisions. The immunity confirmed in section 4(1)(a) of DIPA must therefore be construed in a way that is consistent with the absence of immunity from prosecution for international crimes provided in the Rome Statute.

***The Rome Statute***

[54] The Rome Statute is an international agreement between the State Parties thereto, directed at the prosecution and sentencing of those responsible for the international crimes of war crimes, genocide and crimes against humanity. The importance of the international struggle to rid the world of these crimes is resoundingly stated in the Preamble in the following terms:

"*The States Parties to this Statute*,

*Conscious* that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

*Mindful* that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

*Recognizing* that such grave crimes threaten the peace, security and well-being of the world,

*Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation,

*Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

*Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

. . .

*Determined* to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

*Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

*Resolved* to guarantee lasting respect for and the enforcement of international justice,

*Have agreed as follows*".

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[55] Article 1 creates the ICC and gives it the power "to exercise its jurisdiction over persons for the most serious crimes of international concern". Although the Rome Statute was concluded outside the United Nations ("UN") the aim under article 2 is to bring it into relationship with the UN by agreement between the UN and the ICC. The international crimes that are the subject of the ICC's jurisdiction are defined, as is the Court's jurisdiction. In the ordinary course the ICC has jurisdiction over state parties and their nationals and where a non-party state accepts the jurisdiction of the Court.

[56] This jurisdiction is not universal because parties may for various reasons not accede to the Rome Statute.[27] Article 13(b) of the Rome Statute endeavours to address this problem by providing that the ICC may exercise jurisdiction if:

"a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations."

The Security Council referred the situation in Darfur to the Prosecutor in terms of this provision. While there is debate among commentators as to the full effect of such a referral, it is accepted by all that it confers jurisdiction upon the ICC in respect of the actions of a non-party state and its citizens.[28] UN member states are obliged to accept the authority of the decision by the Security Council to refer the situation in Darfur to the Prosecutor.[29]

[57] Part 9 of the Rome Statute deals comprehensively with the obligations of international co-operation and judicial assistance to the ICC in the performance of its tasks. Article 86 imposes a general obligation to co-operate fully with the Court in the investigation and prosecution of crimes within its jurisdiction. Under article 87.1(a) the ICC may address requests for co-operation to States Parties and under article 88 all States Parties are obliged to have procedures available under national law to enable them to co-operate with the Court.

[58] Article 89 deals with the arrest and surrender of persons to the ICC and its entitlement to request a State to co-operate in securing such arrest and surrender. It is common cause that the ICC has made such a request to South Africa in relation to the arrest warrants issued in respect of President Al Bashir. In urgent cases the ICC may, in terms of article 92, seek the provisional arrest of a person, but that was not the case here, although there appears to have been some confusion over the issue in the



application papers and the order made by the High Court. I will revert to that later.

[59] Article 27 of the Rome Statute deals with the possibility that the crime being prosecuted is likely in many instances to have been perpetrated by a state actor, ranging from a head of state to a humble official or soldier, and therefore the possibility would exist of the accused person raising a claim to immunity in accordance with long-established principles of customary international law, to be considered later in this judgment. It reads:

> "1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

The undisputed effect of this provision is that it is not open to a person being prosecuted before the ICC to claim immunity from prosecution or advance a defence of superior orders. It is agreed by all commentators that, because Party States have bound themselves to the Statute including this provision, all Party States have waived any immunity that their nationals would otherwise have enjoyed under customary international law.

[60] One further provision requires discussion. It is article 98 providing that:

> "1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the co-operation of that third State for the waiver of the immunity.
>
> 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the co-operation of the sending State for the giving of consent for the surrender."

This provision has occasioned much debate. There is a measure of consensus that it deals with requests for surrender or assistance in relation to the nationals, including heads of state, of non-Party States such as Sudan. Beyond that there appear to be two views. The one, espoused by the AU,[30] is that it operates to protect Party States from the obligation to cooperate with requests from the ICC for arrest and surrender or assistance where that would involve their breaching their obligations to respect personal inviolability under customary international law towards non-Party



States.[31] In other words, it provides the justification for African states to refuse to arrest and surrender President Al Bashir, because he is entitled as the head of state of Sudan to immunity *ratione personae*.[32] The other view is that, as non-Party States and their nationals are ordinarily brought within the jurisdiction of the ICC by way of a Security Council reference under article 13(b), article 27 is thereby made applicable to the non-Party State and therefore it is not open to it to rely on article 98.[33] It is well-recognised that there is a tension between articles 27 and 98 that has not as yet been authoritatively resolved.

[61] South Africa is bound by its obligations under the Rome Statute. It is obliged to co-operate with the ICC and to arrest and surrender to the Court persons in respect of whom the ICC has issued an arrest warrant and a request for assistance. To this end, it passed the Implementation Act. The relationship between that Act and the head of state immunity conferred by customary international law and DIPA lies at the heart of this case. But the starting point is not immediately with these, but with the Constitution.

***The constitutional background***

[62] The Constitution makes international customary law part of the law of South Africa, but it may be amended by legislation.[34] It provides a specific mechanism whereby obligations assumed under international agreements become a part of the law of South Africa.[35] And it decrees that, when interpreting any legislation, the Courts must prefer a reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[36] As Ngcobo CJ said in *Glenister* (*II*):[37]

> "Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law . . . These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution."

[63] The Constitution incorporated these provisions pursuant to the goal stated in the Preamble that its purpose is to "[b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations". From being an international pariah South Africa has

sought in our democratic state to play a full role as an accepted member of the international community. As part of this aim it enacted the Implementation Act, the preamble to which records that South Africa has become "an integral and accepted member of the community of nations".

[64] The Constitutional Court explained the inter-relationship between South Africa's obligations under international law and its domestic law in *National Commissioner of Police v Southern African Human Rights Litigation Centre*.[38] The Court was dealing with claims of torture, but its statements also referred to international crimes and are apposite in the context of the present case. Giving the judgment of the Court Majiedt AJ said:

> "[37] Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require states, even in the absence of binding international-treaty law, to suppress such conduct because 'all states have an interest as they violate values that constitute the foundation of the world public order'. Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of s 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm.
>
> [38] Furthermore, along with genocide and war crimes there is an international treaty law obligation to prosecute torture. The Convention against Torture, an international convention drafted specifically to deal with the crime of torture, obliges states parties to 'ensure that all acts of torture are offences under its criminal law', together with an 'attempt to commit torture' and 'complicity and participation in torture'.
>
> [39] South Africa has fulfilled this international-law obligation through the recent enactment of the Torture Act [Prevention and Combating of Torture of Persons Act 13 of 2013]. In effect, torture is criminalised in South Africa under s 232 of the Constitution and the Torture Act whilst torture on the scale of crimes against humanity is criminalised under s 232 of the Constitution, the Torture Act and the ICC Act . . .
>
> [40] Because of the international nature of the crime of torture, South Africa, in terms of ss 231(4), 232 and 233 of the Constitution and various international, regional and subregional instruments, is required, where appropriate, to exercise universal jurisdiction in relation to these crimes as they offend against the human conscience and our international-and domestic-law obligations. The exercise of universal jurisdiction is, however, subject to certain limitations."

[65] That passage strongly supports SALC's case that the Government was under an obligation to co-operate with the ICC in arresting President Al Bashir. I did not understand Mr *Gauntlett* SC to challenge it as a general proposition. His contention was that, as foreshadowed in the final sentence, the principles governing the immunity *ratione personae* of heads of state constituted a limitation on this exercise of universal jurisdiction that precluded the performance of these obligations in relation to current



heads of state.[39] This necessitates a consideration of the nature of immunity in customary international law and, more specifically, the nature of head of state immunity.

***Immunity in customary international law***

[66] Professor Crawford[40] describes the basic principles of the international law of immunity in the following terms:

> "State immunity is a rule of international law that facilitates the performance of public functions of the state and its representatives by preventing them from being sued or prosecuted in foreign Courts. Essentially, it precludes the Courts of the forum state from exercising adjudicative and enforcement jurisdiction in certain classes of case in which a foreign state is a party. It is a procedural bar (not a substantive defence) based on the status and functions of the state or official in question. Previously described as a privilege conferred at the behest of the executive, the grant of immunity is now understood as an obligation under customary international law . . . [T]he existence of this obligation is supported by ample authority . . . Immunity exists as a rule of international law, but its application depends substantially on the law and procedural rules of the forum."

This immunity is available when it is sought to implead a foreign state, whether directly or indirectly,[41] before domestic Courts, and also when action is taken against state officials acting in their capacity as such. They enjoy the same immunity as the state they represent.[42] This is known as immunity *ratione materiae* (immunity attaching to official acts). In addition, heads of state and certain other high officials of state[43] enjoy immunity *ratione personae* (immunity by virtue of status or an office held at any particular time). This form of immunity terminates when the individual demits, or is removed from, office. The country concerned may waive either form of immunity.

[67] The Government called these principles in aid in support of its position that President Al Bashir was immune from arrest and surrender in terms



of the Implementation Act. It cited the authoritative statements by the International Court of Justice ("ICJ") in the *Arrest Warrant* case[44] that:

> ". . . [I]n international law it is firmly established that . . . certain holders of High-ranking office in a State, such as the Head of State . . . enjoy immunities from jurisdiction in other States, both civil and criminal.

. . . [T]hroughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties."

In regard to a suggestion that, because the case concerned allegations of the commission of international crimes, there was an exception to the principle, the ICJ said (paragraph 58) that it had examined State practice, including national legislation and decisions of higher national courts, but was unable to deduce that there existed under customary international law any exception to this rule where the individual concerned was suspected of having committed war crimes or crimes against humanity. This appears to be accepted by leading commentators such as Professor Akande.[45] It has also been widely accepted by national courts which have rejected attempts to implead sitting heads of state including Prime Minister Sharon of Israel, President Gaddafi of Libya, President Mugabe of Zimbabwe, Prime Minister Thatcher of the United Kingdom, President Castro of Cuba, President Zemin of China, President Kagame of Rwanda and President Aristide of Haiti, while the latter was living in exile in the United States of America.[46]

[68] Dating back to the instrument that established the Nuremberg Trials, it has been a feature of international instruments dealing with the prosecution of international crimes before specially constituted international tribunals, that those tribunals are constituted on the basis of specific provisions excluding claims of immunity as a defence or mitigating circumstance before those tribunals.[47] The ICJ considered these as well (paragraph 58) and found that they likewise did not enable it to conclude that any such exception existed in customary international law in regard to national Courts. But it was urged upon us that customary international law has moved on and at least when it was concerned with international

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crimes and international tribunals such as the ICC these principles were subject to an exception.

[69] I mean no disrespect to the efforts of Counsel to provide us with a comprehensive body of authority dealing with the issue of immunity in relation to persons charged with international crimes, in not engaging in a comprehensive consideration of the material placed before us. The narrow issue is whether there is now an international crimes exception to the principle of head of state immunity, enabling a state or national court to disregard such immunity when called upon by the ICC to assist in implementing an arrest warrant. The argument proceeded, as does this judgment, on the basis that once a head of state has been brought before the ICC no plea of head of state immunity can be invoked.[48] But, as a number of commentators have pointed out, that does not necessarily mean that a state is entitled to ignore head of state immunity when requested to co-operate with the ICC to bring such a person before it. It is in this context that the question of an international crimes exception to head of state immunity arises.

[70] In the absence of a binding treaty or other international instrument creating such an exception, or an established universal practice in the affairs of nations, one looks to the decisions of international courts for guidance as to the existence of such an exception. But we were referred to no decision by the ICJ itself, qualifying or limiting the scope of its decision in the *Arrest Warrant* case. Instead, the ICJ appears to have affirmed the decision in its subsequent judgment in *Djibouti v France*,[49] where it cited the judgment and explained that "the determining feature in assessing whether there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority". Then in the *Jurisdictional Immunities* case,[50] after a comprehensive review of both national and international jurisprudence on the point, the ICJ rejected a contention that international law does not recognise immunity, or at least restricts it, in cases involving serious violations of the law of armed conflict. No more recent case from the ICJ was drawn to our attention.

[71] The *Jurisdictional Immunities* case involved a civil claim by one state against another state, but I can discern nothing in the underlying treatment of customary international law that would justify admitting an exception to head of state immunity for international crimes in the context of criminal proceedings, but denying it in relation to civil proceedings. I am mindful that in some of the reasoning in both *Pinochet* (*3*)[51] and *Jones*[52]

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there are passages in which a careful distinction is drawn between civil liability, and the case of criminal liability.[53] But *Pinochet* (*3*) was dealing with the criminal liability of a former head of state, not civil liability, and in *Jones* the House of Lords was concerned with the possible circumvention of state immunity, by permitting personal actions against the officials of the state. Permitting such an action would indirectly infringe the absolute immunity of the foreign state, but indirect infringement does not arise in a criminal case. Of greater relevance in regard to the contention that there is an international crimes exception to head of state immunity is that there are clear statements in *Pinochet* (*3*) that if Senator Pinochet had still been the Chilean head of state he would have enjoyed immunity *ratione personae*.[54] Apart from the point of circumvention of state immunity, it was not suggested that the principles of immunity are different in respect of criminal prosecution of international crimes as opposed to the adjudication of civil claims arising from the perpetration of international crimes. As pointed out by Professor Crawford the immunity afforded to state officials has always been the same as that of the state they represent.[55] And Dame Hazel Fox QC and Philippa Webb say that "Civil immunity can in the last resort . . . be regarded as based on criminal immunity."[56]

[72] In two cases, both relied on by the ICJ in the *Jurisdictional Immunities* decision, the European Court of Human Rights ("ECHR") has likewise accepted that customary international law is as stated in the *Arrest Warrant* case insofar as it concerns civil claims. The ICJ cited the following passage from the ECHR decision in *Al Adsani*:[57]

"Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the Courts of another State where acts of torture are alleged."

Then in *Kalogeropoulou*[58] the EHCR said:

"The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity."

[73] I can see the force of an argument that the prosecution of perpetrators of international crimes is of greater importance than permitting civil claims arising from their conduct. On the other hand, however, and having regard to the fact that customary international law is derived from the actions of states in their relations with one another, it may be that states would be more willing to accept immunity being withdrawn or attenuated

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in relation to claims that sound in monetary terms, than they would to agree to permit their high-ranking office holders and officials to be prosecuted in other national courts. But as I have said no authority to which we were referred drew any distinction between the two situations or suggested that an international crimes exception was accepted in either situation. Professor O'Keefe argues persuasively that there is little likelihood of the acceptance of such an exception in the foreseeable future.[59]

[74] It may be that these considerations will inform future debate and contribute to the development of customary international law, but our task is to assess the state of customary international law as it stands at the present time and apply it. That is what the Constitution requires us to do. While in other areas of the law the Court's function includes the development of the law, in the area of customary international law its task is one of discerning the existing state of the law, not developing it. As Lord Hoffmann said in *Jones*:[60]

"It is not for a national Court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states."

Development of customary international law occurs in international courts and tribunals, in the contents of international agreements and treaties and by its general acceptance by the international community of nations in their relations with one another as to the laws that govern that community. However tempting it may be to a domestic court to seek to expand the boundaries of customary international law by domestic judicial decision, it is not in my view permissible for it to do so.

[75] The ICC itself has affirmed that the *Arrest Warrant* case correctly reflects customary international law in respect of the immunity *ratione personae* of heads of state. In the *DRC* case concerning President Al Bashir[61] it said:

"At the outset, the Chamber wishes to make it clear that it is not disputed that under international law a sitting Head of State enjoys personal immunities from criminal jurisdiction and inviolability before national Courts of foreign States even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court."

In support of this statement the ICC cited the *Arrest Warrant* case.

[76] The *Arrest Warrant* case specifically recognised that there are exceptions to this immunity. The decision mentioned four.[62] The first three were that there is no immunity before a domestic Court; no immunity if it is waived by the State they represent; and no immunity after they demit, or are

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removed from, office. The fourth bears upon the present case. The ICJ recognised that an incumbent of an office entitled to immunity *ratione personae* "may be subject to criminal proceedings before certain international criminal Courts, where they have jurisdiction". It mentioned various possible examples of which the ICC was one. The tribunals in question were those the founding statutes of which excluded such immunity as a defence or ground for moderating sentence. Does this provide the exception for which SALC contends? It has the support of at least one of the commentators cited by SALC.[63] But another equally eminent commentator cited by the Government disagrees.[64] No one so far as I can see claims that the matter has been clearly resolved as a matter of customary international law.

[77] There is a difference between saying that an international tribunal, having jurisdiction and constituted on terms that specifically exclude reliance on any principles of immunity, provides an exception to the customary international law rule that heads of state enjoy immunity *ratione personae*, and saying that a national court asked to provide assistance to that international tribunal is likewise not bound by the customary international law rule. It is the latter proposition with which we are concerned. And it is of great importance that in two instances in dealing with the arrest and surrender of President Al Bashir, the ICC did not found its decisions on that proposition. Instead it held that President Al Bashir does not enjoy any such immunity, because the Security Council removed it by way of Resolution 1593 (2005).

[78] Sudan is not a party to the Rome Statute. It has not therefore undertaken any obligations in relation to the ICC. By contrast a state that is a party to the Rome Statute is bound by its terms. As those include, in article 27, an express provision precluding reliance on immunity it is accepted that party states waive any rights to immunity that their own citizens might otherwise have enjoyed. But the position is different in respect of non-parties. Here the starting point must be that in terms of article 34 of the Vienna Convention on the Law of Treaties[65] a treaty such as the Rome Statute cannot impose obligations on states that are not parties to the

treaty and have not consented to the imposition of such obligations.

[79] The ICC recognised this difficulty in the *DRC* case. It also accepted that in the ordinary course the only means of avoiding the difficulty was by invoking article 98 of the Rome Statute, which provides for the ICC to secure the co-operation of the third party state (in this case, Sudan) in waiving immunity and giving consent for the surrender of the person

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concerned. The papers do not reveal whether the ICC has made approaches to Sudan to secure a waiver or consent, but given that President Al Bashir is the head of state in that country it is obvious at a practical level that it would not be forthcoming.

[80] In *DRC*, the ICC held that requiring the DRC to arrest and surrender President Al Bashir did not create an inconsistency between its obligations under the Rome Statute and its international obligation to respect the immunities of President Al Bashir as a head of state. But its reasoning was not based on the existence of an international crimes exception to head of state immunity. It was based entirely on Security Council Resolution 1593 (2005). The ICC reasoned as follows:[66]

"The Chamber does not consider that such inconsistency arises in this case. *This is so because by issuing Resolution 1593(2005) the SC[Security Council] decided that the 'Government of Sudan [. . . ] shall cooperate fully with and provide necessary assistance to the Court and the Prosecutor pursuant to this resolution'.* Since Immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the co-operation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan 'co-operate fully' and 'provide any necessary assistance to the Court' senseless. Accordingly, the '*cooperation* of that third party State [Sudan] for the waiver of the immunity' as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of the SC Resolution 1593(2005). By virtue of said paragraph, the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State." (My emphasis added in italics. Underlined words emphasised in the original.)

[81] In its decision in relation to President Al Bashir's visit to South Africa referred to earlier[67] the ICC repeated this justification for its view that South Africa was not barred by President Al Bashir's status as a head of state from arresting him and causing him to be surrendered to the ICC. It said:[68]

"In conclusion, the Republic of South Africa is already aware of its obligation under the Rome Statute to immediately arrest Omar Al Bashir and surrender him to the Court, *as it is aware of the Court's explicit position . . . that the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State have been implicitly waived by the Security Council of the United Nations by resolution 1593(2005)* . . . "(My emphasis.)

[82] These decisions involved a departure by the ICC from its earlier decision holding that there is an international crimes exception to head of state

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immunity when a person is charged with international crimes under the Rome Statute.[69] In *Malawi*[70] the ICC concluded that:

". . . [T]he Chamber finds that customary international law creates an exception to Head of State immunity when international Courts seek a Head of State's arrest for the commission of international crimes."

By contrast on the same question Professor Crawford[71] (since 2015 a judge of the ICJ) wrote, in respect of the ICC, that state parties had consented to the waiver of immunity in respect of their nationals by virtue of their agreement to article 27, but:

"The entitlement of nationals of non-parties to personal immunity is not obviously eroded, particularly in the light of Article 98(1) of the ICC statute."

He noted that the Pre-Trial Chamber held a firm opinion to the contrary, but that was written before the Chamber gave a different justification for its views in regard to President Al Bashir and immunity. Its current position appears to accept that President Al Bashir would enjoy head of state immunity, were it not, so it believes, for the fact that it has been waived by the Security Council.

[83] It would serve little purpose to trawl through the academic literature on the question as the commentators are divided, although one senses a desire on the part of many of them that the problem should be resolved by recognising an exception to the rule of head of state immunity. Were it simply a matter for me to determine I would be inclined to share the view expressed by Dr Weatherall[72] that:

". . . [T]he State is not an abstract entity but a community of human beings. Protection of international criminals . . . from international scrutiny under the guise of State dignity is an affront to the citizens against whom grave violations of human rights are perpetrated. As State sovereignty is increasingly viewed to be contingent upon respect for certain values common to the international community, it is perhaps unsurprising that bare sovereignty is no longer sufficient to absolutely shield High officials from prosecution for *jus cogens* violations,"

as well as that of the US District Court[73] he quotes:

"These precedents instruct that resort to head-of-state and diplomatic immunity as a shield for private abuses of the sovereign's office is wearing thinner in the eyes of the world and waning in the cover of the law. The prevailing trend teaches that the day does come to pass when those who violate their public trust are called upon, in this world, to render account for the wrongs they inflict on innocents."

[84] But the content of customary international law is not for me to determine and, like Dr Weatherall, I must conclude with regret that it would go too far to say that there is no longer any sovereign immunity for *jus cogens* (immutable norm) violations. Consideration of the cases and the literature goes no further than showing that Professor Dugard is correct when he says that "customary international law is in a state of flux in respect of immunity, both criminal and civil, for acts of violation of norms of *jus cogens*".[74] In those circumstances, I am unable to hold that at this stage of the development of customary international law there is an international crimes exception to the immunity and inviolability that heads of state enjoy when visiting foreign countries and before foreign national Courts.

[85] Ordinarily that would mean that President Al Bashir was entitled to inviolability while in South Africa last June. But SALC argued that the position was different as a result of the enactment of the Implementation Act. I turn to consider that contention.

**The Implementation Act**

[86] Whether the Implementation Act has the effect of removing the immunity that President Al Bashir would otherwise enjoy is a matter of the proper construction of the Implementation Act. The principles to be followed in that regard are settled.[75] In the present case they are strongly influenced by the fact that we are dealing with a statute that incorporated an international agreement into South African law and are required by section 233 of the Constitution to construe it in a manner consistent with international law. As international law requires state parties to international agreements to comply with the obligations they have assumed under those agreements, an interpretation of the Implementation Act that results in South Africa not complying with its obligations under the Rome Statute is to be avoided if possible.

[87] We are also obliged by section 39(2) of the Constitution to interpret the Implementation Act in a way that promotes the spirit, purport and objects of the Bill of Rights. There are a number of provisions of the Bill of Rights that inform its spirit, purport and objects in this context. If international crimes were committed in South Africa they would infringe a number of rights guaranteed under the Bill of Rights. Section 11 guarantees the right to life and we are here concerned with an arrest warrant that charges the crime of genocide. The charges of war crimes and crimes against humanity not only infringe that right but they also infringe the right to dignity in section 10 and the right to freedom and security of the person in section 12. Section 12(1) explains that this includes the right not to be deprived of freedom arbitrarily or without just cause; the right not to



be detained without trial; the right to be free from all forms of violence from either public or private sources; the right not to be tortured and the right not to be treated in a cruel, inhuman or degrading way. Section 13 guarantees that no one may be subjected to slavery, servitude or forced labour and section 14 protects the right to privacy. Then there are the rights to freedom of religion, belief and opinion; freedom of expression and the right to assembly, demonstration and petition.

[88] Reference to the two arrest warrants show that the conduct of which President Al Bashir stands accused, and for which he is said to be responsible, involves acts that would infringe all of these rights. It is of course not for us to form or express a view on whether the conduct charged occurred or, if it did, his responsibility for it. But I mention it because it illustrates the importance in the context of the interpretation of the Implementation Act of construing it in a way that accords with and gives effect to the spirit, purport and objects of the Bill of Rights.

[89] The starting point in the interpretational exercise is the long title of the Implementation Act, which describes its purposes. It reads that it is an Act:

> "To provide for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa; to ensure that South Africa conforms with its obligations set out in the Statute; to provide for the crime of genocide, crimes against humanity and war crimes; to provide for the prosecution in South African Courts of persons accused of having committed the said crimes in South Africa and beyond the borders of South Africa in certain circumstances; to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstances; to provide for co-operation by South Africa with the said Court; and to provide for matters connected therewith."

[90] Some of these features warrant stressing in the light of the fact that there is no dispute that President Al Bashir is subject to the jurisdiction of the ICC and can be prosecuted by it for his alleged crimes. He has been stripped of any immunity when before the ICC. It is therefore important that the purpose of the Implementation Act is to provide a framework to ensure the effective implementation of the Rome Statute. It is to *ensure* that South Africa conforms to its obligations under the Rome Statute. In that regard there is no doubting its obligation to endeavour to bring President Al Bashir before the ICC for trial. The head of state immunity claimed for him is only a procedural bar to the enforcement of that obligation in this country.[76] It is not an immunity that confers impunity for any wrongdoing on his part.

[91] Lastly, the Implementation Act provides for the arrest of persons accused of international crimes and their surrender to the ICC and for co-operation between this country and the ICC. Those are powerful objectives. The reason for them appears from the preamble where the point is made that

"millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law". As a result of this and South Africa's own painful past the Republic of South Africa is committed to:

"* bringing persons who commit such atrocities to justice, either in a Court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute; and

* carrying out its other obligations in terms of the said Statute".

[92] The relevant provisions of the Implementation Act must be read and construed in the light of this commitment, which as the Constitutional Court has pointed out, is constitutionally mandated. The first is section 4(2) which provides:

"(2) Despite any other law to the contrary, including customary and conventional international law, the fact that a person -

(a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official; or

(b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither -

(i) a defence to a crime; nor

(ii) a ground for any possible reduction of sentence once a person has been convicted of a crime."

[93] In Dugard,[77] it is suggested that this section is an endeavour by the Legislature to "cut past" the controversial issue of immunity *ratione personae*. I confess to being unpersuaded. The section is in a part of the Implementation Act conferring jurisdiction on South African Courts to try international crimes in certain circumstances. It would have been absurd and non-compliant with its international obligations for South Africa in such a case to permit the accused to raise immunity either *ratione personae* or *ratione materiae*, or obedience to orders, to avoid conviction or reduce any sentence. In the circumstances, the section paraphrased the provisions of article 27(1) of the Rome Statute and made them applicable in trials for international crimes in South Africa or, as Professor Du Plessis expressed matters, it "trumps" the immunities that would otherwise attach to individuals.[78] The difficulty lies in taking it further to create in South Africa an international crimes exception to head of state immunity. Nevertheless, that does not mean that it is irrelevant to the interpretational exercise. It is



a clear indication that South Africa does not support immunities when people are charged with international crimes.

[94] Recognition of head of state immunity alongside the provisions of sec-tion 4(2) to preclude someone from being brought to trial in South Africa would create an anomaly. Under section 4(3)(c) a South African Court has jurisdiction to try someone for an international crime if they are present in the territory of the Republic. In such a trial it would be no answer for the accused to raise immunity either *ratione personae* or *ratione materiae*. But on the argument for the Government this would not matter because it would be impossible for the accused to be brought before the Court in terms of the Criminal Procedure Act 51 of 1977 ("CPA"). Under the CPA an accused is brought to Court either by arrest or indictment,[79] but either procedure would compel the accused to submit to the criminal jurisdiction of a South African Court, which is inconsistent with immunity.

[95] A construction of section 4(2) that would exclude claims of immunity if a person was being tried before a South African Court, but would not exclude immunity in seeking to bring that person to trial before that Court would in my view be a serious anomaly. The ordinary principle of interpretation is that the conferral of a power conveys with it all ancillary powers necessary to achieve the purpose of that power.[80] The purpose of the power to prosecute international crimes in South Africa is to ensure that the perpetrators of such crimes do not go unpunished. In order to achieve that purpose it is necessary for the National Director of Public Prosecutions to have the power not only to prosecute perpetrators before our Courts, but, to that end, to bring them before our Courts. This is also consistent with the constitutional requirement that the Implementation Act be construed in a way that gives effect to South Africa's international law obligations and the spirit, purport and objects of the Bill of Rights. The construction proffered on behalf of the Government emasculates the section in relation to international crimes that were perpetrated outside the borders of this country by nationals of other states. That is a construction that would defeat the purposes of the Implementation Act. It is not in my view correct.

[96] I turn then to the provisions of the Implementation Act dealing with requests for assistance from the ICC and, more particularly, requests for assistance in terms of arrest warrants issued by the ICC for the purpose of securing the presence before the Court of alleged perpetrators of international crimes. These are in sections 8 to 10 of the Act. Section 8(1) provides that when a request is received from the ICC for the arrest and surrender of a person for whom it has issued a warrant of arrest it must be referred to the Central Authority. This is defined as the Director-General: Justice and Constitutional Development, the present incumbent of which office is Ms Sindane. The Central Authority must immediately on receipt of the request forward the documents to a magistrate who must endorse the

warrant for execution in any part of the Republic.[81] That was what occurred in relation to the request in relation to the first arrest warrant. It was forwarded to the Chief Magistrate, Pretoria, who endorsed it for execution.[82] So far as the record goes that warrant is still extant and operative.

[97] Section 9(3) provides that any warrant endorsed under section 8 must be in the form and executed in a manner as near as possible to that which is prescribed under the laws relating to criminal procedure in South Africa. This is the only part of section 9 that bears upon the two warrants in this case. The balance of the section deals with provisional warrants to be sought pursuant to a request by the ICC in terms of article 92 of the Rome Statute. That is irrelevant for the purposes of this case, save that in formulating its claim in the founding affidavit SALC sought to rely on section 9(1) and (2). This misconception appears to some degree to have coloured the relief sought by SALC. It will be dealt with below.

[98] Section 10 deals with the procedures to be followed before a competent court after arrest for the purposes of surrender. Within 48 hours of the person's arrest they must be brought before the magistrate in whose area of jurisdiction the arrest took place. The magistrate then conducts an inquiry in order to establish whether the warrant applies to the person in question; whether the person has been arrested in accordance with the procedures laid down in domestic law; and whether the person's rights as contemplated in the Bill of Rights have been respected, if, and to the extent which, they are or may be applicable.[83] The inquiry is conducted in the same manner as a preparatory examination under the CPA.[84] If, at the end of the inquiry, the magistrate is satisfied of the three matters specified in subsection (1) and that the person may be surrendered to the ICC,[85] then they "*must* order that such person be surrendered to the Court and that he or she be committed to prison pending such surrender.'[86] There is no scope for the exercise of any discretion in that regard. Provided the requirements for surrender are satisfied then the magistrate must order surrender.

[99] These provisions do not mention the issue of immunity. Nor is it apparent where a claim to immunity could find its place in the inquiry contemplated by section 10(1). The inquiry is expressly confined to the three matters specified and none of those appear to involve issues of immunity. Certainly the question whether the person arrested is the person referred to in the warrant does not raise that as an issue. Similarly, whether the person's arrest complied procedurally with the requirements for a valid arrest in South African domestic law would not raise that issue. When this difficulty was raised with Counsel he suggested that the inquiry became



relevant when considering whether the arrested person's rights in terms of the Bill of Rights had been respected and referred to section 12 of the Constitution guaranteeing the right to freedom and security of the person and section 21 governing freedom of movement. But, if the Implementation Act provides for a person's arrest in those circumstances neither of those rights is infringed, or, if they are, the limitation is justified under section 36 of the Constitution. The argument is dependent on the premise that such an arrest would be unlawful because of the existence of immunity. But that begs the very question in issue in this case, namely, whether in relation to an ICC arrest warrant and request for assistance, such immunity exists.

[100] It is here that section 10(9) assumes crucial importance because it deals with the very question of the relevance of claims to immunity to the order of surrender. It provides that:

"The fact that the person to be surrendered is a person contemplated in section 4(2)(a) or (b) does not constitute a ground for refusing to issue an order contemplated in subsection (5)."

The persons referred to in section 4(2) include a person who "is or was a head of State". In other words, it includes any person in the situation of President Al Bashir. So the fact that President Al Bashir was such a person would not have provided a ground for a magistrate not to make an order for his surrender in terms of section 10(5).

[101] In an endeavour to circumvent what appears to be a plain provision the Government argued that section 10 deals only with the surrender of persons who had already been arrested under section 9 and that the latter section was silent on the question of immunity. But that creates an absurdity. If it were correct, then any person entitled on any basis to claim immunity would challenge their arrest by way of an interdict *de libero homine exhibendo* (the equivalent of a *habeas corpus* application in other jurisdictions) and demand their release. So the only people who could be brought before a magistrate under section 10 would be those who had no grounds for claiming immunity. But then section 10(9) would serve no purpose at all. It would be entirely redundant, because there would be no possible situation in which a person brought before the magistrate under section 10(1) would be a person referred to in section 4(2)(a) or (b). Needless to say such an interpretation is to be avoided.

[102] Counsel contended that to construe the Implementation Act in the manner suggested by SALC involved a tacit repeal or amendment of section 4(2) of DIPA, because that was the prior statute and until the Implementation Act was passed would have served to afford President Al Bashir immunity. He submitted that this is not lightly to be inferred.[87] That is no doubt



correct, but there is another principle that emerges from the cases on this point. It was referred to by Marshall J in *Gorham v Luckett*:[88]

". . . if this last Act professes, or manifestly intends, to regulate the whole subject to which it relates, it necessarily supersedes and repeals all former acts, so far as it differs from them in its prescriptions."

This aptly describes the situation with which we are concerned. DIPA is a general statute dealing with the

subject of immunities and privileges enjoyed by various people, including heads of state. The Implementation Act is a specific Act dealing with South Africa's implementation of the Rome Statute. In that special area the Implementation Act must enjoy priority. I would not, however, use the language of repeal or amendment. It is rather more an example of the application of the related principle in the converse situation embodied in the maxim *generalia specialibus non derogant* (general words and rules do not derogate from special ones).[89] Where there is legislation dealing generally with a topic and, either before or after the enactment of that legislation, the Legislature enacts other legislation dealing with a specific area otherwise covered by the general legislation, the two statutes co-exist alongside one another, each dealing with its own subject matter and without conflict. In both instances, the general statute's reach is limited by the existence of the specific legislation. So DIPA continues to govern the question of head of state immunity, but the Implementation Act excludes such immunity in relation to international crimes and the obligations of South Africa to the ICC.

[103] I conclude therefore that when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa co-operating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for co-operation made.[90] I accept, in the light of the earlier discussion of head



of state immunity, that in doing so South Africa was taking a step that many other nations have not yet taken. If that puts this country in the vanguard of attempts to prevent international crimes and, when they occur, cause the perpetrators to be prosecuted, that seems to me a matter for national pride rather than concern. It is wholly consistent with our commitment to human rights both at a national and an international level. And it does not undermine customary international law, which as a country we are entitled to depart from by statute as stated in section 232 of the Constitution. What is commendable is that it is a departure in a progressive direction.

[104] It is also important to note that this conclusion accords with the understanding of Government as to its obligations under and in terms of the Rome Statute and the Implementation Act. As noted above when South Africa received the first arrest warrant and request for assistance from the ICC, the Central Authority acted in terms of section 8(1) of the Implementation Act and forwarded it to the Chief Magistrate, Pretoria, who endorsed it for execution in any part of the Republic. When President Zuma was inaugurated and an invitation was extended to President Al Bashir to attend the inauguration, Sudan enquired whether he would be liable to arrest if he attended, and the answer was in the affirmative. The then Director-General of the Department of International Relations and Co-operation issued a public statement quoted in the papers, that:

"If today, President al Bashir landed in terms of the provision [of the Rome Statute], he would have to be arrested."

There are several statements in the papers and the literature with which we have been furnished that indicate that there have been other occasions, such as the funeral of the late President Mandela, that President Al Bashir did not attend, because he would have been liable to arrest and surrender to the ICC had he done so. It is plain from this that, save for the circumstances of the present case, South Africa has hitherto complied meticulously with its obligations under the Rome Statute in respect of President Al Bashir.

[105] That brings me back to the point made in paragraphs 11 to 16 and 24 of this judgment that the arguments with which we have been confronted were not those on which the case was conducted in the Court below. Nor, and this is the important point, did they reflect the approach of the Government to the issues. That emerges from the affidavits of Ms Sindane and, in particular, of Dr Lubisi. Ms Sindane explained that the Government's reasons for not seeking to arrest President Al Bashir were based on the terms of the hosting agreement and the ministerial proclamation. And Dr Lubisi explained that "Cabinet collectively appreciated and acknowledged that the aforesaid decision can only apply for the duration of the AU Summit". These statements demonstrated that as far as South Africa was concerned this involved a departure from its commitment to its obligations under the Rome Statute. We have not been apprised of the reasons for South Africa departing from those obligations on this occasion. But, be that as it may, whilst the departure from this country's



obligations was unfortunate, according to the affidavits it was only temporary. It is perhaps a pity in those circumstances that the Government chose to pursue the new arguments, thereby possibly giving the impression that our commitment as a nation to the Rome Statute was in question.

**Waiver**

[106] We received extensive argument on two propositions to the effect that, even if the Implementation Act did not oust President Al Bashir's head of state immunity, it had been waived, either by the Security Council Resolution 1593 (2005) or, in relation to the second arrest warrant, by the Genocide Convention (1948). In view of my conclusion on the effect of the Implementation Act it is unnecessary to address these submissions. The position under the Security Council Resolution is hotly contested by the commentators and the limited argument we received on the Genocide Convention does not give me confidence that we should express a view on it. I pass therefore to a consideration of the relief granted by the High Court and the question of costs.

**The relief**

[107] The relief granted by the High Court is set out in paragraph 6 above. The matter having been brought and dealt with as an urgent application the orders were not as well-tailored to the contentions being advanced by SALC as mature consideration would indicate. A broad statement that conduct was inconsistent with the Constitution did little to define where the shortcoming lay. Mr *Trengove* SC accepted that even if the appeal failed it was desirable that the declaratory order be formulated with greater precision. In my view, an appropriate order would have been the following:

"The conduct of the Respondents in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful."

[108] The second paragraph of the order directed the applicants to take reasonable steps to arrest President Al Bashir without a warrant in terms of section 40(1)(k) of the CPA. I do not think that section has anything to do with a person charged with international crimes under the Rome Statute. It is true that it deals with people who have committed crimes outside South Africa that would have been an offence if committed inside South Africa, which would include international crimes. But it is qualified by the requirement that the person arrested is "under any law relating to extradition or fugitive offenders" liable to arrest and detention in South Africa. That is not the position with an arrest under section 10 of the Implementation Act. That Act is not concerned with extradition, but with



surrender to the ICC. Persons arrested thereunder are not necessarily fugitive offenders. After all President Al Bashir continues to tread the world stage and has made appearances at the UN and visited China, as well as a number of other states, in his official capacity as head of state of Sudan, so he is not a fugitive offender.

[109] I am not sure why it was thought necessary to look to the CPA in regard to the possible arrest of President Al Bashir. After all the power to arrest him existed under the Implementation Act. Furthermore he was not to be arrested without a warrant, but in terms of warrants endorsed by a magistrate, one of which was in existence at the time, although SALC did not know that. As paragraph 2 of the order sought by SALC and granted by the High Court was inappropriate, and there is at present no reason to think that the existing arrest warrants will not be dealt with in terms of the Implementation Act and be available to be enforced if President Al Bashir returns to this country, it should simply be deleted. Subject to those amendments to the order the appeal should be dismissed.

**Costs**

[110] The amendments to the order do not represent substantial success for the applicants. While their arguments in regard to the content of customary international law as it applies under DIPA were accepted, the key statute is the Implementation Act and their arguments in regard to that were unsuccessful. SALC have succeeded in establishing important points of public importance in regard to the Government's obligations under the Rome Statute and the Implementation Act. They should accordingly have their costs, including the costs of two Counsel.

[111] The Foundation's arguments were of great value in dealing with this case and the emphasis they rightly placed on the importance of the Constitution in construing the statutes under consideration was a valuable insight. In my view, they should also have their costs including the costs of the application for admission as *amicus curiae* and the costs of two Counsel.

[112] As regards the costs incurred by the *amici* other than the Foundation and the costs of the Government in opposing their applications for admission as *amici* I have already expressed the view that the *amici* should not be penalised for their lack of success in securing their admission as *amici*. The Government must bear its own costs in relation to these applications, as must the *amici*.

**Result**

[113] I make the following order:

1. The application for leave to appeal is granted.
2. The applicants are to pay the costs of that application such costs to include those consequent upon the employment of two Counsel.
3. The applications by the African Centre for Justice and Peace Studies, the International Immigration Rights Initiative, the Peace and Justice Initiative and the Centre for Human Rights for admission as *amici curiae* are dismissed with no order for costs.



4. The order of the High Court is varied to read as follows:

   "1 The conduct of the Respondents in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful.

   2 The applicant is entitled to the costs of the application on a *pro bono* basis."

5. The appeal is otherwise dismissed.

6. The applicants are to pay the respondent's costs of appeal and the costs of the Helen Suzman Foundation, including the costs of its application for admission as an *amicus*, such costs to include in both instances the costs consequent upon the employment of two Counsel.

(Majiedt and Shongwe JJA concurred in the judgment of Wallis JA. Lewis and Ponnan JJA concurred for separate reasons in the judgment of Wallis JA.)

**Ponnan JA:**

[114] I have had the privilege of reading the judgment of Wallis JA, which comprehensively sets out the facts and issues that call for adjudication in the appeal. I feel persuaded to write separately in this matter. Both my approach and the line that I take in endeavouring to resolve it are far narrower than and, in their emphasis, different from that preferred by my learned Colleague.

[115] I agree with Wallis JA that the content of customary international law is not for us to determine.91 Nor can I fault his conclusion that:

"when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of State immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for co-operation made".92

With due deference to my learned Colleague, that conclusion, I daresay, renders his discussion on customary international law unnecessary. I am accordingly hesitant to endorse Wallis JA's discussion on customary international law as also his conclusion on the subject, the high water mark of which is:

"In those circumstances I am unable to hold that at this stage of the development of customary international law there is an international crimes exception to the immunity and inviolability that heads of State enjoy when visiting foreign countries and before foreign national courts."93



[116] More narrowly then, at the heart of the appeal lies the supposed clash between section 4(1)(a) of the DIPA and section 4(2) of the Implementation Act. The clash is said to arise because the former provision recognises an immunity that the latter purportedly negates. Harmonising that clash - a clash that seems to me to be more apparent than real - necessarily disposes of the primary issue in the appeal.

[117] Section 4(1)(a) of the DIPA provides:

"A head of State is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as -

(a) heads of State enjoy in accordance with the rules of customary international law . . . "

Supposing there was no further legislation, President Al Bashir would have enjoyed immunity from arrest and surrender to the ICC. But there is further and later legislation in the form of the Implementation Act, sec-tion 4(2) of which provides:

"Despite any other law to the contrary, including customary and conventional international law, the fact that a person -

(a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official; or

(b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither -

(i) a defence to a crime; nor

(ii) a ground for any possible reduction of sentence once a person has been convicted of a crime."

[118] In my view, the apparent conflict can reasonably be reconciled when one applies the appropriate rules of statutory construction. Generally speaking, when the repeal of former legislation is intended, specific words to that effect are employed, but this, however desirable, is not always done, nor is it absolutely necessary. For, as Kotze AJA observed in a separate concurring judgment in *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 397:

"There are many illustrations in the books of the repeal by implication of earlier statutes by later ones, for subsequent legislation repeals previous inconsistent legislation, whether it expressly declares such repeal or not. Such an implied repeal will arise wherever the contents and operation of a later Act are repugnant to or cannot be harmonized with those of an earlier one . . ."

But repeal by implication is not favoured. An interpretation of apparently conflicting statutory provisions which involve the implied repeal of the earlier by the later ought not to be adopted unless it is inevitable (*R v Durban Corporation* 1946 NPD 109 at 115). Any reasonable construction which offers an escape from that is more likely to be in consonance with the real intention of the Legislature (*R v Tucker* 1953 (3) SA 150 (A) at 162 [also reported at [1953] 3 All SA 258 (A) - Ed]). As it was put in *Wendywood Developments (Pty) Ltd v Rieger and another* 1971 (3) SA 28 (A) at 38 [also reported at [1971] 3 All SA 103 (A) - Ed]:

"It is necessary to bear in mind a well-known principle of statutory construction, namely, that statutes must be read together and the later one must not be so construed as to repeal the provisions of the earlier one, unless the later



statute expressly alters the provisions of the earlier one or such alteration is a necessary inference from the terms of the

later statute."

[119] I can draw no such inference in this case particularly when regard is had to the nature, purpose and background of the Implementation Act. The preamble to the Implementation Act records that "throughout the history of human-kind, millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law." It commits South Africa to "bringing persons who commit such atrocities to justice" either in our own courts, or, in accordance with the principle of complementarity, in the ICC. Section 3 lists the objects of the Implementation Act as being, amongst others to: ensure that the Rome Statute is effectively implemented in South Africa; ensure that South Africa conforms with its obligations under the Rome Statute; and, enable the Republic to co-operate with the ICC by, *inter alia*, the surrender of suspects for prosecution before the ICC. Section 4(1) provides that any person who commits any of the international crimes is guilty of an offence and liable to conviction and punishment. Section 4(3) vests our courts with universal jurisdiction over the prosecution of all international crimes, wherever they may be committed, provided only that the accused is present in the Republic.

[120] Sections 8, 9 and 10 of the Implementation Act govern the manner in which an ICC request for the arrest of a suspect must be implemented. They do so in mandatory terms. Section 8 caters for an ICC request for the arrest and the surrender of a suspect. Section 8(1) says that the request "must" be referred to the central authority, namely, the Director-General of Justice. Section 8(2) requires the central authority immediately on receipt of that request to forward it to a magistrate who "must" endorse the warrant of arrest for execution. That has happened here in relation to one of the two warrants. Section 9(3) says that a warrant endorsed in terms of section 8 "must" be in a form and be executed in a manner as near as possible to that prescribed for domestic warrants of arrest in South Africa.

[121] Section 10 then comes into play - subsection (1) provides that the suspect "must" be brought before a magistrate within 48 hours, who "must" hold an inquiry to determine: first, whether the warrant applies to the suspect; second, whether the suspect has been arrested in accordance with our domestic law, and third, whether the suspect's constitutional rights have been respected. According to section 10(5), if the magistrate is satisfied that the three requirements have been met and that the suspect may be surrendered to the ICC, he or she "must" order that the suspect be surrendered to the ICC. Tellingly, these provisions leave no room for the suspect to raise any immunity claim or for the magistrate to inquire into and determine such a claim.

[122] Finally, there is section 10(9) of the Implementation Act, which provides:

"The fact that the person to be surrendered is a person contemplated in section 4(2)(a) or (b) does not constitute a ground for refusing to issue an order contemplated in subsection (5)."



There is no imperfection in the language of this provision. Its meaning is clear and unambiguous. It applies to any person contemplated in section 4(2)(a) or (b), which includes a sitting or former head of State. Accordingly, the fact that the suspect is a sitting or former head of State does not constitute a ground for refusing an order contemplated in section 10(5) - that is an order that the suspect be surrendered to the ICC. Recognition of head of State immunity alongside the provisions of section 4(2) to preclude someone from being brought to trial in South Africa would create an intolerable anomaly. In terms of section 4(2) of the Implementation Act, a head of State may be arrested and prosecuted before South African domestic courts. The same head of State may be prosecuted before the ICC in terms of article 27 of the Rome Statute. But, when the ICC requests South Africa to arrest and surrender that head of State to the ICC for prosecution, it would be precluded from doing so by virtue of the suspect's immunity. The immunity would not protect him against arrest and prosecution in South Africa but inexplicably protects him from an arrest in South Africa for surrender to the ICC.

[123] The Legislature has thus made a clear choice in section 10(9) to negate the head of State immunity that might otherwise have stood in the way of the arrest and surrender of President Al Bashir. This is not to suggest that section 4(1)(a) of the DIPA has in any way become obsolete or redundant by virtue of the enactment of the Implementation Act. Both enactments address the matter in a slightly different manner. In my view, section 4(1)(a) of the DIPA falls to be read subject to the provisions of the Implementation Act. Or to put it another way, section 4(1)(a) of the DIPA only finds application insofar as the Implementation Act does not. Thus the immunity contemplated by section 4(1)(a) the DIPA can only be validly invoked if it is not in conflict with the Implementation Act. The Legislature has shown, through the Implementation Act, in what respects the more general immunity conferred by section 4(1)(a) of the DIPA is to be excluded. Any other construction would mean that the provisions of the Implementation Act to which I have referred must simply be ignored. Accordingly, section 4(1)(a) of the DIPA continues to govern head of State immunity unless such immunity is excluded by the operation of the Implementation Act. So construed, section 4(1)(a) of the DIPA and section 4(2) of the Implementation Act can stand side by side.

[124] The issues raised are of considerable constitutional and public importance. On any reckoning, even the rather more discrete point of statutory interpretation adopted in this judgment, the matter is appealable.94 For the rest, I agree with the reasoning and orders proposed by Wallis JA.

(Lewis JA concurred in the judgment of Ponnan JA.)

For the applicants:

*JJ Gauntlett* SC, *FB Pelser* and *L Dzai* instructed by the *State Attorney*, Pretoria and Bloemfontein

For the respondent:

*WH Trengove* SC, *M du Plessis*, *I Goodman* and *H Rajah* instructed by *Webber Wentzel*, Johannesburg and *Webbers Attorneys*, Bloemfontein

For the first *amicus curiae*:

*D Unterhalter* SC, *C Steinberg*, *A Coutsoudis* and *N Muwangua* instructed by *Webber Wentzel*, Johannesburg and *Symington & De Kok*, Bloemfontein
For the applicants for admission as second and third *amici curiae*:

*GM Malindi* SC and *N Lewis* instructed by *Lawyers for Human Rights Law Clinic*, Johannesburg and *Webbers Attorneys*, Bloemfontein
For the applicants for admission as fourth and fifth *amici curiae*:

*J Brickhill* instructed by the *Legal Resources Centre*, Johannesburg and *Honey Attorneys*, Bloemfontein

**The following cases were referred to in the above judgment:**

**South Africa**

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|---|---|
| Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk [2014] 1 All SA 517 ([2013] ZASCA 176; 2014 (2) SA 494) (SCA) - **Referred to** | 522 |
| Certain Amicus Curiae Applications, In re: Minister of Health and others v Treatment Action Campaign and others 2002 (10) BCLR 1023 (2002 (5) SA 713) (CC) - ***Dictum* at para [5] approved and applied** | 501 |
| Children's Institute v Presiding Officer of the Children's Court, Krugersdorp and others 2013 (1) BCLR 1 ([2012] ZACC 25; 2013 (2) SA 620) (CC) - **Referred to** | 501 |
| City of Tshwane Metropolitan Municipality and others v Nambiti Technologies (Pty) Ltd [2016] 1 All SA 332 ([2015] ZASCA 167) (SCA) - **Referred to** | 498 |
| CUSA v Tao Ying Metal Industries and others 2009 (1) BCLR 1 ([2008] ZACC 15; 2009 (2) SA 204) (CC) - **Referred to** | 498 |
| Fischer and another v Ramahlele and others [2014] 3 All SA 395 ([2014] ZASCA 88; 2014 (4) SA 614) (SCA) - **Referred to** | 498 |
| Glenister v President of the Republic of South Africa and others 2011 (7) BCLR 651 ([2011] ZACC 6; 2011 (3) SA 347) (CC) - ***Dictum* at para [97] approved and applied** | 512 |
| Government of the Republic of South Africa and another v Government of KwaZulu and another [1983] 3 All SA 332 (1983 (1) SA 164) (A) - **Referred to** | 527 |
| Institute for Security Studies, *Ex parte*: *In re*: S v Basson (CCT 30/2003) [2005] ZACC 4; 2006 (6) SA 195 (SCA) - **Referred to** | 500 |
| Janse van Rensburg NO and another v Minister of Trade and Industry and another NNO 2000 (11) BCLR 1235 ([2000] ZACC 18; 2001 (1) SA 29) (CC) - **Distinguished** | 496 |
| JT Publishing (Pty) Ltd and another v Minister of Safety and Security and others 1996 (12) BCLR 1599 ([1996] ZACC 23; 1997 (3) SA 514) (CC) - **Distinguished** | 497 |



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|---|---|
| Kent NO v South African Railways and another 1946 AD 398 - **Referred to** | 527 |
| Koyabe and others v Minister for Home Affairs and others (Lawyers for Human Rights as *amicus curiae*) 2009 (12) BCLR 1192 ([2009] ZACC 23; 2010 (4) SA 327) (CC) - **Referred to** | 502 |
| Member of the Executive Council for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute 2014 (5) BCLR 547 ([2014] ZACC 6); 2014 (3) SA 481) (CC) - **Referred to** | 495 |
| Middelburg Municipality v Gertzen 1914 AD 544 - **Referred to** | 525 |
| Minister of Defence and Military Veterans v Motau and others 2014 (8) BCLR 930 ([2014] ZACC 18; 2014 (5) SA 69) (CC) - **Referred to** | 528 |
| Mthembu v Letsela and another [2000] 3 All SA 219 ([2000] ZASCA 181; 2000 (3) SA 867) (SCA) - **Referred to** | 528 |
| Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 ([2012] ZASCA 13; 2012 (4) SA 593) (SCA) - **Referred to** | 522 |
| National Commissioner of the South African Police v Southern African Human Rights Litigation Centre and another (Dugard and others as *amici curiae*) 2014 (12) BCLR 1428 ([2014] ZACC 30; 2015 (1) SA 315) (CC) - ***Dicta* at paras [37]-[38] approved** | 491 |

New Modderfontein Gold Mining Co v Transvaal Provincial Administration 1919 AD 367 - **Referred to** 527

Oudekraal Estates (Pty) Ltd v City of Cape Town and others [2004] 3 All SA 1 ([2004] ZASCA 48; 2004 (6) SA 222) (SCA) - **Referred to** 495

President, Ordinary Court Martial and others v Freedom of Expression Institute and others 1999 (11) BCLR 1219 ([1999] ZACC 10; 1999 (4) SA 682) (CC) - **Distinguished** 497

Qoboshiyane NO and others v Avusa Publishing Eastern Cape (Pty) Ltd and others [2013] JOL 30408 ([2012] ZASCA 166; 2013 (3) SA 315) (SCA) - **Referred to** 498

R v Durban Corporation 1946 NPD 109 - **Referred to** 533

R v Tucker [1953] 3 All SA 258 (1953 (3) SA 150) (A) - **Referred to** 533

Sasol Synthetic Fuels (Pty) Ltd and others v Lambert and others [2002] JOL 9264 ([2001] ZASCA 133; 2002 (2) SA 21) (SCA) - **Referred to** 528

South Atlantic Islands Development Corporation Ltd v Buchan [1971] 1 All SA 203 (1971 (1) SA 234) (C) - **Referred to** 509

Springs Town Council v Soonah [1963] 2 All SA 1 (1963 (1) SA 659) (A) - **Referred to** 528

Van Rensburg v Van Rensburg en andere [1963] 1 All SA 572 (1963 (1) SA 505) (A) - **Referred to** 498

Wendywood Developments (Pty) Ltd v Rieger and another [1971] 3 All SA 103 (1971 (3) SA 28) (A) - **Referred to** 533

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**European Court of Human Rights**

Al Adsani v The United Kingdom (2002) 34 EHRR 11 - **Referred to** 517

Kalogeropoulou and others v Greece and Germany (2002) 129 ILR 537 - **Referred to** 517

**International Court of Justice**

Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France), Judgment, ICJ Reports 2008, p. 177; [2008] ICJ 4 - **Referred to** 516

Democratic Republic of the Congo v Belgium) ICJ Reports 2002, p. 3; [2002] ICJ 1 - **Referred to** 515

Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Judgment, ICJ Reports 2012, p 99; [2012] ICJ 10 - **Referred to** 516

**United Kingdom**

Compania Naviera Vascongado v SS Cristina [1938] AC 485; [1938] 1 All ER 719 (HL) - **Referred to** 514

Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening); Mitchell v Al-Dali [2006] UKHL 26; [2007] 1 AC 270; [2007] 1 All ER 113 (HL) - **Referred to** 514

R v Bow Street Metropolitan Stipendiary Magistrate, *Ex parte* Pinochet Ugarte (No 3) (Amnesty International intervening) [2000] 1 AC 147, [1999] 2 All ER 97 (HL) - **Referred to** 516

R v Bow Street Stipendiary Magistrate and others, *Ex parte* Pinochet Ugarte (Amnesty International and others intervening) [1998] 4 All ER 897 (HL) - **Referred to** 517

**United States of America**

Gorham v Luckett 6 B Monroe (Ky) 146 at 154 (1845) - **Referred to** 528

Tachiona v Mugabe 169 F Supp 2d 259, 316-7 (SDNY 2001) - **Referred to** 521

**Footnotes**

1 Preamble to the Rome Statute. The Statute operates in terms of the principle of complementarity under which international crimes should in the first instance be prosecuted in national Courts and before the ICC if national Courts are unable or unwilling to do so. *National Commissioner of Police v South African Human Rights Litigation Centre and another* (CCT 02/14) [2014] ZACC 30*;* 2015 (1) SA 315 (CC) para [30] [also reported as *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre and another* (*Dugard and others as amici curiae*) at 2014 (12) BCLR 1428 (CC) - Ed]. Dapo Akande "The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC" (2012) 10 *Journal of International Criminal Justice* 299 at 302.

2 Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir ICC-02/05-01/09 Date 13 June 2015. In argument, Counsel for the Government suggested that this judgment was given summarily and late at night, likening it to an unopposed application in a motion Court. That characterisation was unjustified. A reading of the judgment shows that it was only delivered after a consultation between the ICC and the Government of South Africa under art 97 of the Rome Statute.

3 GN 470, *GG* 38860, 5 June 2015.

4 Emphasis added.

5 *Oudekraal Estates* (*Pty*) *Ltd v City of Cape Town and others* (41/2003) [2004] ZASCA 48; 2004 (6) SA 222 (SCA) para [26] [also reported at [2004] 3 All SA 1 (SCA) - Ed]; *MEC for Health*, *Eastern Cape and another v Kirland Investments* (*Pty*) *Ltd t/a Eye & Lazer Institute* [2014] ZACC 6); 2014 (3) SA 481 (CC) paras [65]-[66] and [88]-[90] [also reported at 2014 (5) BCLR 547 (CC) - Ed].

6 The African Centre for Justice and Peace Studies and The International Refugee Rights Initiative applied jointly to be admitted as second and third *amici* respectively. The Peace and Justice Initiative and the Centre for Human Rights applied jointly to be admitted as fourth and fifth *amici* respectively.

7 R 16(8) provides that an *amicus* is limited to the record on appeal and may not add thereto.

8 *Janse van Rensburg NO and another v Minister of Trade and Industry and another NNO* (CCT13/99) [2000] ZACC 18; 2001 (1) SA 29 (CC) para [9] [also reported at 2000 (11) BCLR 1235 (CC) - Ed].

9 *President*, *Ordinary Court Martial and others v Freedom of Expression Institute and others* (CCT5/99) [1999] ZACC 10; 1999 (4) SA 682 (CC) para [8] [also reported at 1999 (11) BCLR 1219 (CC) - Ed] and *JT Publishing* (*Pty*) *Ltd and another v Minister of Safety and Security and others* (CCT49/95) [1996] ZACC 23; 1997 (3) SA 514 (CC) para [15] [also reported at 1996 (12) BCLR 1599 (CC) - Ed].

10 *Qoboshiyane NO and others v Avusa Publishing Eastern Cape* (*Pty*) *Ltd and others* (864/2011) [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para [5] [also reported at [2013] JOL 30408 (SCA) - Ed]; *City of Tshwane Metropolitan Municipality and others v Nambiti Technologies* (*Pty*) *Ltd* (20580/2014) 2015 ZASCA 167: [2016] 1 All SA 332 (SCA) para [6].

11 *Van Rensburg v Van Rensburg en andere* 1963 (1) SA 505 (A) at 510A-C [also reported at [1963] 1 All SA 572 (A) - Ed]. The approach has been endorsed by the Constitutional Court. *CUSA v Tao Ying Metal Industries and others* (CCT 40/07) [2008] ZACC 15; 2009 (2) SA 204 (CC) para [68] [also reported at 2009 (1) BCLR 1 (CC) - Ed].

12 *Fischer and another v Ramahlele and others* (203/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA) paras [13] and [14] [also reported at [2014] 3 All SA 395 (SCA) - Ed].

13 The rule reads as follows:

"Admission as *amicus*

(1) Subject to this rule, any person interested in any matter before the Court may, with the written consent of all the parties in the matter before the Court given not later than the time specified in subrule (5), be admitted therein as an *amicus curiae* upon such terms and conditions and with such rights and privileges as may be agreed upon in writing with all the parties before the Court or as may be directed by the President in terms of subrule (3).

Admission by consent

(2) The written consent referred to in subrule (1) shall, within 10 days of it having been obtained, be lodged with the registrar and the *amicus curiae* shall, in addition to any other provision, comply with the times agreed upon for the lodging of written argument.

Amendment of consent

(3) The President may amend the terms, conditions, rights and privileges agreed upon in terms of subrule (1).

Application to be admitted

(4) If the written consent referred to in subrule (1) has not been secured, any person who has an interest in any matter before the Court may apply to the President to be admitted therein as an *amicus curiae*, and the President may grant such application upon such terms and conditions and with such rights and privileges as he or she may determine.

Time for application

(5) An application pursuant to the provisions of subrule (4) shall be made within one month after the record has been lodged with the registrar.

Format

(6) An application to be admitted as an *amicus curiae* shall -

(a) briefly describe the interest of the *amicus curiae* in the proceedings;

(b) briefly identify the position to be adopted by the *amicus curiae* in the proceedings;

(c) set out the submissions to be advanced by the *amicus curiae*, their relevance to the proceedings and his or her reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

Argument

(7) (a) An *amicus curiae* shall have the right to lodge written argument, provided that such written argument does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court.

(b) The heads of argument of an *amicus curiae* shall not exceed 20 pages unless a judge, on request, otherwise orders.

Limitations

(8) An *amicus curiae* shall be limited to the record on appeal and may not add thereto and, unless otherwise ordered by the Court, shall not present oral argument.

Filing of heads

(9) An order granting leave to be admitted as an *amicus curiae* shall specify the date of lodging the written argument of the *amicus curiae* or any other relevant matter.

Costs

(10) An order of the Court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of the *amicus curiae*."

14 The Constitutional Court has held in respect of its similarly worded rules governing admission as an *amicus* (r 10) that consent alone is not sufficient and an application must also be made to the Chief Justice. *Ex parte Institute for Security Studies*: *In re S v Basson* (CCT30/2003) [2005] ZACC 4; 2006 (6) SA 195 (SCA) paras [6]-[8]. Although Harms *Civil Procedure in the Supreme Court* (loose-leaf) C16-1 (issue 51) says that this is equally applicable in the SCA that does not accord with the practice in this Court.

15 This is a material difference from the Constitutional Court rule, which does not limit the length of the written submissions

of an *amicus*. Also in that Court it is the Chief Justice who determines whether an *amicus* is permitted to make oral submissions, although in practice it is understood that the entire Court has input in that decision. Historically the Constitutional Court has been generous in permitting oral representations by *amici*. Van Loggerenberg and others *Erasmus Superior Court Practice* (2ed, loose-leaf) Vol 1, B1-30 (Original Service, 2015). In this Court it is plain that the Court constituted to hear the appeal decides whether the *amicus* may make oral submissions.

16 Compare *Children's Institute v Presiding Officer of the Children's Court, Krugersdorp and others* (CCT 69/12) [2012] ZACC 25; 2013 (2) SA 620 (CC) [also reported at 2013 (1) BCLR 1 (CC) - Ed]. That dealt with r 16A in the Uniform Rules of Court, which does not contain a provision that an *amicus* is confined to the record on appeal. In the Constitutional Court an *amicus* is confined to the record on appeal (r 10(8)) subject to the right in terms of r 31 to submit additional facts that are common cause or otherwise incontrovertible or are of an official, scientific technical or statistical nature and capable of easy verification. The SCA has a limited power to permit the leading of additional evidence on appeal, but the Court has not had to consider whether that power can be exercised on the application of an *amicus*.

17 *In re*: *Certain Amicus Curiae Applications*: *Minister of Health and others v Treatment Action Campaign and others* 2002 (5) SA 713 (CC) para [5] [also reported at 2002 (10) BCLR 1023 (CC) - Ed] which reads:

> "The role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The *amicus* must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court. Ordinarily it is inappropriate for an *amicus* to try to introduce new contentions based on fresh evidence."

18 See generally *Koyabe and others v Minister for Home Affairs and others* (CCT 53/08) [2009] ZACC 23; 2010 (4) SA 327 (CC) para [80] [also reported as *Koyabe and others v Minister for Home Affairs and others* (*Lawyers for Human Rights as amicus curiae*) at 2009 (12) BCLR 1192 (CC) - Ed] where it is stated that:

> "*Amici curiae* have made and continue to make an invaluable contribution to this Court's jurisprudence. Most, if not all, constitutional matters present issues, the resolution of which will invariably have an impact beyond the parties directly litigating before the Court. Constitutional litigation by its very nature requires the determination of issues squarely in the public interest, and insofar as *amici* introduce additional, new and relevant perspectives, leading to more nuanced judicial decisions, their participation in litigation is to be welcomed and encouraged."

The qualification to their usefulness must be observed.

19 I have already drawn attention to the fact that r 16 makes no provision for such opposition so that there was nothing untoward in the Deputy President making an order on the application as it stood.

20 The Preamble to the Rome Statute contains the following: "Emphasising that the International Criminal Court established under this statute shall be complementary to national criminal jurisdictions".

21 Art 68 provides for victims and witnesses to be protected and to participate in proceedings before the ICC.

22 Art 75 provides for the creation of a trust fund for the purpose of making reparations to victims and their families.

23 Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by the General Assembly of the United Nations on 9 December 1948.

24 Fn 5, *supra*.

25 Dire Tladi "The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law; Attempting to make a Collage from an Incoherent Framework" (2015) 13 *Journal of International Criminal Justice* 1027 at 1046 suggests that the reference in art VIII.1 to arts V and VII of the OAU General Convention on the Privileges and Immunities of the AU incorporates the immunities of heads of state and other representatives of states in the hosting agreement and the proclamation. Counsel for the Government did not pursue such an argument, which ignores that these articles are only mentioned in the context of saying that the members of the Commission and Staff Members and delegates and other representatives of Inter-Governmental Organisations are to enjoy those privileges. It clearly goes no further than that.

26 This constitutionalised what was in any event the legal position. *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C) at 238C-F [also reported at [1971] 1 All SA 203 (C) - Ed].

27 These include three permanent members of the UN Security Council, namely, the United States of America, Russia and China, and the world's largest democracy, India. Sudan is not a member, although 34 African countries are members. South Africa was the first African country to sign the Rome Statute and to accede to it.

28 Akande, fn 1, *supra*, 301; Aleksandra Dubak "Problems Surrounding Arrest Warrants issued by the International Criminal Court: A Decade of Judicial Practice" (2012) 32 *Polish Yearbook of International Law* 209 at 220.

29 Art 25 of the UN Charter provides that "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

30 Akande, fn 1, *supra*, 301. ICC Decision Pursuant to art 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Co-operation Requests issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 of 12 December 2011 (*Malawi*) para [15].

31 Paola Gaeta "Does President Al Bashir Enjoy Immunity from Arrest?" (2009) 7 *Journal of International Criminal Justice* 315 at 327-329.

32 Michiel Blommestijn and Cedric Ryngaert "Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity" (2010) 6 Zeitschrift für Internationale Strafrechtsdogmatik 428 at 438-440.

33 Dabo Akande "The Legal Nature of Security Council Referrals to the ICC and its impact on Al Bashir's Immunities" (2009) 7 *Journal of International Criminal Justice* 333 at 342.

34 S 232 of the Constitution.

35 S 231 of the Constitution.

36 S 233 of the Constitution.

37 *Glenister v President of the Republic of South Africa and others* [2011] ZACC 6; 2011 (3) SA 347 (CC) para [97] [also reported at 2011 (7) BCLR 651 (CC) - Ed].

38 *National Commissioner of Police v Southern African Human Rights Litigation Centre and another* [2014] ZACC 30; 2015 (1) SA 315 (CC) paras [37]-[40].

39 In advancing this contention he echoed the view consistently taken by the states of the AU that a sitting head of state enjoys immunity in the absence of waiver and that President Al Bashir is accordingly for the present immune from proceedings in other countries and before national Courts directed at securing his arrest and surrender under the two ICC arrest warrants. See the various resolutions of the AU referred to in fn 12 of *Malawi* fn 30 *supra*. See also Asad G Kiyani "Al-Bashir & the ICC: The Problem of Head of State Immunity" (2013) 12 *Chinese Journal of International Law* 467 para [41] which deals with the AU's approach and says that it is shared by the Arab League and China.

40 James Crawford *Brownlie's Principles of Public International Law* (8ed) (2012) (*Brownlie*) at 487-488.

41 An action *in rem* against a ship owned by a foreign sovereign is an example of an indirect impleading of a foreign

sovereign. See *Compania Naviera Vascongado v SS Cristina* [1938] AC 485; [1938] 1 All ER 719 (HL). So is a civil action against an individual in respect of actions on behalf of a foreign state, where permitting an action against the individual would circumvent the state's immunity. *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* (*Secretary of State for Constitutional Affairs intervening*); *Mitchell v Al-Dali* [2006] UKHL 26; [2007] 1 AC 270; [2007] 1 All ER 113 (HL).

42 *Brownlie*, *supra*, 493-4.

43 For example the Head of Government or the Minister of Foreign Affairs.

44 Case concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) ICJ Reports 2002, p 3; [2002] ICJ 1 paras [51] and [54] (*Arrest Warrant*).

45 Akande, fn 33 *supra* at 334.

46 See the cases cited in Michael A Tunks, "Diplomats or Defendants? Defining the Future of Head-of-State Immunity" (2002) 52 *Duke Law Journal* 651 at 662-663 and 665-666; Thomas Weatherall "Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence" (2015) 46 *Georgetown Journal of International Law* 1151 at 1171-1173.

47 Charter of the International Military Tribunal of Nuremberg, art 7; Charter of the International Military Tribunal for the Far East, art 6; Statute of the International Criminal Tribunal for the former Yugoslavia, art 7, para [2]; Statute of the International Criminal Tribunal for Rwanda, art 6, para [2]; and Rome Statute of the International Criminal Court, art 27. Most of these provisions are quoted in *Prosecutor v Taylor*, Decision on Immunity from Jurisdiction (Charles Taylor) of the Special Court for Sierra Leone, case number SCSL/2003-01-I, Appeals Chamber, 31 May 2004.

48 As was held in *Prosecutor v Taylor ibid*.

49 *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v France*), *Judgment*, ICJ Reports 2008, p 177; [2008] ICJ 4 para [170].

50 *Jurisdictional Immunities of the State* (*Germany v Italy*: *Greece intervening*), *Judgment*, ICJ Reports 2012, p 99; [2012] ICJ 10 paras [81]-[97].

51 *R v Bow Street Metropolitan Stipendiary Magistrate*, *Ex parte Pinochet Ugarte* (*No 3*) (*Amnesty International intervening*) [2000] 1 AC 147, [1999] 2 All ER 97 (HL).

52 *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* (*Secretary of State for Constitutional Affairs intervening*); *Mitchell v Al-Dali* [2006] UKHL 26; [2007] 1 AC 270; [2007] 1 All ER 113 (HL).

53 Lord Bingham of Cornhill para [32] and Lord Hoffmann para [71].

54 Lord Goff of Chieveley citing at 116 the opinion of Lord Slynn of Hadley in *Pinochet* (*1*) [1998] 4 All ER 897 (HL) at 913 [reported as *R v Bow Street Stipendiary Magistrate and others*, *Ex parte Pinochet Ugarte* (*Amnesty International and others intervening*) - Ed]; Lord Millett at 171; and Lord Phillips of Worth Matravers at 181.

55 *Brownlie* fn 35 *ante*.

56 Hazel Fox QC and Philippa Webb *The Law of State Immunity* (3ed) (2014) 85.

57 *Al Adsani v The United Kingdom* (2002) 34 EHRR 11 para [61].

58 *Kalogeropoulou and others v Greece and Germany* (2002) 129 ILR 537.

59 Roger O'Keefe the Professor of Public International Law at University College London "Symposium on the Immunity of State Officials. An "International Crime" Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely" (2015) 109 AJIL 167.

60 Para [63].

61 Decision on the Co-operation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court ICC-02/05-01/09 dated 9 April 2014 (*DRC*) para [25].

62 Para [61].

63 Dr Göran Sluiter "The Surrender of War Criminals to the International Criminal Court" (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 605 at 632. The proposition is contained in a single bald sentence reading:

> "Also, the recent judgment by the ICJ in the *Congo-Belgium* case acknowledges, in my view, that current international law for state and diplomatic immunities are not applicable to arrests and surrenders at the request of the ICC."

64 Gaeta, fn 31, 315 especially at 319.

65 Vienna Convention on the Law of Treaties, 1969.

66 Para [29].

67 Fn 2, *supra*.

68 Para [9] of the Decision.

69 Tladi, fn 25 *supra* at 1042. The author regards the earlier decisions as incorrect because they dealt with the issue as if art 98 formed no part of the Rome Statute. So does Erika De Wet "The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law" (2015) 13 *Journal of International Criminal Justice* 1049 at 1057. Professor De Wet regards the reasoning in the later decisions as preferable. In other words, she supports the approach of the removal of immunity by the Security Council. We were provided with other material in which the reasoning in the decision was subjected to substantial criticism.

70 *Malawi* paras [37]-[43] fn 30, *supra*.

71 *Brownlie*, *supra* 501.

72 Weatherall, fn 41 *supra*, at 1175.

73 *Tachiona v Mugabe* 169 F Supp 2d 259, 316-317 (SDNY 2001).

74 John Dugard *International Law*: *A South African Perspective* (4ed) (2011) (Dugard) at 258.

75 *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para [18] [also reported at [2012] 2 All SA 262 (SCA) - Ed]; and *Bothma-Batho Transport* (*Edms*) *Bpk v S Bothma & Seun Transport* (*Edms*) *Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para [12] [also reported at [2014] 1 All SA 517 (SCA) - Ed].

76 *Jurisdictional Immunities* para [93]; Hazel Fox QC and Philippa Webb, fn 56 *supra* at 5, 21 and 38-39.

77 Dugard fn 68 *ante*, at 211. This appears in a chapter written by Professor du Plessis. See also J Dugard and G Abraham "Public International Law" 2002 *Annual Survey of South African Law* 140 at 165-166; and M du Plessis "South Africa's Implementation of the ICC Statute: An African Example" (2007) 5 *Journal of International Criminal Justice* 460 at 474.

78 Du Plessis *ibid*.

79 In the Magistrates' Courts arrest and summons are used but it is inconceivable that international crimes would be prosecuted anywhere but in the High Court.

80 *Middelburg Municipality v Gertzen* 1914 AD 544 at 552.

81 S 8(2) of the Implementation Act.

82 Tladi, fn 25 *supra*, 1037.

83 S 10(1) of the Implementation Act.

84 S 10(3) of the Implementation Act.

85 This is not an additional matter on which the magistrate must be satisfied. If the three requirements are present then the person may be surrendered to the ICC and the magistrate must so order.

86 S 10(5) of the Implementation Act.

87 *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 400 (*New Modderfontein*); *Kent NO v South African Railways and another* 1946 AD 398 at 405; *Government of the Republic of South Africa and another v Government of KwaZulu and another* 1983 (1) SA 164 (A) at 200E-F [also reported at [1983] 3 All SA 332 (A) - Ed].

88 *Gorham v Luckett* 6 B Monroe (Ky) 146 at 154 (1845) cited in *New Modderfontein* at 397 and again in *Springs Town Council v Soonah* 1963 (1) SA 659 (A) at 669A-D [also reported at [1963] 2 All SA 1 (A) - Ed] and quoted in *Mthembu v Letsela and another* [2000] ZASCA 181; 2000 (3) SA 867 (SCA) para [28] [also reported at [2000] 3 All SA 219 (SCA) - Ed].

89 *Minister of Defence and Military Veterans v Motau and others* [2014] ZACC 18; 2014 (5) SA 69 (CC) para [78] [also reported at 2014 (8) BCLR 930 (CC) - Ed]; *Sasol Synthetic Fuels* (*Pty*) *Ltd and others v Lambert and others* [2001] ZASCA 133; 2002 (2) SA 21 (SCA) [also reported at [2002] JOL 9264 (SCA) - Ed].

90 My colleague Ponnan JA in his separate judgment says that this conclusion, which he shares, may render the discussion on customary international law unnecessary. With respect I do not agree. Until one reaches the conclusion that under customary international law President Al Bashir would ordinarily enjoy immunity a discussion of the relevant provisions of the Implementation Act is irrelevant. One cannot construe the provisions of the Implementation Act as removing an immunity that does not exist. If there was no such immunity, because there is an international crimes exception as contended by SALC, then the relevant sections of the Implementation Act merely reflect the provisions of customary international law and do not depart from them. That is an entirely different interpretation from the one in the body of this judgment and would involve a different analysis of the Implementation Act on the footing that it reflected, not overrode, customary international law.

91 Para [84].

92 Para [103].

93 Para [84].

94 *Qoboshiyane NO and others v Avusa Publishing Eastern Cape* (*Pty*) *Ltd and others* fn 10, *supra*.

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# Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur*

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# Introduction

1. The topic "Immunity of State officials from foreign criminal jurisdiction" was included in the long-term programme of work of the International Law Commission at its fifty-eighth session, in 2006, on the basis of the proposal in the report of the Commission on the work of that session.[1] At its fifty-ninth session, in 2007, the Commission decided to include this topic in its current programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[2] At the same session, the Secretariat was requested to prepare a background study on the topic.[3]

2. Special Rapporteur Kolodkin submitted three reports, in which he established the boundaries within which the topic should be considered and analysed various aspects of the substantive and procedural questions relating to the immunity of State officials from foreign criminal jurisdiction.[4] The Commission considered the reports of the Special Rapporteur at its sixtieth and sixty-third sessions, held in 2008 and 2011, respectively. The Sixth Committee of the General Assembly dealt with the topic during its consideration of the report of the Commission, particularly in 2008 and 2011.

3. At its 3132nd meeting, held on 22 May 2012, the Commission appointed Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[5]

4. At the same session, the Special Rapporteur submitted a preliminary report on the immunity of State officials from foreign criminal jurisdiction.[6] That report helped to clarify the terms of the debate up to that point, identified the principal points of contention which remained, the topics to be considered and the methodology to be followed, and set out a workplan for consideration of the topic over the present quinquennium. The Commission examined the preliminary report at its sixty-fourth session, in 2012,[7] and the Sixth Committee examined it at its sixty-seventh session.[8] In both cases, the Special Rapporteur's proposals were approved.

5. At the Commission's sixty-fifth session, in 2013, the Special Rapporteur submitted a second report on the immunity of State officials from foreign criminal

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[1] See *Yearbook of the International Law Commission, 2006*, vol. II, Part Two, p. 185, para. 257 and p. 191, annex I.

[2] See *Yearbook ... 2007*, vol. II, Part Two, p. 98, para. 376.

[3] See *ibid.*, p. 101, para. 386. For the memorandum by the Secretariat, see *Yearbook ... 2008*, vol. II, Part One (Addendum 2), document A/CN.4/596.

[4] Special Rapporteur Kolodkin's reports are contained in *Yearbook ... 2008*, vol. II, Part One, p. 157, document A/CN.4/601 (preliminary report); document A/CN.4/631 (second report) and document A/CN.4/646 (third report).

[5] See A/67/10, para. 84.

[6] Document A/CN.4/654.

[7] For a summary of the debate, see A/67/10, paras. 84-139. See also the provisional summary records of the Commission contained in documents A/CN.4/SR.3143 to A/CN.4/SR.3147.

[8] The Sixth Committee considered the topic of immunity of State officials from foreign criminal jurisdiction at the sixty-seventh session of the General Assembly, in 2012 (*Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th to 23rd meetings (A/C.6/67/SR.20 to A/C.6/67/SR.23). In addition, two States referred to the topic at another meeting (*ibid.*,19th meeting (A/C.6/67/SR.19)). See also the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-seventh session (A/CN.4/657, paras. 26-38).

jurisdiction.[9] The report examined the scope of the topic and of the draft articles, the concepts of immunity and jurisdiction, the distinction between immunity *ratione personae* and immunity *ratione materiae*, and the normative elements of immunity *ratione personae*, proposing six draft articles. The Commission considered the second report of the Special Rapporteur[10] and provisionally adopted three draft articles, dealing respectively with the scope of the draft articles (draft article 1) and the normative elements of immunity *ratione personae* (draft articles 3 and 4)[11] together with the commentaries thereto. The Drafting Committee decided to keep the draft article on definitions under review and to take action on it at a later stage.[12] The Sixth Committee examined the Special Rapporteur's second report at its sixty-eighth session, held in 2013, welcoming the report and the progress made by the Commission.[13]

6. At the sixty-sixth session of the Commission, in 2014, the Special Rapporteur submitted the third report on the immunity of State officials from foreign criminal jurisdiction.[14] She commenced with an analysis of the normative elements of immunity *ratione materiae*, focusing on the general concept of "State official" in the subjective context of immunity *ratione materiae* (persons enjoying immunity), analysed the terminology to be used in referring to State officials and proposed two draft articles. The Commission considered the third report of the Special Rapporteur at its 3217th to 3222nd meetings[15] and provisionally adopted the draft articles dealing with the general concept of "State official"(draft article 2 (e)) and "Persons enjoying immunity *ratione materiae*" (draft article 5),[16] together with the commentaries thereto.[17] At its sixty-ninth session, the Sixth Committee examined the topic of immunity of State officials from foreign criminal jurisdiction as part of its consideration of the annual report of the International Law Commission. States welcomed the third report of the Special Rapporteur and the two new draft articles

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[9] Document A/CN.4/661.

[10] For a detailed analysis of the issues raised in the discussions and the positions held by members of the Commission, see A/CN.4/SR.3164 to A/CN.4/SR.3168 and A/CN.4/SR.3170.

[11] See annex I of this report for the text of these draft articles.

[12] For the consideration of the topic by the Commission at its sixty-fifth session, see A/68/10, paras. 40-49. See in particular the draft articles with the commentaries thereto contained in para. 49. For the Commission's discussions on the commentaries to the draft articles, see A/CN.4/SR.3193 to A/CN.4/SR.3196. For the presentation of the report of the Drafting Committee, see A/CN.4/SR.3174.

[13] See *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 17th to 19th meetings (A/C.6/68/SR.17 to A/C.6/68/SR.19). See also the topical summary of the debate held in the Sixth Committee of the General Assembly at its sixty-eighth session (A/CN.4/666) and in particular sect. B.

[14] Document A/CN.4/673.

[15] For a detailed analysis of the issues raised in the discussions and the positions held by members of the Commission, see A/CN.4/SR.3217 to A/CN.4/SR.3222.

[16] For the texts of the draft articles, see annex I of this report.

[17] For the consideration of the topic by the Commission at its sixty-sixth session, see A/69/10, paras. 123-132. See in particular the draft articles with the commentaries thereto contained in para. 132. For the Commission's discussions on the commentaries to the draft articles, see A/CN.4/SR.3240 to A/CN.4/SR.3242. For the report of the Drafting Committee and its presentation in plenary, see document A/CN.4/L.850 (mimeographed) and A/CN.4/SR.3231. The statement by the Chairman of the Drafting Committee can be consulted on the Commission's website.

provisionally adopted by the Commission, highlighting the significant progress made on the topic.[18]

7. At the sixty-seventh session of the Commission, in 2015, the Special Rapporteur submitted the fourth report on the immunity of State officials from foreign criminal jurisdiction,[19] which continued the analysis of the normative elements of immunity *ratione materiae*, addressing the substantive and temporal aspects in detail, and proposed two draft articles. The Commission examined the Special Rapporteur's fourth report at its 3271st to 3278th meetings[20] and decided to refer the two draft articles to the Drafting Committee. The Drafting Committee provisionally adopted draft articles 2 (f) (definition of "act performed in an official capacity") and 6 (scope of immunity *ratione materiae*).[21] The Commission took note of these draft articles and decided that the commentaries thereto would be considered at the current session.[22] At its seventieth session, the Sixth Committee examined the topic of immunity of State officials from foreign criminal jurisdiction as part of its consideration of the annual report of the Commission. States again welcomed the Special Rapporteur's fourth report and the two new draft articles provisionally adopted by the Drafting Committee and highlighted the progress made on the topic by the Commission.[23]

8. Starting in 2013, the Commission has addressed various questions to States on issues of interest to the topic of immunity of State officials from foreign criminal jurisdiction. In 2014, ten States submitted comments: Belgium, Czech Republic, Germany, Ireland, Mexico, Norway, Russian Federation, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America.[24] In 2015, the following States submitted contributions: Austria, Czech Republic, Cuba, Finland, France, Germany, Netherlands, Peru, Poland, Spain, United Kingdom and Switzerland.[25] In 2016, at the time when the present report was finalized, written

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[18] See *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 21st to 26th meetings (A/C.6/69/SR.21 to A/C.6/69/SR.26). See also the topical summary of the debate held in the Sixth Committee of the General Assembly at its sixty-ninth session (A/CN.4/678), sect. D, paras. 37-51.

[19] Document A/CN.4/686.

[20] For a detailed analysis of the issues raised in the discussions and the positions held by members of the Commission, see A/CN.4/SR.3271 to A/CN.4/SR.3278.

[21] See A/CN.4/L.865 (mimeographed) and A/CN.4/SR.3284. The statement by the Chairman of the Drafting Committee can be consulted on the Commission's website. The text of the draft articles provisionally adopted by the Drafting Committee is included in annex II of this report.

[22] For the consideration of the topic by the Commission at its sixty-seventh session, see A/70/10, paras. 174-243.

[23] See *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 20th and 22nd to 25th meetings (A/C.6/69/SR.20 and A/C.6/69/SR.22 to A/C.6/69/SR.25). See also the topical summary of the debate held in the Sixth Committee of the General Assembly at its seventieth session (A/CN.4/689), sect. F, paras. 68-76.

[24] A/68/10, para. 25. The Commission requested States to provide information, by 31 January 2014, on the practice of their institutions, and in particular, on judicial decisions, with reference to the meaning given to the phrases "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction.

[25] A/69/10, para. 28. The Commission requested States to provide information, by 31 January 2015, on their domestic law and their practice, in particular judicial practice, with reference to the following issues: (a) the meaning given to the phrases "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction; and (b) any exceptions to immunity of State officials from foreign criminal jurisdiction.

replies had been received from the following States: Australia, Austria, Netherlands, Paraguay, Peru, Spain and Switzerland.[26] In addition, several States referred in their statements in the Sixth Committee to the issues raised in the Commission's requests. The Special Rapporteur wishes to thank those States for their comments, which are invaluable to the work of the Commission. She would also welcome any other comments that States may wish to submit at a later date. The comments received, as well as the observations contained in the oral statements by delegations in the Sixth Committee, were duly taken into account in the preparation of the present report.

9. As already announced in 2015, the present report analyses the limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. It deals successively with the Commission's consideration of this issue over the two quinquenniums during which it has been dealing with the topic (chapter I), the analysis of relevant practice (chapter II), some methodological and conceptual questions relating to limitations and exceptions (chapter III), and instances in which the immunity of State officials from foreign criminal jurisdiction does not apply (chapter IV). On the basis of this study, a draft article is proposed. The report also contains a reference to the future workplan (chapter V). Lastly, in order to facilitate the Commission's consideration of this report, it has three annexes containing draft articles provisionally adopted by the Commission (annex I), draft articles provisionally adopted by the Drafting Committee and of which the Commission has taken note (annex II) and a draft article proposed in this report (annex III).

# I. Limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction: introduction

## A. General considerations

10. As already pointed out by the Special Rapporteur, the issue of limitations and exceptions to immunity should be addressed once the analysis of the normative elements of immunity *ratione personae* and immunity *ratione materiae* has been completed. This is for the obvious reason that only after examining the basic elements that define the general regime applicable in abstract terms to immunity from foreign criminal jurisdiction is it possible to address the complex question of whether that general regime may be subject to limitations and exceptions. In addition, it has been pointed out that the issue of limitations and exceptions to immunity must be analysed both comprehensively and with reference to the two types of immunity referred to above.

11. The issue of limitations and exceptions to immunity has traditionally been considered from the perspective of the acts that can be covered by immunity. Consequently, some publicists and States have focused on the relationship between immunity from foreign criminal jurisdiction and *jus cogens*, serious and systematic violations of human rights, international crimes and efforts to combat impunity. On the other hand, other publicists and States have concentrated on attribution of the official's act to the State, emphasizing the characterization of the official's immunity as the State's immunity. In addition, the question of limitations and

[26] A/70/10, para. 29. The Commission stated that it "would appreciate being provided by States with information on their legislation and practice, in particular judicial practice, related to limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction".

exceptions to immunity has also been considered from a different angle essentially concerning the representative character of persons enjoying immunity *ratione personae*. Nevertheless, also in relation to this category of immunity, the existence or non-existence of limitations and exceptions thereto has been linked in some way to the nature of the act performed by these State officials.

12. The wealth of recent publications on the immunity of the State and its officials has demonstrated that the issue of limitations and exceptions constitutes one of the major concerns of the international legal community.[27] The same concern is reflected in the series of resolutions that have been adopted to date by the Institut de Droit International and which contain references to limitations and exceptions to immunity.[28] The same can be said of other indirect contributions to the literature on our topic, including the Princeton Principles on Universal Jurisdiction.[29]

13. However, this focus on limitations and exceptions to immunity is not only theoretical or doctrinal. On the contrary, the discussion concerning the judgments of the European Court of Human Rights, especially in the *Al-Adsani* and *Jones* cases,[30] demonstrates that the issue of limitations and exceptions to sovereign immunity has a very important practical dimension. In addition, the judgment of the International

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[27] See, in particular: Annyssa Bellal, *Immunités et violations graves des droits humains: vers une évolution structurelle de l'ordre juridique international?*, Brussels, Bruylant, 2011; Alvaro Borghi, *L'immunité des dirigeants politiques en droit international*, Brussels, Bruylant, 2003; Jürgen Bröhmer, *State immunity and the violation of human rights*, The Hague, Martinus Nijhoff, 1997; Sophie Canadas-Blanc, *La responsabilité pénale des élus locaux*, Paris, Johanet, 1999; Micaela Frulli, *Inmunità e crimini internazionali. L'esercizio della giuridizione penale e civile nei confronti degli organi statali sospetati di gravi crimini internazionali*, Turin, Giappichelli, 2007; Michael J. Kelly, *Nowhere to hide: Defeat of the sovereign immunity defense for crimes of genocide and the trials of Slobodan Milosevic and Saddam Hussein*, New York, Peter Lang, 2005; Leon Otshudi Okondjo Wonyangondo, *L'immunité de juridiction pénale des dirigeants étrangers accusés des crimes contre l'humanité*, Publibook, 2009; Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, Leiden, Brill/Nijhoff, 2015; Yitiha Simbeye, *Immunity and International Criminal Law*, Aldershot, Ashgate, 2004; Rosanne Van Alebeek, *The immunity of States and their officials in international criminal law and international human rights law*, Oxford, Oxford University Press, 2008; Joe Verhoeven (ed.): *Le droit international des immunités: contestation ou consolidation?*, Brussels, Larcier, 2004. Among the general works devoted to the immunity of the State and of State officials which have dealt with the question of limitations and exceptions, see: Joanne Foakes, *The position of heads of State and senior officials in international law*, Oxford, Oxford University Press, 2014; Hazel Fox and Philippa Webb, *The Law of State Immunity*, revised and new third edition, Oxford, Oxford University Press, 2013.

[28] See the following resolutions: Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, Vancouver session, 2001 (art. 11, paras. 1.b and 3; 13, para. 2) (*Annuaire de l'Institut du Droit International*; vol. 69, Paris, Pedone, 2001); Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, Krakow session, 2005 (art. 6) (*Annuaire*, vol. 71, t. II, Paris, Pedone, 2005); Immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, Naples session (arts. II. 2 and 3, and III.1) (*Annuaire*, vol. 73, t. I and II, Paris, Pedone, 2009; and Universal Civil Jurisdiction with regard to Reparation for International Crimes, Tallinn session, 2015 (art. 5).

[29] See in particular principle 5, entitled "Immunities". Princeton Project on Universal Jurisdiction. The Princeton Principles on Universal Jurisdiction, Princeton (New Jersey), Program in Law and Public Affairs, 2001.

[30] *Al-Adsani v. United Kingdom*, judgment of 21 November 2001, Application No. 35763/97, *Reports of Judgments and Decisions 2001-XI*; *Jones and others v. United Kingdom*, judgment of 2 June 2014. See also paras. 87-95 *infra*.

Court of Justice in the case of *Jurisdictional Immunities of the State*,[31] has placed the close relationship between immunity and several key concepts of contemporary international law, especially *jus cogens*, at the forefront of the debate. Moreover, it will be remembered that domestic courts have also ruled on the question of limitations and exceptions to the immunity from criminal jurisdiction of the officials of a foreign State in the regular exercise of their judicial functions, some of which have had an important social and media impact and been extensively covered in legal discussions and writings. The *Pinochet* case, in which Spanish and British courts were involved, can no doubt be considered as having prompted the current discussion on the immunities of State officials and exceptions thereto. Two recent judgments by domestic courts have also complicated the problem. The first is the 22 October 2014 judgment of the Italian Constitutional Tribunal concerning the application in Italy of the judgment of the International Court of Justice in *Jurisdictional Immunities of the State*.[32] The second is the judgment issued in February this year by the Supreme Court of Appeal of South Africa in the case of the request for the arrest of President Al-Bashir following the warrant issued by the International Criminal Court.[33] Lastly, it will also be remembered that the question of limitations and exceptions to immunity is the crux of the more recent developments concerning international criminal jurisdiction, as exemplified by various decisions of the African Union, particularly the *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, which created an international criminal law section in that Court.[34]

14. Consequently, any work of the Commission on the immunity of State officials from foreign criminal jurisdiction would be incomplete without consideration of the limitations and exceptions to such immunity. However, such analysis should not be limited to the relationship between international crimes and immunity of State officials from foreign criminal jurisdiction, even though that issue certainly constitutes the central and most controversial aspect of the question. Indeed, there are other examples in practice that should also be analysed from the perspective of limitations and exceptions to immunity. Moreover, this report must also take into consideration a series of questions of general import without which the consideration of limitations and exceptions to immunity would be incomplete. The main goal of the report is therefore to consider in detail the issue of limitations and exceptions to immunity, starting with an introductory analysis of prior work by the Commission over the two most recent quinquenniums.

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[31] *Jurisdictional immunities of the State* (Germany v. Italy, (Greece intervening)), judgment. *I.C.J. Reports 2012*, p. 99. (see also *I.C.J. Summaries 2008-2012*, p. 252). See also paras. 61-86 *infra*.

[32] Judgment No. 238/2014.

[33] See the judgment in the case *The Minister of Justice and Constitutional Development and Others v. The Southern Africa Litigation Centre and Others* (867/15) [2016] ZASCA 17 (15 March 2016). The judgment was in response to the appeal lodged by the Government of South Africa against the judgment issued by the High Court of South Africa (Gauteng Division, Pretoria) on 23 June 2015 in case 27740/2015 (*Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others*.

[34] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo, 27 June 2014) http://www.au.int/en/treaties. The Protocol, known as the Malabo Protocol, was adopted at the twenty-third regular session of the Assembly of the African Union. It has not yet entered into force.

## B. Prior consideration by the Commission of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction

15. The limitations and exceptions to immunity are undoubtedly one of the central issues to be considered by the Commission in its work on this topic, and is also a highly politically sensitive issue. It therefore comes as no surprise that the issue of limitations and exceptions has been covered in the various reports submitted for the Commission's consideration and has been the subject of an ongoing debate within the Commission, to the point where in fact some of its members consider the issue to be the very purpose, and even the only purpose, of the present topic. The importance attached to this issue is also reflected in the statements made by delegations in the Sixth Committee, which have repeatedly referred to the limitations and exceptions to immunity during the consideration of the annual report of the Commission, as well as in the written contributions provided by States in response to questions posed by the Commission.

16. It will be recalled that the subject of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction was analysed in detail in the Memorandum by the Secretariat,[35] as well as in the second report of the former Special Rapporteur, Mr. Kolodkin, one section of which was devoted to a case study of exceptions to immunity.[36] On the basis of that study, Mr. Kolodkin concluded that there is in contemporary international law no customary norm (or trend toward the establishment of such a norm) making it possible to assert that there are exceptions to immunity, apart from the exception concerning harm caused directly in the forum State when that State did not consent to the performance of the act or to the presence of the foreign official in its territory.[37] He added that further restrictions on immunity, even *de lege ferenda*, were not desirable, since they could impair the stability of international relations; he also questioned their effect on efforts to combat impunity.[38]

17. In her preliminary report, the present Special Rapporteur highlighted the lack of consensus within the Commission on the issue of limitations and exceptions to immunity, while drawing attention to the need to analyse the topic during the present quinquennium, with the goal of finding the appropriate place for exceptions to immunity, particularly in the case of international crimes, in the definition of the legal regime applicable both to immunity *ratione personae* and to immunity *ratione materiae*. In addition, emphasis was placed on the need to approach the question in the light of the values and legal principles that are affected by immunity, from the perspective both of the values protected by immunity (sovereign equality of the State, stability of international relations) and of other values and legal principles that could be affected by the existence of immunity of State officials from foreign criminal jurisdiction. Lastly, the preliminary report also referred to the need to approach the issue of immunity — including the question of exceptions — from the perspective of both *lex ferenda* and *lex lata*, thus fulfilling the Commission's dual

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[35] See *Yearbook ... 2008*, vol. II, Part One (Addendum 2), document A/CN.4/596, paras. 67-87, 141-153 and 180-212.

[36] Document A/CN.4/631, paras. 31-61.

[37] *Ibid.*, para. 90.

[38] *Ibid.*, paras. 91 and 92.

mandate encompassing both the codification and the progressive development of international law.[39]

18. In her following reports, the Special Rapporteur did not deal directly with the question of limitations and exceptions to immunity, although in the three reports submitted for the Commission's consideration in 2013, 2014 and 2015 she expressed a reservation regarding subsequent consideration of this question. Accordingly, none of the analyses contained in those reports and none of the draft articles included therein should be understood as a pronouncement on the existence or otherwise of exceptions to immunity.[40] In addition, it will be recalled that the fourth report contained an indirect analysis of the issue of limitations and exceptions to immunity in connection with the study of the concept of "acts performed in an official capacity" and already mentioned some of the elements that are developed in detail in this report.[41]

19. All this prior work shows the context within which the Commission's discussion to date on limitations and exceptions to immunity has taken place. Although the question will again be discussed, this time in the form of a case study, in view of the consideration of the present report at the current session, it is useful at this point to reiterate the issues and arguments concerning this question that have been raised by Commission members to date. These arguments can be summarized as follows:

(a) Although some Commission members have maintained that there are no exceptions to immunity, they are in the minority.[42] Indeed, a number of members have admitted that there are instances in which the application of immunity is not possible, although their positions are not identical in all respects.[43]

(b) The commission of international crimes is considered to be the main instance in which immunity would not be applicable. In addition, other examples of exceptions or limitations have been mentioned by Commission members, including *ultra vires* acts, *acta jure gestionis*, performance of functions that are ostensibly connected with official status but are in fact for the exclusive benefit of the State official (especially acts of corruption and misappropriation of State funds), and instances in which the official's act causes harm to persons or property in the territory of the forum State, usually referred to as the "territorial tort exception".[44]

(c) Some Commission members have argued that conduct characterized as being contrary to *jus cogens* is a basis for limitations and exceptions to immunity. However, this argument has been put forward not as an autonomous and absolute

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[39] Document A/CN.4/654, paras. 68 and 72. See also paras. 21, 34 and 45.

[40] Document A/CN.4/661, paras. 18, 55 and 73; document A/CN.4/673, para. 15; and document A/CN.4/686, paras. 20 and 133.

[41] Document A/CN.4/686, paras. 121-126, 137 and 138.

[42] See A/CN.4/SR.3145. The reference is to summary records of the Commission dealing with the topics mentioned in the text. The same system has been used in subsequent footnotes.

[43] See *Yearbook ... 2008*, vol. I, 2983rd to 2985th and 2987th meetings; see also A/CN.4/SR.3086 to A/CN.4/SR.3088,A/CN.4/SR.3113 to A/CN.4/SR.3115, A/CN.4/SR.3143 to A/CN.4/SR.3145, A/CN.4/SR.3164 to A/CN.4/SR.3168, A/CN.4/SR.3217, A/CN.4/SR.3219 and A/CN.4/SR.3220, A/CN.4/SR.3273 and A/CN.4/SR.3275.

[44] See *Yearbook ... 2008*, vol. I, 2983rd to 2985th meetings; see also A/CN.4/SR.3086 to A/CN.4/SR.3088, A/CN.4/SR.3115, A/CN.4/SR.3144 and A/CN.4/SR.3145, A/CN.4/SR.3167 and A/CN.4/SR.3275.

criterion but in relation to efforts to combat impunity for international crimes, to serious human rights violations and to protection of the fundamental values of contemporary international law.[45]

(d) International crimes have been identified mainly as the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[46] One Commission member has referred simply to crimes listed in the Rome Statute of the International Criminal Court,[47] as a means of identifying crimes generally viewed as such by the international community.[48]

(e) International crimes have been mentioned by some Commission members as exceptions to immunity,[49] while others have seen them as conduct that can never be part of State functions and which therefore cannot even be considered as acts performed in an official capacity.[50] In both cases, however, when Commission members have advanced these arguments, they have done so with the aim of precluding application of the rules concerning immunity of State officials from foreign criminal jurisdiction.

(f) With a few exceptions, most of the Commission members who have expressed an opinion on the matter have stated that exceptions to immunity do not apply to persons enjoying immunity *ratione personae* (Head of State, Head of Government and Minister for Foreign Affairs) during their term in office. They would, however, apply after that term has ended.[51]

(g) A large number of Commission members have maintained that immunity *ratione materiae* is indeed covered by the above-mentioned exceptions and limitations.[52]

(h) Some Commission members have stated that there is no norm of international law concerning exceptions to immunity and that international practice is limited and inconsistent. Thus the Commission either cannot take exceptions into account or must deal with them prudently and cautiously.[53]

(i) On the other hand, those who have been in favour of exceptions and limitations consider that either it is possible to point to the existence of norms allowing exceptions or, even if is debatable whether they exist at the customary level, it is possible to identify a clear and growing trend toward exceptions to immunity, particularly in the case of international crimes.[54] They have also noted

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[45] See A/CN.4/SR.3086 to A/CN.4/SR.3088 and A/CN.4/SR.3145.

[46] See *Yearbook ... 2008*, vol. I, 2984th meeting; see also A/CN.4/SR.3087 and A/CN.4/SR.3088, A/CN.4/SR.3145 and A/CN.4/SR.3275.

[47] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations *Treaty Series*, vol. 2187, No. 38544, p. 91.

[48] See A/CN.4/SR.3087, A/CN.4/SR.3145 and A/CN.4/SR.3164.

[49] See *Yearbook ... 2008*, vol. I, 2983rd and 2984th meetings; see also A/CN.4/SR.3086 to A/CN.4/SR.3088, A/CN.4/SR.3115, A/CN.4/SR.3144 and A/CN.4/SR.3145.

[50] See *Yearbook ... 2008*, vol. I, 2985th meeting; see also A/CN.4/SR.3274 and A/CN.4/SR.3275.

[51] See *Yearbook ... 2008*, vol. I, 2983rd and 2984th meetings; see also A/CN.4/SR.3087, A/CN.4/SR.3088, A/CN.4/SR.3113, A/CN.4/SR.3143, A/CN.4/SR.3144 and A/CN.4/SR.3145.

[52] See A/CN.4/SR.3086 to A/CN.4/SR.3088, A/CN.4/SR.3144 and A/CN.4/SR.3145, A/CN.4/SR.3167, A/CN.4/SR.3219 and A/CN.4/SR.3275.

[53] See A/CN.4/SR.3086, A/CN.4/SR.3143 and A/CN.4/SR.3144 and A/CN.4/SR.3167.

[54] See A/CN.4/SR.3086 and A/CN.4/SR.3087, A/CN.4/SR.3143 to A/CN.4/SR.3145, A/CN.4/SR.3165 and A/CN.4/SR.3274.

that the inconsistent and inconclusive nature of practice cannot be construed to mean solely that there are no exceptions to immunity. Consequently, the Commission can consider them in the exercise of its mandate, which includes both the codification and the progressive development of international law. In this connection, some Commission members have drawn attention to the fact that it is precisely the lack of consistent and conclusive practice that allows the Commission to opt for inclusion of exceptions, particularly in order to ensure consistency of the draft articles with other legal norms and principles enshrined in contemporary international law, which must be viewed as a normative whole.[55]

(j) Commission members generally have acknowledged the need to preserve the progress made over the last few decades in international criminal law, especially regarding the consolidation of efforts to combat impunity as a goal of the international community. However, Commission members have drawn varying conclusions from this affirmation. For example, some have emphasized that impunity and immunity are different concepts and that immunity is exclusively procedural and not substantive in nature, concluding that the non-existence of exceptions in no way affects efforts to combat impunity. Others, on the contrary, have pointed out that in certain circumstances immunity may have substantive connotations or consequences that would preclude effective individual criminal responsibility. In this context, it is essential to define exceptions or limitations to immunity in order to ensure that immunity does not become a form of impunity.[56]

(k) Lastly, it should be noted that some Commission members who support the existence of exceptions have mentioned the need for such exceptions to be accompanied by recognition of procedural safeguards to prevent them from being misused.[57]

20. Together with this discussion within the Commission, attention should be drawn to the fact that, when analysing the Commission's work on this subject, States have referred at length to the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, both in the discussions held in the Sixth Committee and in the written contributions provided in response to questions posed by the Commission. An analysis of the positions maintained by States leads to the following conclusions:

(a) States attach considerable importance to questions related to exceptions and limitations to immunity, to which they have referred repeatedly since the first debate on immunity of State officials from foreign criminal jurisdiction was held in 2008.[58] In addition, a number of States have drawn attention to the need to approach

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[55] See *Yearbook ... 2008*, vol. I, 2984th meeting; see also A/CN.4/SR.3087 and A/CN.4/SR.3088, A/CN.4/SR.3115 and A/CN.4/SR.3167.

[56] See *Yearbook ... 2008*, vol. I, 2984th, 2985th and 2987th meetings; see also A/CN.4/SR.3145, A/CN.4/SR.3165, A/CN.4/SR.3217 and A/CN.4/SR.3275.

[57] See A/CN.4/SR.3168 and A/CN.4/SR.3275.

[58] *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, Germany, 18th meeting (A/C.6/68/SR.18), *ibid., Seventieth Session, Sixth Committee*, 24th meeting (A/C.6/70/SR.24), *ibid., Sixty-sixth Session, Sixth Committee*, 24th meeting (A/C.6/66/SR.24); Algeria, *ibid., Sixty-seventh Session, Sixth Committee*, 24th meeting (A/C.6/67/SR.24); Austria, *Sixty-eighth Session, Sixth Committee*, 17th meeting (A/C.6/68/SR.17), *ibid., Sixty-third Session, Sixth Committee*, 23rd meeting (A/C.6/63/SR.23), *ibid., Sixty-sixth Session, Sixth Committee*, 26th meeting (A/C.6/66/SR.26), *ibid., Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), *ibid., Seventieth Session, Sixth Committee*, 24th meeting (A/C.6/70/SR.24);

Belarus, *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27), *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21), *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18); Belgium, *ibid., Sixty-sixth Session, Sixth Committee*, 26th meeting (A/C.6/66/SR.26); Canada, *ibid., Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20); Chile, *ibid., Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18); China, *ibid., Sixty-third Session, Sixth Committee*, 23rd meeting (A/C.6/63/SR.23), *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27), *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21), *ibid., Sixty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/68/SR.19), *ibid., Sixty-ninth Session, Sixth Committee*, 23rd meeting A/C.6/69/SR.23); Croatia, *ibid., Seventieth Session, Sixth Committee*, 24th meeting (A/C.6/70/SR.24); Denmark, *ibid., Sixty-ninth Session, Sixth Committee*, 22nd meeting (A/C.6/69/SR.22); Slovenia, *ibid., Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22), *ibid., Seventieth Session, Sixth Committee*, 24th meeting (A/C.6/70/SR.24); Spain, *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27), *ibid., Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22), *ibid., Sixty-eighth Session, Sixth Committee*, 17th meeting (A/C.6/68/SR.17); United States, *ibid., Sixty-ninth Session, Sixth Committee*, 24th meeting (A/C.6/69/SR.24), *ibid., Seventieth Session, Sixth Committee*, 25th meeting (A/C.6/70/SR.25); Ethiopia, *ibid., Sixty-ninth Session, Sixth Committee*, 12th meeting (A/C.6/69/SR.12); Russian Federation, *ibid., Sixty-third Session, Sixth Committee*, 25th meeting (A/C.6/63/SR.25), *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27), *ibid., Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22); France, *ibid., Sixty-sixth Session, Sixth Committee*, 20th meeting (A/C.6/66/SR.20), *ibid., Sixty-eighth Session, Sixth Committee*, 17th meeting (A/C.6/68/SR.17); Greece, *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18), *ibid., Seventieth Session, Sixth Committee*, 24th meeting (A/C.6/70/SR.24); Hungary, *ibid., Sixty-sixth Session, Sixth Committee*, 19th meeting (A/C.6/66/SR.19); India, *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27), *ibid., Sixty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/68/SR.19); Indonesia, *ibid., Sixty-sixth Session, Sixth Committee*, 24th meeting (A/C.6/66/SR.24), *ibid., Sixty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/68/SR.19); Iran (Islamic Republic of), *ibid., Sixty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/68/SR.19), *ibid., Sixty-ninth Session, Sixth Committee*, 12th meeting (A/C.6/69/SR.12) and 24th meeting (A/C.6/69/SR.24), *ibid., Seventieth Session, Sixth Committee*, 25th meeting (A/C.6/70/SR.25); Ireland, *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21), *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18); Israel, *ibid., Sixty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/68/SR.19); Italy, *ibid., Sixty-sixth Session, Sixth Committee*, 26th meeting (A/C.6/66/SR.26), *ibid., Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22), *ibid., Sixty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/68/SR.19); Japan, *ibid., Sixty-third Session, Sixth Committee*, 23rd meeting (A/C.6/63/SR.23), *ibid., Seventieth Session, Sixth Committee*, 25th meeting (A/C.6/70/SR.25); Malaysia, *ibid., Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22), *ibid., Sixty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/68/SR.19); Mexico, *ibid., Sixty-sixth Session, Sixth Committee*, 18th meeting (A/C.6/66/SR.18); Norway, *ibid., Sixty-third Session, Sixth Committee*, 23rd meeting (A/C.6/63/SR.23), *ibid., Sixty-sixth Session, Sixth Committee*, 26th meeting (A/C.6/66/SR.26), *ibid., Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), *ibid., Seventieth Session, Sixth Committee*, 23rd meeting (A/C.6/70/SR.23); New Zealand, *ibid., Sixty-third Session, Sixth Committee*, 24th meeting (A/C.6/63/SR.24), *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27), *ibid., Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22); Netherlands, *ibid., Sixty-third Session, Sixth Committee*, 22nd meeting (A/C.6/63/SR.22), *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21), *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18), *ibid., Sixty-ninth Session, Sixth Committee*, 23rd meeting (A/C.6/69/SR.23); Peru, *ibid., Sixty-sixth Session, Sixth Committee*, 26th meeting (A/C.6/66/SR.26), *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21); Poland, *ibid., Sixty-sixth Session, Sixth Committee*, 26th meeting (A/C.6/66/SR.26), *ibid., Sixty-ninth Session, Sixth Committee*, 23rd meeting (A/C.6/69/SR.23); Portugal, *ibid., Sixty-sixth*

the question cautiously,[59] with some delegations emphasizing the need to consider first existing law (*lex lata*) and then proposals for progressive development (*lex ferenda*). However, it is also noteworthy that there is no clear consensus among States as to which questions concerning exceptions would be included in each of the two categories.[60]

(b) Exceptions to immunity have been viewed by States from two different perspectives: their effect on the goal sought by immunities, on the one hand, and their relationship to efforts to combat immunity for the most serious international crimes, on the other.[61]

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*Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27), *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21), *ibid., Sixty-eighth Session, Sixth Committee*, 17th meeting (A/C.6/68/SR.17), *ibid., Sixty-ninth Session, Sixth Committee*, 24th meeting (A/C.6/69/SR.24); United Kingdom, *ibid., Sixty-third Session, Sixth Committee*, 23rd meeting (A/C.6/63/SR.23), *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18), *ibid., Sixty-ninth Session, Sixth Committee*, 23rd meeting (A/C.6/69/SR.23), *ibid., Seventieth Session, Sixth Committee*, 24th meeting (A/C.6/70/SR.24); Czech Republic, *ibid., Sixty-third Session, Sixth Committee*, 24th meeting (A/C.6/63/SR.24), *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18); Republic of Korea, *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21), *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18); Republic of the Congo, *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21); Singapore, *ibid., Sixty-eighth Session, Sixth Committee*, 17th meeting (A/C.6/68/SR.17); Sri Lanka, *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27); South Africa, *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21), *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18); Sudan, *ibid., Sixty-third Session, Sixth Committee*, 25th meeting (A/C.6/63/SR.25); Switzerland, *ibid., Sixty-third Session, Sixth Committee*, 24th meeting (A/C.6/63/SR.24), *ibid., Sixty-sixth Session, Sixth Committee*, 26th meeting (A/C.6/66/SR.26), *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21); Thailand, *ibid., Sixty-ninth Session, Sixth Committee*, 24th meeting (A/C.6/69/SR.24), Viet Nam, *ibid., Seventieth Session, Sixth Committee*, 25th meeting (A/C.6/70/SR.25).

[59] China, *ibid., Sixty-third Session, Sixth Committee*, 23rd meeting (A/C.6/63/SR.23), *ibid., Sixty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/68/SR.19), *ibid., Sixty-ninth Session, Sixth Committee*, 23rd meeting (A/C.6/69/SR.23); Cuba, *ibid., Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22), *ibid., Sixty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/68/SR.19), *ibid., Sixty-ninth Session, Sixth Committee*, 23rd meeting (A/C.6/69/SR.23), *ibid., Seventieth Session, Sixth Committee*, 24th meeting (A/C.6/70/SR.24); El Salvador, *ibid., Sixty-third Session, Sixth Committee*, 23rd meeting (A/C.6/63/SR.23); Russian Federation, *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27); Israel, *ibid., Seventieth Session, Sixth Committee*, 25th meeting (A/C.6/70/SR.25); Peru, *ibid., Sixty-sixth Session, Sixth Committee*, 26th meeting (A/C.6/66/SR.26); Republic of Korea, *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21); Romania, *ibid., Seventieth Session, Sixth Committee*, 24th meeting (A/C.6/70/SR.24); Viet Nam, *ibid., Sixty-ninth Session, Sixth Committee*, 25th meeting (A/C.6/69/SR.25).

[60] Austria, *ibid., Sixty-sixth Session, Sixth Committee*, 26th meeting (A/C.6/66/SR.26), Belarus, *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27); Russian Federation, *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27), *ibid., Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22); France, *ibid., Sixty-sixth Session, Sixth Committee*, 20th meeting (A/C.6/66/SR.20); Iran (Islamic Republic of), *ibid., Sixty-seventh Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27); Mexico, *ibid., Sixty-sixth Session, Sixth Committee*, 18th meeting (A/C.6/66/SR.18).

[61] Chile, *ibid., Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), *ibid., Sixty-ninth Session, Sixth Committee*, 24th meeting (A/C.6/69/SR.24); Denmark (on behalf of the Nordic countries), *ibid., Sixty-ninth Session, Sixth Committee*, 22nd meeting (A/C.6/69/SR.22); Indonesia, *ibid., Sixty-sixth Session, Sixth Committee*, 24th meeting (A/C.6/66/SR.24); Jamaica,

(c) The proponents of the first approach have warned of the damage that recognition of any type of exception might do to the exercise of the State's own functions, the risk of submission of politically motivated requests and the harm that limitation of immunity might do to the stability of inter-State relations.[62]

(d) In the second approach, other States have drawn attention to the need to take into account the developments that have occurred in international criminal law in recent decades, as well as the need for the Commission to consider the question of immunities in general, and exceptions in particular, in a manner consistent with the rest of the norms and principles in force in contemporary international law. Those States have mentioned, in particular, the fact that the treatment given to exceptions should not undermine the progress achieved in international criminal law, including the progress that has occurred in the process of creating and establishing international criminal tribunals.[63] Those States believe that international crimes should be considered, *prima facie*, as exceptions to immunity.[64]

(e) With one exception, States have supported full or absolute immunity *ratione personae* for the Head of State, the Head of Government and the Minister for Foreign Affairs, with no exception, even for international crimes, during their term of office.[65]

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*ibid., Sixty-third Session, Sixth Committee*, 24th meeting (A/C.6/63/SR.24); Japan, *ibid., Sixty-third Session, Sixth Committee*, 23rd meeting (A/C.6/63/SR.23); Mexico, *ibid., Sixty-sixth Session, Sixth Committee*, 18th meeting (A/C.6/66/SR.18); Norway, *ibid., Sixty-third Session, Sixth Committee*, 23rd meeting (A/C.6/63/SR.23), ibid., Sixty-seventh Session, Sixth Committee, 20th meeting (A/C.6/67/SR.20), *ibid., Sixty-eighth Session, Sixth Committee*, 17th meeting (A/C.6/68/SR.17), *ibid., Seventieth Session, Sixth Committee*, 23rd meeting (A/C.6/70/SR.23); New Zealand, *ibid., Sixty-third Session, Sixth Committee*, 24th meeting (A/C.6/63/SR.24), *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27); Portugal, *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27); Republic of Korea, *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21), *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18); South Africa, *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18); Thailand, *ibid., Sixty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/68/SR.19).

[62] Algeria, *ibid., Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22); China, *ibid., Sixty-third Session, Sixth Committee*, 23rd meeting (A/C.6/63/SR.23), *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27); New Zealand, *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27); Cuba, *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27).

[63] Slovenia, *ibid., Seventieth Session, Sixth Committee*, 24th meeting (A/C.6/70/SR.24), Norway (on behalf of the Nordic countries), *ibid., Sixty-sixth Session, Sixth Committee*, 26th meeting (A/C.6/66/SR.26), *ibid., Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20).

[64] Republic of Korea, *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18); Canada, *ibid., Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20); Japan, *ibid., Sixty-ninth Session, Sixth Committee*, 23rd meeting (A/C.6/69/SR.23); Norway (on behalf of the Nordic countries), *ibid., Sixty-sixth Session, Sixth Committee*, 26th *meeting* (A/C.6/66/SR.26); Netherlands, *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21), *ibid., Sixty-ninth Session, Sixth Committee*, 23rd *meeting* (A/C.6/69/SR.23); Poland, *ibid., Sixty-ninth Session, Sixth Committee*, 23rd meeting (A/C.6/69/SR.23); Republic of the Congo, *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21).

[65] Germany, *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18); Austria, *ibid., Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), *ibid., Sixty-eighth Session, Sixth Committee*, 17th meeting (A/C.6/68/SR.17); Belarus, *ibid., Sixty-seventh Session, Sixth Committee*, 21st *meeting* (A/C.6/67/SR.21), *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27); Chile, *ibid., Sixty-seventh Session, Sixth Committee*, 20th

(f) However, a large number of States have supported the existence of various exceptions to immunity *ratione materiae*, the main one being the commission of the most serious crimes of concern to the international community as a whole,[66] although some States have referred to other exceptions to immunity, such as acts of sabotage, espionage or other harm done by the official of the foreign State in the territory of the forum State.[67]

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meeting (A/C.6/67/SR.20); China, *ibid., Sixty-sixth Session, Sixth Committee*, 27th *meeting* (A/C.6/66/SR.27); Slovenia, *ibid., Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22); Spain, *ibid., Sixty-eighth Session, Sixth Committee*, 17th meeting (A/C.6/68/SR.17); United States, *ibid., Sixty-ninth Session, Sixth Committee*, 24th meeting (A/C.6/69/SR.24); Greece, *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18); Hungary, *ibid., Sixty-sixth Session, Sixth Committee*, 19th meeting (A/C.6/66/SR.19); Indonesia, *ibid., Sixty-sixth Session, Sixth Committee*, 24th meeting (A/C.6/66/SR.24); Ireland, *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21), *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18); Jamaica, *ibid., Sixty-third Session, Sixth Committee*, 24th meeting (A/C.6/63/SR.24), *ibid., Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22); Malaysia, *ibid., Sixty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/68/SR.19); Netherlands, *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21), *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18); Peru, *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21); Czech Republic, *ibid., Sixty-third Session, Sixth Committee*, 24th meeting (A/C.6/63/SR.24); Republic of Korea, *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18), *ibid., Sixty-ninth Session, Sixth Committee*, 25th meeting (A/C.6/69/SR.25); Republic of the Congo, *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21); Sri Lanka, *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27); Switzerland, *ibid., Sixty-third Session, Sixth Committee*, 24th meeting (A/C.6/63/SR.24). Opposition to the absolute character of immunity *ratione personae* seemed to be expressed by: Portugal, *ibid., Sixty-third Session, Sixth Committee*, 25th meeting (A/C.6/63/SR.25), *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21), *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27); Italy, *ibid., Sixty-sixth Session, Sixth Committee*, 26th meeting (A/C.6/66/SR.26), and Mexico, *ibid., Sixty-sixth Session, Sixth Committee*, 18th meeting (A/C.6/66/SR.18).

[66] Austria, *ibid., Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20); Canada, *ibid., Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20); Chile, *ibid., Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20); Croatia, *ibid., Seventieth Session, Sixth Committee*, 24th meeting (A/C.6/70/SR.24); Denmark (on behalf of the Nordic countries), *ibid., Sixty-ninth Session, Sixth Committee*, 22nd meeting (A/C.6/69/SR.22); Slovenia, *ibid., Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22); Greece, *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18); Norway (on behalf of the Nordic countries), *ibid., Sixty-seventh Session, Sixth Committee*, 27th meeting (A/C.6/67/SR.27), *ibid., Seventieth Session, Sixth Committee*, 23rd meeting (A/C.6/70/SR.23); New Zealand, *ibid., Sixty-sixth Session, Sixth Committee*, 27th meeting (A/C.6/66/SR.27), *ibid., Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22); Netherlands *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21), *ibid., Sixty-ninth Session, Sixth Committee*, 23rd meeting (A/C.6/69/SR.23); Peru, *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21); Poland, *ibid., Sixty-ninth Session, Sixth Committee*, 23rd meeting (A/C.6/69/SR.23); Czech Republic, *ibid., Sixty-third Session, Sixth Committee*, 24th meeting (A/C.6/63/SR.24), Republic of the Congo, *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21). Opposed to consideration of international crimes as exceptions: China, *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21).

[67] Austria, *ibid., Sixty-third Session, Sixth Committee*, 23rd meeting (A/C.6/63/SR.23); Iran (Islamic Republic of), *ibid., Seventieth Session, Sixth Committee*, 25th meeting (A/C.6/70/SR.25).

(g) In referring to international crimes, States have made special mention of the crime of genocide, crimes against humanity, war crimes and serious violations of international humanitarian law, torture and enforced disappearance.[68]

(h) The commission of international crimes has been considered by some States to be an exception that is already enshrined in contemporary international law, while others have maintained that it reflects a growing trend that could not be ignored by the Commission in its work.[69]

(i) Lastly, it is noteworthy that most States refer to "exceptions to immunity", using the term "limits" or "limitations" residually.

21. In preparing this report, the Special Rapporteur has taken into account this past history of consideration of the question of limitations and exceptions to immunity of State officials from foreign criminal jurisdiction.

# II. Study of practice

22. As already mentioned in earlier reports submitted by the Special Rapporteur, the study of practice is an essential foundation of this work. Accordingly, the following pages contain an analysis of treaty practice (section A), national legislative practice (section B), international judicial practice (section C), national judicial practice (section D) and other prior work of the Commission that is of relevance to the present report (section E).

## A. Treaty practice

23. The various conventions analysed in earlier reports also include provisions that may be germane to the question of limitations and exceptions. However, as a general observation, it should be noted that none of them use this terminology. In fact, they adopt a more general and pragmatic approach to the question, referring to instances in which the convention, or one of its provisions, does not apply.

24. Starting with the conventions that directly or indirectly govern immunity, it is noteworthy that the ones which regulate the exercise of the diplomatic function do not contain provisions contemplating any form of exception or limitation to immunity as regards criminal jurisdiction. On the contrary, they recognize the immunity from criminal jurisdiction of persons enjoying immunity in absolute terms during the person's term in office. This is established in article 31, paragraph 1, of

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[68] China, *ibid., Sixty-ninth Session, Sixth Committee*, 23rd meeting (A/C.6/69/SR.23); Denmark (on behalf of the Nordic countries), *ibid., Sixty-ninth Session, Sixth Committee*, 22nd meeting (A/C.6/69/SR.22); Greece, *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18); Portugal, *ibid., Sixty-eighth Session, Sixth Committee*, 17th meeting (A/C.6/68/SR.17); United Kingdom, *ibid., Sixty-ninth Session, Sixth Committee*, 23rd meeting (A/C.6/69/SR.23), *ibid., Seventieth Session, Sixth Committee*, 24th meeting (A/C.6/70/SR.24); Czech Republic, *ibid., Sixty-ninth Session, Sixth Committee*, 23rd meeting (A/C.6/69/SR.23); South Africa, *ibid., Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18); Republic of Korea, *ibid., Sixty-third Session, Sixth Committee*, 23rd meeting (A/C.6/63/SR.23).

[69] Canada, *ibid., Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20); Greece, *ibid., Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20); Portugal, *ibid., Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21).

the Vienna Convention on Diplomatic Relations,[70] in article 31, paragraph 1, of the Convention on Special Missions[71] and in articles 30, paragraph 1, and 60, paragraph 1, of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.[72] It is also noteworthy that the provisions mentioned mainly describe a model of immunity *ratione personae* and that immunity therefore covers both acts performed in an official capacity and acts performed in a private capacity. In the case of the first two conventions, however, the forum State has an alternative mechanism that it can use to deal with instances in which an individual enjoying immunity has committed or is committing a crime: designation of the person concerned as "*persona non grata*" or "not acceptable", in which case the person must leave the national territory.[73] In any case, it should be remembered that such immunity is of limited duration and that, after the functions have ended, it is no longer absolute, since it applies solely to acts performed in an official capacity.[74] However, these conventions do not define exceptions applicable to this residual immunity *ratione materiae* as regards criminal jurisdiction.

25. The Vienna Convention on Consular Relations,[75] for its part, adopts a different approach, since the system of immunities follows a model of immunity *ratione materiae* linked to acts specific to the consular function and also applies in the case of criminal jurisdiction,[76] where the consular official and the other staff of the consular office enjoy not absolute immunity but immunity limited to acts performed in an official capacity.[77] Lastly, it should be noted that article 43, paragraph 2 (b), of the Convention establishes a sort of "territorial tort exception".

26. In concluding this study of the conventions governing immunity, it should be noted that, for the purposes of the present report, the United Nations Convention on Jurisdictional Immunities of States and Their Property[78] is in principle less relevant than the other conventions, since it refers to immunity from jurisdiction of the State and not to immunity from jurisdiction of State officials. Furthermore, it does not apply to immunity from criminal jurisdiction. However, it is of interest for other reasons. Firstly, as regards methodology, it is noteworthy that the Convention does not distinguish between limitations and exceptions to immunity, addressing them under the same heading: "Proceedings in which State immunity cannot be

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[70] Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), United Nations *Treaty Series*, vol. 500, No. 7310, p. 96.

[71] Vienna Convention on Special Missions (New York, 8 December 1969). *Ibid.*, vol. 1400, No. 23431, p. 232.

[72] Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975), United Nations *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.

[73] See Vienna Convention on Diplomatic Relations, art. 9, para. 1; and Convention on Special Missions, art. 12.

[74] See Vienna Convention on Diplomatic Relations, art. 39, para. 2; Convention on Special Missions, art. 43, para. 2; Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, art. 38. para. 2.

[75] Vienna Convention on Consular Relations (Vienna, 24 April 1963), United Nations *Treaty Series*, vol. 596, No. 8638, p. 262.

[76] See Vienna Convention on Consular Relations, arts. 43 and 53, para. 4.

[77] Regarding the exercise of criminal jurisdiction, see arts. 41, 42 and 63 of the Convention.

[78] United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49). vol. I, resolution 59/38, annex.

invoked".[79] Secondly, it includes the "territorial tort exception" among those instances. Lastly, it does not recognize any exception or limitation based on violation of *jus cogens* norms.

27. Article 12 of the Convention (Personal injuries and damage to property) states that:

> "Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission."

28. This precept follows the precedent of the Vienna Convention on Consular Relations[80] and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.[81] It was also contemplated in the European Convention on State Immunity,[82] which provides in its article 11 that:

> "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."

29. Article 12 of the Convention on the Jurisdictional Immunities of States and Their Property reproduces almost verbatim the draft article adopted at the time by the Commission.[83] In the opinion of the Commission, the above-mentioned rule constitutes an exception to State immunity from jurisdiction,[84] justified by application of the jurisdictional principle of *lex loci delicti commissi* and the preponderance of the role played in this case by the territorial element.[85] In addition, the exception satisfies the requirement that the individuals concerned must be guaranteed access to recourse, which would probably not be the case if there were to

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[79] See Part III of the Convention, arts. 10-17. The instances mentioned in that Part fit into both the category of limitations and the category of exceptions to immunity.

[80] Art. 43, para. 2 (b), of the Convention establishes an exception to immunity from civil jurisdiction when the action is brought "by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft".

[81] Art. 60, para. 4, concerning members of delegations to international conferences, states that "Nothing in this article shall exempt such persons from the civil and administrative jurisdiction of the host State in relation to an action for damages arising from an accident caused by a vehicle, vessel or aircraft, used or owned by the persons in question, where those damages are not recoverable from insurance".

[82] European Convention on State Immunity (Basle, 16 May 1972), United Nations *Treaty Series*, vol. 1495, No. 25699, p. 182.

[83] See *Yearbook …*, 1991, vol. II, Part Two, p. 44.

[84] *Ibid.*, para. (1) of the commentary.

[85] *Ibid.*, pp. 44 and 45, paras. (2), (6) and (8) of the commentary.

be immunity.[86] Lastly, although the "territorial tort exception" established in the Convention is designed to apply to civil jurisdiction, the Commission noted in its commentaries that it could also be used in relation to claims relating to "intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination".[87] If, in addition, one considers the fact that the Commission understood the words "author of the act" to mean agents or officials of a State exercising their official functions and not necessarily the State itself as a legal person",[88] then an exception of this kind can conceivably play some role in the context of immunity from criminal jurisdiction.

30. The idea of incorporating in the Convention on the Jurisdictional Immunities of States and Their Property an exception connected with violation of *jus cogens* norms was broached at a late stage, at the end of the negotiation process on the Convention, when the General Assembly requested the Commission to review some questions still pending from that process, as well as to consider new elements which had emerged in practice after its draft articles were adopted in 1991. The Commission set up a Working Group for this purpose, which in an annex to its report drew the attention of the General Assembly to:

> "the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition on torture".[89]

31. The Commission based its commentary on judicial practice followed in earlier years, especially in relation to the *Pinochet* case, concluding that these facts "are a recent development relating to immunity which should not be ignored".[90] Although the question was discussed in the Working Group of the Sixth Committee conducting the final negotiations on the future Convention, the exception was not incorporated in the text because it was considered that the issue, "although of current interest, did not really fit into the [draft Convention]" and that "[f]urthermore, it did not seem to be ripe enough for the Working Group to engage in a codification exercise over it".[91] Nevertheless, some States made declarations upon ratifying the Convention, in order to safeguard international protection of human rights in that connection.[92] In any case, the discussion on this exception is ongoing, having picked up steam since the judgment of the International Court of Justice in the case of *Jurisdictional Immunities of the State*.

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[86] *Ibid.*, paras. (3) and (9) of the commentary, pp. 43 and 44. The Commission actually stated that in this case "[t]he injured individual would have been without recourse to justice had the State been entitled to invoke its jurisdictional immunity" (para. (3)).

[87] *Ibid.*, p. 45, para. (4) of the commentary.

[88] *Ibid.*, p. 46, para. (10) of the commentary.

[89] *Yearbook* … 1999, vol. II, Part Two, p. 172; para. 3 of the annex to the report of the Working Group.

[90] *Ibid.*, para. 13.

[91] See A/C.6/54/L.12, para. 47.

[92] In this connection, it is the understanding of Finland, Liechtenstein, Norway, Sweden and Switzerland that the current regulation provided by the Convention is "without prejudice to future developments in international law concerning the protection of human rights". Italy, for its part, declared that the Convention should be interpreted "in accordance with the principles concerning the protection of human rights from serious violations" (TREATIES III-13).

32. In addition to these conventions referring directly to immunity, there is also an interesting group of treaties falling within the scope of international human rights law and international criminal law with provisions concerning individual criminal responsibility that are relevant to the purposes of the present report. This group includes the Convention on the Prevention and Punishment of the Crime of Genocide,[93] the International Convention on the Suppression and Punishment of the Crime of Apartheid,[94] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[95] the International Convention for the Protection of All Persons from Enforced Disappearance,[96] the Inter-American Convention to Prevent and Punish Torture[97] and the Inter-American Convention on Forced Disappearance of Persons.[98]

33. The Convention on the Prevention and Punishment of the Crime of Genocide indirectly postulates the irrelevance of official status by stating in its article IV that "[p]ersons 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." The International Convention on the Suppression and Punishment of the Crime of Apartheid, for its part, states that "[i]nternational criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State" (article III). On the other hand, the remaining Conventions do not contain similar provisions: the International Convention for the Protection of All Persons from Enforced Disappearance simply refers to "any person" in its enumeration of those who will be held responsible for that crime (article 6, paragraph 1 (a)). However, both the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance include "agents of the State" when defining the crime,[99] indicating that they may be held criminally responsible for such acts even when they acted in an official capacity. Consequently, it appears at first sight — and subject to comments to be made below — that the cited conventions provide grounds for concluding that commission of a crime of genocide, apartheid, torture or enforced disappearance may constitute *prima facie* an exception to immunity from criminal jurisdiction.

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[93] Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948). United Nations *Treaty Series*, vol. 78, No. 1021, p. 278.

[94] International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973), United Nations *Treaty Series*, vol. 1015, No. 14861, p. 244.

[95] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), United Nations *Treaty Series*, vol. 1465, No. 24841, p. 113.

[96] International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), A/RES/61/177.

[97] Inter-American Convention to Prevent and Punish Torture (Cartagena, 9 December 1985), OAS *Treaty Series*, No. 67.

[98] Inter-American Convention on Forced Disappearance of Persons (Belém do Pará, 9 June 1994), www.oas.org/juridico/english/treaties/a-60.html.

[99] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art.1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 2. For a more detailed analysis of this question, see document A/CN.4/673, paras. 79-84.

34. However, this conclusion will be tenable on the basis of the cited conventions only when the State party is expressly obliged to exercise its criminal jurisdiction in order to prosecute persons presumed to have committed the crimes in question, regardless of their nationality. In this connection, it should be noted that all these conventions, with the exception of the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention for the Suppression and Punishment of the Crime of Apartheid,[100] include provisions requiring States parties to establish jurisdiction when the crimes are committed in any territory under their jurisdiction[101] and when the presumed perpetrator is located in any territory under their jurisdiction, unless the criminal is extradited or surrendered to another State or to a competent international criminal jurisdiction.[102]

35. Lastly, it should be noted that the crimes of genocide,[103] enforced disappearance,[104] and apartheid[105] have been declared to be international crimes or crimes under international law by the conventions analysed above. Torture has also been declared to be "an offense against human dignity and a denial of the principles set forth in the Charter of the Organization of American States and in the Charter of the United Nations", as well as a violation of "the fundamental human rights and freedoms proclaimed in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights".[106] This is important in order to

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[100] The Convention on the Prevention and Punishment of the Crime of Genocide states in its article VI that persons charged with that crime "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". Similarly, article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid establishes that persons charged with that crime "may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction".

[101] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, para. 1 (a); International Convention for the Protection of All Persons from Enforced Disappearance, art. 9, para. 1 (a); Inter-American Convention on Forced Disappearance of Persons, article IV, first paragraph, subparagraph a.; Inter-American Convention to Prevent and Punish Torture, art. 12, second paragraph.

[102] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, para. 2; International Convention for the Protection of All Persons from Enforced Disappearance, art. 9, para. 2; Inter-American Convention on Forced Disappearance of Persons, art. IV, first paragraph, subparagraph (a); Inter-American Convention to Prevent and Punish Torture, art. 12, first paragraph, subparagraph (a).

[103] See the Convention on the Prevention and Punishment of the Crime of Genocide, art. 1 and first preambular paragraph.

[104] Art. 5 of the International Convention for the Protection of All Persons from Enforced Disappearance states that "The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law". See, in a similar vein, the sixth preambular paragraph of the Inter-American Convention on Forced Disappearance of Persons.

[105] International Convention for the Suppression and Punishment of the Crime of Apartheid, art. I, para. 1.

[106] Inter-American Convention to Prevent and Punish Torture, second preambular paragraph. A reference to the prohibition of torture in the Universal Declaration of Human Rights is contained in the preamble of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

determine what should be understood to be international crimes for the purposes of the exceptions referred to in this report.

36. A parallel example is the Rome Statute of the International Criminal Court, which expressly recognizes the irrelevance of official capacity in determining individual criminal responsibility (article 27, paragraph 1), the inapplicability to the Court of immunities under national or international law (article 27, paragraph 2), as well as the general principle of the irrelevance of compliance with orders of a Government or of a superior in determining individual criminal responsibility (article 33). The rules cited are designed to avoid instances in which the responsibility of the individual can be evaded as a consequence of the individual's special relationship with the State, in order to eliminate loopholes that would otherwise allow the most serious crimes that concern the international community as a whole to be committed with impunity. This emphasis placed by the Rome Statute on the absolute character of international crimes in order to define the individual criminal responsibility of any person and the consequent declaration of the non-applicability of immunities cannot be ignored in the present report. However, the cited provisions and their effect on exceptions to the immunity of State officials from foreign criminal jurisdiction will be analysed in greater detail chapter III, section B *infra*.

37. Lastly, it is noteworthy that the conventions on corruption cover the possibility of acts of corruption being committed by officials of a foreign State,[107] which undoubtedly could give rise to a claim of immunity from foreign criminal jurisdiction when a State's courts attempt to exercise jurisdiction over the officials. However, the cited conventions do not contain general provisions referring to such immunity, the only exceptions being certain provisions included in the Council of Europe Criminal Law Convention on Corruption,[108] in the United Nations Convention against Corruption[109] and in the African Union Convention on Preventing and Combating Corruption,[110] which all contain provisions referring to immunity albeit with clearly different approaches and effects as regards limitations and exceptions.

38. The Council of Europe Criminal Law Convention on Corruption states in its article 16 (Immunity):

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[107] See, for example, the United Nation Convention against Corruption, arts. 16 and 17; the Criminal Law Convention on Corruption, arts. 5 and 6; and the Inter-American Convention against Corruption [(Caracas, 29 March 1996). E/1996/99], art. VIII. All these provisions make express reference to the participation in an act of corruption of an official of the foreign State. The African Union Convention on Preventing and Combating Corruption does not refer specifically to foreign officials. However, the broad definition of "public official" given in article 1, together with the provisions of article 13 on the establishment of national jurisdiction over acts of corruption, indicates that the Convention can also be applied to foreign officials and that therefore the question of immunity can also be raised before the courts of States parties.

[108] Criminal Law Convention on Corruption (Strasbourg, 27 January 1999), United Nations *Treaty Series*, vol. 2216, No. 39391, p. 228.

[109] United Nations Convention against Corruption (New York, 31 October 2003), United Nations *Treaty Series*, vol. 2349, No. 42146.

[110] African Union Convention on Preventing and Combating Corruption (Maputo, 11 July 2003), *International Legal Materials* (ILM), vol. XLIII (2004).

> "The provisions of this Convention shall be without prejudice to the provisions of any Treaty, Protocol or Statute, as well as their implementing texts, as regards the withdrawal of immunity."

Despite the unclear wording, the Explanatory Report to the Convention states that "[t]he Convention recognizes the obligation of each of the institutions concerned to give effect to the provisions governing privilege and immunities", and that "customary international law is not excluded in this field".[111]

39. The United Nations Convention against Corruption, for its part, states in its article 30, paragraph 2, that:

> "Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention."

Although the Convention refers to immunities under national law protecting national officials, it uses the concept of "appropriate balance", which may also be relevant for the purpose of defining the system of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.

40. A similar focus, but with a stronger wording, is to be found in the African Union Convention on Preventing and Combating Corruption, which refers to immunities in the following terms (article 7, paragraph 5):

> "Subject to the provisions of domestic legislation, any immunity granted to public officials shall not be an obstacle to the investigation of allegations against and the prosecution of such officials."

41. Lastly, attention should be drawn to the fact that the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, establishing an International Criminal Law Section in the Court, includes corruption and money-laundering among the crimes covered by that Section.[112]

## B. National legislative practice

42. Immunity of the State or of its officials from jurisdiction is not explicitly regulated in most States. On the contrary, the response to immunity has been left to the courts and, when they did address the issue, the courts have usually done so by applying what they consider to be rules of international law referred to in their judgments and other decisions. Various legal grounds have been invoked for this application of the rules of international law: reference to the general principles of law governing the relationship between international law and national law; application of the intrinsic principles of common law;[113] or application of provisions

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[111] *Explanatory Report*, para. 77, p. 16.

[112] See new art. 28A, paras. 8 and 9, of the Statute of the African Court.

[113] This is the case, in particular, in the United States on the basis of the *Samantar* judgment, which established the inapplicability of the Foreign Sovereign Immunities Act to State officials considered individually and stated that their immunity is subject to the rules of common law. See Chimène I. Keitner: "The common law of foreign official immunity", *Green Bag*, vol. 14 2D,

of a general nature determining the powers of domestic judicial organs and referring to applicable international law to settle instances in which immunity may be an issue.[114]

43. This report does not analyse the national norms that simply refer to applicable international law, since they do nothing to shed light on the nature of the limitations and exceptions to immunity, which will necessarily be those established in the international order. There will, however, be an analysis of the practice of the domestic courts responsible for applying those norms, since their decisions show what they understand by "applicable international law". This section analyses the national laws expressly governing immunity and those other laws which, in regulating the jurisdiction of the State as regards international crimes, refer to immunity.

44. Starting with the first category, attention should first be drawn to the fact that national laws regulating jurisdictional immunity are very few in number and, in addition, usually refer basically to immunities of the State. However, some laws contain provisions allowing them to be applied to certain State officials, especially the Head of State. These include legislation of the United States (Foreign Sovereign Immunities Act, 1976),[115] the United Kingdom (State Immunity Act, 1978),[116] Singapore (State Immunity Act, 1979), Pakistan (State Immunity Ordinance, 1981),[117] South Africa (Foreign States Immunities Act, 1981), Australia (Foreign States Immunities Act, 1985),[118] Canada (State Immunity Act, 1985),[119] Argentina (Jurisdictional Immunity of Foreign States in Argentine Courts Act, 1995),[120] Japan (Civil Jurisdiction of Japan with respect to a Foreign State Act, 2009)[121] and Spain (Privileges and Immunities of Foreign States, International Organizations with

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(Autumn 2010), pp. 61-75.

[114] Among these norms providing for general reference to international law, mention may be made of the following examples: Belgium: Repression of Serious Violations of International Humanitarian Law Act, amended by Act of 23 April 2003, art. 4.3; Germany, Courts Constitution Act, art. 20.2; Kyrgyzstan: Criminal Procedure Code, 1999, art. 16.2; Montenegro, Criminal Procedure Code, 2010, art. 252.1; Netherlands: Penal Code, art. 8; Philippines: Crimes against International Humanitarian Law, Genocide and other Crimes against Humanity Act, No. 9851, of 27 July 2009, sect. 9 (b); Russian Federation: Penal Code, 13 July 1996, art. 11.4; Spain: Organic Act 6/1985 on the Judiciary, amended by Organic Act 16/2015, art. 23.4; Uzbekistan: Criminal Procedure Code art. 4. This reference to the applicable norms of international law has created quite a few problems for domestic courts in cases concerning immunity, which is why some States have enacted domestic laws on the subject. For example, after following a system of reference to international law for over 30 years, Spain opted to supplement that system in 2015 with an Immunities Act.

[115] The United States legislation was amended in 1991 by the Torture Victim Protection Act of 1991. See sects. 1605 and 1605A of the U.S. Code.

[116] The United Kingdom legislation was adopted on 20 July 1978 and has not been amended since that date.

[117] Ordinance VI of 1981, dated 12 March 1981.

[118] The Australian legislation was amended in 1987, 2009 and 2010.

[119] See Revised Statutes of Canada, 1985, c. S-18 (updated on 28 April 2016). The Canadian legislation was amended on 13 March 2012 to include an exception in the case of terrorism.

[120] Act 24.488 of 31 May 1995. Approved on 31 May 1995, it was partially promulgated on 22 June that year (infoleg.mcon.gov.ar).

[121] Act No. 24 of 24 April 2009.

Headquarters or Offices in Spain and International Conferences and Meetings held in Spain Organic Act, 2015).[122]

45. Most of these laws refer to exceptions and limitations to immunities of the State in two different ways: (*a*) a "territorial tort exception" in the case of damage to persons or property occurring in the forum State;[123] and (*b*) exceptions to certain categories of proceedings concerning claims connected with rights and obligations that may be classified in the category of *jus gestionis* acts, anticipating or applying the provisions of the 2004 Convention.[124] On the other hand, it is noteworthy that, although all the laws mentioned apply generically to the State, only some of them refer to State officials, mentioning only the Head of State or the representatives of the State acting "in their public capacity"[125] and thus limiting their applicability to such officials *ratione materiae*. Only the Spanish Act of 2015 deals with the immunity of certain officials (Head of State, Head of Government and Minister for Foreign Affairs) from the perspective of both immunity *ratione personae* and immunity *ratione materiae*.[126] Lastly, it should be noted that, because of their content, the cited laws generally regulate exceptions in such a way that they are only indirectly relevant to criminal jurisdictions. In addition, some of the laws in question expressly bar their application to criminal proceedings.[127]

46. Only three laws on immunity contain provisions referring to another type of exception more germane to the subject under consideration. These are the United States Foreign Sovereign Immunities Act, the Canadian State Immunity Act and the Spanish Organic Act 16/2015. The Argentine Act 24.488 should also be considered, although it does not expressly mention any exception related to criminal issues.

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[122] Organic Act 16/2015, of 27 October (*Official Gazette*, No. 258, of 28 October 2015).

[123] See the following laws: Argentina, art. 2 (e); Australia, sects. 13 and 42 (2); Canada, sect. 6; Japan (art. 10; Singapore, sect. 7; South Africa, sect. 6; Spain, art. 11; United Kingdom, sect. 5; United States, sect. 1605 (a) (5) (for convenience, the laws are cited by reference to the adopting State).

[124] These exceptions refer to the following acts: commercial transactions, labour contracts, rights concerning ownership and possession of assets, intellectual and industrial property, membership and participation in legal entities and corporate bodies, submission to commercial arbitration, acts and rights relating to State-owned vessels used for commercial purposes, obligations concerning payment of taxes and charges, rights and obligations derived from shares. See the following laws: Argentina, art. 2 (c), (d), (f), (g) and (h); Australia, sects. 11, 12, 14, 15, 16, 17, 18, 19 and 20; Canada, sects. 5, 7 and 8; Spain, arts. 9, 10 and 12-16; United States, sect. 1605 (a) (2)-(4) and (6) (b) and (d); Japan, arts. 8, 9 and 11-16; Pakistan, sects. 5-12; United Kingdom, sections 3, 4 and 6-11; Singapore, sects. 5 and 6-13; and South Africa, sects. 4, 5 and 7-12.

[125] The following laws refer in a general way to the Head of State: Australia, sects. 3.1, 3.3 (a) and 36; Canada, sect. 2 (a); Pakistan, sect. 15; Singapore, sect. 16 (1) (a); South Africa, sect. 1 (2) (a); and United Kingdom, sect. 14 (a). There are references to "representatives of the State when acting in that capacity" in the laws of Spain, art. 2 (c) (iv), and Japan, art. 2 (iv). United States courts originally considered that State officials acting in an official capacity were covered by the Foreign Sovereign Immunities Act. However, since the judgment in the *Samantar* case, such immunity is exclusively governed by the norms of common law. On this question, see document A/CN.4/686, para. 106.

[126] Organic Act 16/2015 applies both to immunities of "foreign States and their property" (art. 1 (a)) and to immunities of "Heads of State and Government and Ministers for Foreign Affairs during the exercise and upon the completion of their functions" (art. 1 (b)). Title II of Organic Act 16/2015 is devoted entirely to "privileges and immunities of the Head of State, the Head of Government and the Minister for Foreign Affairs of the foreign State". See also art. 22, para. 2.

[127] See the following laws: Canada, sect. 18; Japan, art. 1; Singapore, sect. 19 (2) (b); and South Africa, sect. 2 (3). The United States law also is not applicable to criminal jurisdiction.

47. Although the United States Foreign Sovereign Immunities Act originally used the general version of exceptions described *supra*, it was amended by the Torture Victim Protection Act, which added a section 1605A, entitled "Terrorism exception to the jurisdictional immunity of a foreign State", which provides as follows:

> "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency";[128]

providing that the following conditions are met:[129]

(a) The foreign State was designated by the Secretary of State as a "State sponsor of terrorism";

(b) The claimant or the victim was a national of the United States, a member of its armed forces or an employee of the Government;

(c) In a case in which the act occurred in the territory of the State against which the claim has been brought, the claimant has afforded the foreign State a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration.

48. This exception allowed United States courts to deny a foreign State immunity from jurisdiction in a number of cases that have been confirmed in civil jurisdiction[130] in relation to acts that are unmistakably international crimes. However, it should also be noted that the exception in question is not general in scope and applies only in relation to acts performed by States formally designated by the Secretary of State as sponsors of terrorism, thus making the exception a matter of political discretion.

49. Canada's State Immunity Act was amended in 2012 to add an exception entitled "Support of terrorism", which is included in the section devoted to damage and injury. Under the Act, a State included on the terrorism support list will not be immune from the jurisdiction of Canadian courts as regards proceedings brought against it for support for terrorism or for terrorist activities.[131] The presentation of this exception is very similar to that of United States law, so that the observations in the preceding paragraph also apply to it.

50. Organic Act 16/2015, recently adopted in Spain, has introduced a somewhat different version of the regime applicable to exceptions. As already noted *supra*, this Act distinguishes between the regime applicable to immunity of the State and the regime applicable to Heads of State, Heads of Government and Ministers for Foreign Affairs, both as regards immunity *ratione personae*[132] and as regards immunity

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[128] Sect. 1605 A, (a) (1).
[129] Sect. 1605 A, (2) (A).
[130] See sect. D *infra*.
[131] See sect. 6.1 (1) and (11). Regarding the procedure for inclusion of a State on the terrorism support list, see sect. 6.1 (2), (3)-(10), sect. 11 (3) and sect. 13 (2).
[132] See art. 22.

*ratione materiae*.[133] In the latter case, it introduces an exception based on international crimes, establishing that even for "acts performed during a term in office in exercise of official functions (…) crimes of genocide, forced disappearance, war and crimes against humanity will be excluded from immunity".[134] This is a general exception which does not impose any additional conditions, but it is applicable exclusively in the framework of immunity *ratione materiae*.

51. This exception is supplemented by a provision of general scope, under the heading "International crimes", which establishes the following:

> "The provisions of this Title shall not affect the international obligations assumed by Spain regarding the prosecution of international crimes, or its commitments to the International Criminal Court".[135]

This provision has a different significance from the exception previously mentioned, since it applies both to immunity *ratione materiae* and to immunity *ratione personae*. However, its scope is more limited, since it concerns only instances in which Spain is required by an international norm to prosecute a person for the commission of international crimes and measures to be taken by Spanish courts to respond to a request for cooperation from the International Criminal Court.[136]

52. Lastly, Act 24 488 adopted by the Congress of Argentina contained the following article 3:

> "If a complaint is made to Argentine courts against a foreign State, claiming a violation of international human rights law, the court concerned shall simply indicate to the complainant which organ of international protection in the regional or universal sphere would be competent to hear the complaint, if appropriate. In addition, it shall transmit a copy of the complaint to the Ministry of Foreign Affairs, International Trade and Worship so that it can be informed of the request and can take any appropriate measures in the international order".

53. However, this article was deleted ("observed") when the Act was promulgated by Decree 849/95 and is therefore not part of it.[137] The argument put forward in the Decree concerning the deletion of article 3 is of interest in connection with the analysis of exceptions, for two main reasons: (*a*) it states that violations of human rights generally constitute acts performed in the exercise of authority (*acta jure imperii*)";[138] and (*b*) it notes that the Convention on the Prevention and Punishment

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[133] See arts. 23-25.

[134] Art. 23, para. 1, *in fine*.

[135] Art. 29.

[136] This exception was included at the request of the General Council of the Judiciary and the Public Prosecutor's Council (the organs responsible for judges and prosecutors) in order to ensure that, despite recognizing the relevant immunities, Spain can fulfil its international obligations derived from norms of international criminal law and especially that it can comply with requests for cooperation addressed to it by international criminal tribunals. It is important to realize that this provision must be read in the light of the sixth final provision of the Organic Act to the effect that "in the event of a normative conflict between the present Organic Act and the provisions of an international treaty to which the Kingdom of Spain is a party, preference shall be given to the international treaty".

[137] See art. 1 of the above-mentioned Decree. Decree 849/95 of 22 June 1995, adopted by the Council of Government, can be consulted at infoleg.mecon.gov.ar.

[138] See the second preambular paragraph of the Decree.

of the Crime of Genocide and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (which have constitutional status in Argentina) refer to "crimes that may give rise to civil liability" and that it "seems inappropriate to deny access to justice in order to require compliance with that requirement".[139] Consequently, although Act No. 24.488 does not contain an explicit exception concerning international crimes, its interpretation in the light of Decree No. 849/95, ordering its partial promulgation, leads to the conclusion that Argentine courts will be competent to hear complaints against a foreign State for violation of international human rights law.

54. Among the domestic laws regulating international crimes, mention should first be made of the Repression of Serious Violations of International Humanitarian Law Act, adopted in Belgium in 1993 and amended in 1999 and 2003. The Act had an interesting history, largely relating to the *Arrest Warrant* case of 11 April 2000.[140] The 1999 version stated that "immunity connected with the official status of a person shall not prevent the application of the (…) law", but following the 2003 amendment that statement was modified by the phrase "within the limitations established by international law".[141] Moreover, article 13 of the Act circumscribes this rule still further by stating that:

> "In accordance with international law, exercise of jurisdiction is excluded in relation to: (i) Heads of State, Heads of Government and Ministers for Foreign Affairs, during the period when they are performing their functions, as well as to other persons with immunity recognized in international law; (ii) persons enjoying total or partial immunity under a treaty binding on Belgium."

Consequently, Belgian law recognizes absolute immunity *ratione personae* but does not address immunity *ratione materiae* and this has been interpreted as implicit recognition of the possibility of applying exceptions to it in connection with crimes against humanity, war and genocide.

55. In the Netherlands, the 2003 International Crimes Act uses a similar wording, establishing in its section 16 that "[c]riminal prosecution for one of the crimes referred to in this Act is excluded with respect to: (*a*) foreign Heads of State, Heads of Government and Ministers for Foreign Affairs, as long as they are in office, and other persons in so far as their immunity is recognized under customary international law; (*b*) persons who have immunity under any convention applicable within the Kingdom of the Netherlands". Consequently, the Netherlands legislation recognizes the immunity of the "troika" members when they are in office, including with regard to international crimes. However, after their term in office has ended, immunity would apply to them only in respect of acts performed in an official capacity and this, according to information provided by the Netherlands Government, would not cover international crimes.[142]

56. The opposite approach is followed in the Penal Code of the Republic of the Niger, amended in 2003, which explicitly states that "immunity linked to the official

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[139] See third preambular paragraph of the Decree.

[140] Democratic Republic of the Congo v. Belgium, *I.C.J. Reports 2002*, p. 46. See also *ICJ Summaries 1997-2002*, p. 153.

[141] See Act amending the Repression of Serious Violations of International Humanitarian Law Act of 16 June 1993 and art. 144 *ter* of the Judicial Code. The text quoted above is from art. 5.3 of the Repression of Serious Violations of International Humanitarian Law Act.

[142] Comments by the Netherlands in reply to questions from the Commission (20 April 2016).

status of a person does not exempt him or her from [criminal] prosecution for war crimes or crimes against humanity".[143]

57. Lastly, the question of immunity has been regulated in various laws designed to incorporate and develop in domestic legislation the provisions contained in the Rome Statute, both from a substantive viewpoint and from the viewpoint of competence and procedure. These are what are referred to as "implementing laws", which are undeniably of interest for the purposes of the present report. These "implementing laws" have addressed the question of limitations and exceptions to immunity from two different perspectives: (*a*) definition of a general system of exclusion from immunity; and (*b*) definition of a system of exclusion from immunity solely in relation to the general obligation of States parties to cooperate with the International Criminal Court.

58. The first approach is typified by the laws adopted in Burkina Faso, the Comoros, Ireland, Mauritius and South Africa.[144] Under these laws, domestic law recognizes that in general no immunity can be invoked against to the exercise of national criminal jurisdiction regarding crimes within the competence of the International Criminal Court, especially crimes of genocide, crimes against humanity and war crimes.

59. The second approach circumscribes the question of application of immunity to those cases in which national criminal jurisdiction must be exercised in order to ensure some form of cooperation with the Court, especially as regards arrest and surrender of persons to the Court. This second approach is illustrated by laws adopted in Canada, France, Germany, Kenya, New Zealand, Norway, Switzerland and Uganda, which do not take into consideration immunity or relevance of official status as grounds for non-compliance with the order to surrender.[145] The laws

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[143] Art. 208.7. This article should be read in conjunction with art. 208.2, second paragraph, which establishes a universal jurisdiction so that the courts of the Niger will be competent even if the crimes were committed abroad.

[144] See Burkina Faso: Act No. 52 of 2009 on the determination of competence and procedures for application of the Rome Statute of the International Criminal Court by the jurisdictions of Burkina Faso, arts. 7 and 15.1 (according to which the courts of Burkina Faso may exercise jurisdiction with respect to persons who have committed a crime within the competence of the court, even in cases where it was committed abroad, provided that the suspect is in their territory. In addition, official status will not be grounds for exception or reduction of responsibility); Comoros, Act No. 11-022 of 13 December 2011 concerning the application of the Rome Statute, art. 7.2 ("the immunities or special rules of procedure accompanying the official status of a person by virtue of the law or of international law shall not prevent national courts from exercising their competence with regard to that person in relation to the offences specified in this Act"); Ireland: International Criminal Court Act 2006, art. 61.1 ("In accordance with article 27, any diplomatic immunity or state immunity attaching to a person by reason of a connection with a state party to the Statute is not a bar to proceedings under this Act in relation to the person."; Mauritius: International Criminal Court Act 2001, art. 4; South Africa: Act No. 27 of 18 July 2002 implementing the Rome Statute of the International Criminal Court, art. 4 (2) (a) (i) and 4 (3) (c) stating that South African courts are competent to prosecute crimes of genocide, crimes against humanity and war crimes when the presumed perpetrator is in South Africa and that any official status claimed by the accused is irrelevant. This exemption from immunity is, in addition, effective "despite any other law to the contrary, including customary and conventional international law". The Supreme Court of South Africa ruled on this question on 15 March 2016 in connection with the unsuccessful arrest warrant for President Al-Bashir.

[145] See Canada: 1999 Extradition Act, art, 18; France: Code of Criminal Procedure (under Act No. 2002-268 of 26 February 2002), art. 627.8; Germany: Courts Constitution Act, arts. 20.1 and 21;

adopted in Iceland, Ireland, Malta, Samoa and the United Kingdom deal only with the irrelevance of immunity and of official status in relation to nationals of States parties to the Rome Statute, establishing a system of consultations with the Court in the case of nationals of States not parties.[146] Lastly, the laws adopted in Argentina, Australia, Austria and Liechtenstein do not provide for non-applicability of immunity in all cases, using systems of consultation with the Court in order to resolve any dispute that may arise as a result of the combined application of articles 27 and 98, paragraph 1, of the Rome Statute.[147] In any case, the non-applicability of immunity for the purpose of ensuring cooperation with the Court is also mentioned in some of the implementing laws following the first approach, as in the case of Burkina Faso and South Africa.[148]

## C. International judicial practice

60. The question of limitations and exceptions to immunity from foreign criminal jurisdiction has been considered in various judgments of the International Court of Justice, the European Court of Human Rights, the International Criminal Tribunal for the former Yugoslavia, the Special Court for Sierra Leone and the International Criminal Court.

### 1. International Court of Justice

61. In the *Arrest Warrant* case, the International Court of Justice was categorical as to the full nature of the immunity from foreign criminal jurisdiction enjoyed by the Minister for Foreign Affairs of the Democratic Republic of the Congo:

> "Throughout the duration of his or her office, [the Minister for Foreign Affairs] when abroad enjoys full immunity from criminal jurisdiction and inviolability."[149]

Such immunity is based on the functions performed by the Minister for Foreign Affairs in international relations. To protect those functions, the immunity covers all acts performed by the Minister, both in an official capacity and in a private

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Kenya: Act No. 16 of 2008 on International Crimes, art. 27; New Zealand: International Crimes and International Criminal Court Act 2000, art. 31.1; Norway: Act No. 65 of 15 June 2001 concerning implementation of the Statute of the International Criminal Court of 17 July 1998 (Rome Statute) in Norwegian law, art. 2; Switzerland: Act on cooperation with the International Criminal Court, art. 6; Uganda: Act No. 18 of 2006 on the International Criminal Court, art. 25 1 (a) and (b).

[146] See Iceland: 2003 Act on the International Criminal Court, art. 20.1; Ireland: 2006 International Criminal Court Act No. 30, art. 6.1; Malta: Extradition Act, art. 26S; Samoa: Act No. 26 of 2007 on the International Criminal Court, arts. 32.1 and 41.

[147] See Argentina: Act 26200 Implementing the Rome Statute of the International Criminal Court, adopted by Act No. 25390 and ratified on 26 January 2001, arts. 40 and 41; Australia: International Criminal Court Act No. 41 of 13 August 2002, art. 12.4; Austria: Federal Act No. 135 of 13 August 2002 on cooperation with the International Criminal Court, arts. 9.1 and 9.3; Liechtenstein: Act of 20 October 2004 on cooperation with the International Criminal Court and other international tribunals, art. 10.1 (b) and (c). Denmark is a special case: its Act of 16 May 2001 on the International Criminal Court (art. 2) notes the decision to settle questions on executive immunity without defining a specific system for consultations.

[148] See Burkina Faso: Act No. 52 of 2009, art. 39.2; South Africa: Act No. 27 of 2002, arts. 10.5 and 10.9.

[149] See *I.C.J Reports, 2002*, p. 22, para. 54.

capacity.[150] The Court also concluded that it was unable to determine the existence of an exception to such immunity in contemporary international law, not even in cases where the acts in question constitute war crimes or crimes against humanity. According to the Court, such exception cannot be deduced from State practice[151] or from the instruments creating international criminal courts or tribunals.[152]

62. Nonetheless, the Court attempted to safeguard the principle of individual criminal responsibility enshrined in contemporary international law, which, in its view, is not affected by immunity from criminal jurisdiction. The Court used two complementary arguments to that end, namely the distinction between immunity and jurisdiction, on the one hand, and the distinction between immunity and impunity, on the other.

63. With regard to the first argument, the Court said that "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction", and that even in cases where certain conventions have imposed on States the obligation to prosecute or extradite a person for international crimes, such extension of jurisdiction "in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs", which "remain opposable before the courts of a foreign State".[153]

64. The argument concerning the distinction between immunity and impunity is of greater interest for the purposes of the present report. In that connection, the Court noted that

> "The *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility."[154]

65. To reinforce the argument, the Court pointed to the existence of an alternative model for deducing an individual's criminal responsibility, which it described as follows:

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[150] *Ibid*. For a description of said functions, see *ibid*., pp. 21-22, para. 53. The Court was especially clear in describing the functional dimension of that immunity: "[f]urthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions" (*ibid*., p. 22, para. 55).

[151] After examining the relevant national laws and a few decisions of national higher courts, the Court stated that it had been unable to deduce "that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity" (*ibid*., p. 24, para. 58, first subparagraph.

[152] *Ibid*., second and third subparagraphs.

[153] *Ibid*., pp. 24-25, para. 59.

[154] *Ibid*., p. 25, para. 60.

> "First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.
>
> Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.
>
> Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.
>
> Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."[155]

66. With these arguments, the Court set out a model of immunity from foreign criminal jurisdiction of Ministers for Foreign Affairs which has become the benchmark, revolving around four basic ideas:

(a) All acts performed by the Minister for Foreign Affairs during his or her time in office are covered by absolute immunity;

(b) There are no exceptions to such immunity;

(c) Immunity is a "procedural bar" to the exercise of jurisdiction and not a substantive bar to the deduction of international criminal responsibility, including for acts which might constitute international crimes;

(d) Individual criminal responsibility is safeguarded by recourse to other means of redress distinct from the exercise of foreign criminal jurisdiction.

67. In any event, it should be noted that even though the judgment in the *Arrest Warrant* case is usually cited as a benchmark for the regime of immunity from foreign criminal jurisdiction for all State officials, the Court's conclusions on this matter have limited scope. For instance, as the Court itself noted in the judgment that, "[f]or the purposes of [the said] case, (…) it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider",[156] but did not go any further. The Court's response therefore falls within the scope of immunity *ratione personae*, since it is not possible to conclude that said model should apply automatically to other State officials, who the Court seems to admit fall under a different legal regime. In any event, the Court's view on the topic under consideration is conclusive: there are no exceptions to immunity from international criminal jurisdiction for a Minister for Foreign Affairs (and, by extension, to immunity *ratione personae*), not even in respect of such grave crimes as war crimes and crimes against humanity.

68. Although the judgment was approved by a large majority, it must be remembered that various judges took a more nuanced view of the limitations and exceptions to immunity, and even dissented from the judgment. In that connection,

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[155] *Ibid*., p. 25, para. 61.
[156] *Ibid*., p. 21, para. 51, *in fine*.

although Judges Higgins, Kooijmans and Buergenthal supported the Court's position that there are no exceptions that could apply to immunity in the case under consideration, they drew attention to the increasing claim in the literature "that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform".[157] They also pointed to the need for a balanced interpretation of immunity that takes into account the need to protect the principle of sovereign equality and the requirements of international relations, on the one hand, and the need to ensure that said principle does not impede the combating of impunity, on the other. In that regard, they noted the increasing recognition that the notion that "perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law".[158] For the three judges, immunity is never substantive; it "[h]as given rise to a tendency, in the case of international crimes, to grant procedural immunity from jurisdiction only for as long as the suspected State official is in office".[159] It should be noted that the three judges also expressed doubts as to the viability of the alternative means of redress which the Court referred to in its judgment.[160]

69. The position taken by Judge Al-Khasawneh in his dissenting opinion is more convincing. In his view, the immunity from international criminal jurisdiction of the Minister for Foreign Affairs must remain limited to acts performed in an official capacity and, even more importantly for the purposes of the present report, can under no circumstances apply to war crimes, crimes against humanity and genocide. For him, it does not appear reasonable to admit that State immunity has been gradually restricted to exclude acts that are of a commercial or *jure gestiones* nature. Nonetheless, the immunity of the Minister for Foreign Affairs should be maintained where he or she commits an international crime, especially at a time when the combating of grave crimes has assumed a *jus cogens* character.[161]

70. Lastly, Judge *ad hoc* Van den Wyngaert not only denied that Ministers for Foreign Affairs enjoy immunity *ratione personae*, but also introduced new elements in her argument, which could be summarized as follows: (a) extending immunity *ratione personae* to the Minister for Foreign Affairs "would dramatically increase the number of persons enjoying international immunity from jurisdiction. There would be a potential for abuse. *Male fide* Governments could appoint suspects of serious human rights violations to cabinet posts in order to shelter them from prosecution in third States",[162] and "[v]ictims of such violations bringing legal action against such persons in third States would face the obstacle of immunity from jurisdiction (…) and may even lead to conflict with international human rights rules";[163] (b) there is a "general tendency toward the restriction of immunity of the State officials (including even Heads of State), not only in the field of private and commercial law where the *par in parem* principle has become more and more restricted and deprived of its mystique, but also in the field of criminal law, when

[157] See separate joint opinion of Judges Higgins, Kooijmans and Buergenthal, p. 88, para. 85.
[158] *Ibid*., p. 78, para. 51, second subparagraph.
[159] *Ibid*., p. 85, para. 74. See also para. 75.
[160] *Ibid*., p.86, para. 78.
[161] See dissenting opinion of Judge Al-Khasawneh, in particular p. 98, para. 7.
[162] See dissenting opinion of Judge *ad hoc* Van den Wyngaert, p. 150, para. 21, *in fine*.
[163] *Ibid*., p. 150, para. 22.

there are allegations of serious international crimes";[164] and (iii) the alternative model which, according to the judgment, would help to reduce the individual criminal responsibility of a Minister for Foreign Affairs for international crimes, is not consonant with the reality of our international practice nor with the limited nature of the jurisdictions of international criminal courts.[165]

71. In *Certain Questions of Mutual Assistance in Criminal Matters*, the ICJ also made reference to the limitations and exceptions to immunity, reiterating what it had said in the *Arrest Warrant* case:

> "A Head of State enjoys in particular 'full immunity from criminal jurisdiction and inviolability' which protects him or her 'against any act of authority of another State which would hinder him or her in the performance of his or her duties.'"[166]

In any event, that assertion was made solely in relation to the immunity *ratione personae* that would be enjoyed by the President of Djibouti. Conversely, by not addressing the immunity claimed by the *Procureur de la République* and the Head of National Security, the judgment failed to provide conclusive reference as to the limitations and exceptions that could have been alleged in both cases.

72. Lastly, in *Questions Relating to the Obligation to Prosecute or Extradite*, the Court also did not pronounce on the question of immunities, since Chad had communicated to the Court that it had waived the immunity of Mr. Hissène Habré.[167] However, for the purposes of the present report, it is worth noting that the Court stressed in its judgment that "the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)".[168] It is also important to note that, for the Court, the oversight system established by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is intended "(…) to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State party".[169] In so doing, the Court introduced the argument that the combating of impunity is one of the objectives pursued by the international community.[170]

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[164] *Ibid*., p. 151, para. 23.

[165] *Ibid*., pp. 153-159, paras. 34-38; Judges Higgins, Kooijmans and Buergenthal expressed a similar opinion in their joint separate opinion, *ibid*., p. 86, para. 78.

[166] *Djibouti v. France*, judgment, *I.C.J. Reports 2008*, p. 236, para. 170.

[167] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment, *I.C.J. Reports 2012*, p. 422. Only Judge *ad hoc* Sur referred to the topic of immunity, stating in his dissenting opinion that "unlike the Rome Statute for example, the Convention [against Torture] does not state that the immunity of public authorities is unenforceable in proceedings instituted before domestic courts" (*ibid*., p. 620, para. 54). However, that topic was not before the Court.

[168] *Ibid*., p. 457, para. 99. Some of the judges maintained that stance on the prohibition of torture in their separate or dissenting opinions. In her dissenting opinion, for example, Judge Xue expressly identified "the prohibition of torture as *jus cogens*" p. 575, para. 17), by concluding that "*jus cogens*, by its very nature, does not automatically trump the applicability of these procedural rules" (*ibid*.).

[169] *Ibid*., p. 461, para. 120.

[170] In their separate or dissenting opinions, some of the judges also referred to the fight against impunity and the role that the Convention against Torture plays to that end. In that connection, see the opinions of Judges Cançado Trindade (*ibid*., p. 519, para. 83 and p. 527, para. 103) and Donoghue (*ibid*., p. 584, para. 2).

73. While in the judgments analysed above the Court addressed the basis on which a State could claim to exercise jurisdiction against an individual (State official), the issue raised in *Jurisdictional Immunities of the State* is different. In that case, what was before the Court was not the immunity of a high-ranking official, but the immunity of the State in a narrow sense. Nonetheless, some of the issues addressed in that case are of considerable interest for the institution of immunity, in abstract terms, especially the procedural nature of immunity, the relationship between immunity and the exercise of jurisdiction, and the relationship between immunity and responsibility. On the other hand, the Court did address two possible exceptions to immunity: the "territorial tort exception" and the exception based on the violation of *jus cogens* norms, both in close reference to war crimes and crimes against humanity committed by the Nazi occupying forces in Italian and Greek territories during the Second World War.

74. Given its complex content, it is not surprising that the judgment has given rise to a fascinating academic debate.[171] On the other hand, it should be borne in mind that, owing to that same content, the judgment has also been cited as a reference in identifying the rules pertaining to the regime of immunity in a broad sense. For the purposes of the present report, an analysis of the judgment in *Jurisdictional Immunities of the State* would therefore be useful, in particular with regard to the following aspects: the nature of immunity and its relationship with jurisdiction and the regime of the international responsibility of the State; the effects of *jus cogens* norms on immunity; the scope of the "territorial tort exception", and the question concerning the existence of alternative means of redress.

75. In that judgment, the Court, in line with its previous rulings, put emphasis on the clearly procedural nature of immunity, which does not affect the definition of State responsibility, but only the possibility of such responsibility deriving from the exercise of foreign jurisdiction. In that connection, it stated expressly that:

> "The law of immunity is essentially procedural in nature (…). It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful."[172]

76. The basis for immunity, according to that view, is the principle of the sovereign equality of States. However, that principle does not operate autonomously; the Court stated that said principle:

> "has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory."

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[171] See, *inter alia*, Jaume Ferrer Lloret, "La insoportable levedad del derecho internacional consuetudinario en la jurisprudencia de la Corte Internacional de Justicia: el caso de las inmunidades jurisdiccionales del Estado", in *Revista Electrónica de Estudios Internacionales*, vol. 24 (2012), pp. 1-36; Chimène I. Keitner, "*Germany v. Italy* and the Limitations of Horizontal Enforcement. Some Reflections from a United States Perspective", *Journal of International Criminal Justice*, vol. 11 (2013), pp. 167-183; Lorna McGregor, "State Immunity and Human Rights. Is There a Future after *Germany v. Italy*?", *Journal of International Criminal Justice*, vol. 11 (2013), pp. 125-145.

[172] *Jurisdictional Immunities of the State*, judgment*, I.C.J. Reports 2012*, p. 124, para. 58. See also the separate opinion of Judge Koroma, p. 157, para. 3.

77. The Court therefore recognizes the need to balance competing principles, having stated that:

> "Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it."[173]

78. The Court also used the argument that immunity is a procedural bar to conclude that it does not conflict with the rules of *jus cogens*:

> "Assuming (...) that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful (...) For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility."[174]

The Court later added:

> "A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application."[175]

79. The third relevant topic addressed by the Court in that case is the question of whether there is any rule of customary international law that implies the existence of an exception to State immunity based on a serious violation of human rights or international humanitarian law. The Court's answer is that there is not. It stated that:

> "customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated."[176]

80. Still with regard to exceptions, the Court also rejected the argument that the "territorial tort principle" is applicable to the case at hand. However, it should be noted that the Court's response concerning that exception is more nuanced than its comments on a potential exception based on the violation of *jus cogens* rules. It did not deny the existence of that exception or of a certain amount of practice in that respect, but simply stated that it was not applicable to the case at hand because the

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[173] *Ibid*., pp. 123-124, para. 57.
[174] *Ibid*., p. 140, para. 93. See, in general, paras. 92-97.
[175] *Ibid*., p. 141, para. 95.
[176] *Ibid*., p. 137, para. 84. *Sed contra*, see the dissenting opinion of Judge Cançado Trindade and the separate opinion of Judge Bennouna.

acts imputable to Germany, despite their gravity, constitute *acta jure imperii* and, as such, are covered by the jurisdictional immunities of the State.[177]

81. In the same judgment, the Court also ruled on the contention by Italy that the exercise of jurisdiction is a "last resort" in view of the impossibility of satisfying the claims of the victims for redress for the harm suffered. The Court concluded that immunity is not dependent upon whether or not there exists a right to redress or alternative means of securing redress.[178]

82. In summary, in that judgment the Court, in line with its previous rulings, maintained its view of immunity as a merely procedural institution. However, it went a step further in strengthening State immunity by concluding that its existence is not in conflict with the rules of *jus cogens*, that no exceptions to such immunity based on a serious violation of human rights, international humanitarian law or other rules of *jus cogens* can be identified, and that the "territorial tort exception" does not apply in the case of State immunity for *acta jure imperii*. Lastly, the Court could also be considered to be moving away from the model of alternative means of redress as a way of preventing impunity that it established in its judgment in *Arrest Warrant*.

83. On first reading, the Court's position could, *a priori*, appear to have a bearing on the immunity of State officials from foreign criminal jurisdiction. The inverted parallelism that the Court itself seems to establish between the *Jurisdictional Immunities of the State* and *Arrest Warrant* cases has no doubt contributed to such an understanding:

> "In *Arrest Warrant*, the Court held, albeit without express reference to the concept of *jus cogens*, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of *jus cogens* did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf (...) [T]he same reasoning is applicable to the application of the customary international law regarding the immunity of one State from proceedings in the courts of another."[179]

84. The fact that the Court brought national case law, which at times pertains more to State officials than to the State itself, into its argument may also have contributed to such a reading. It is therefore unsurprising that this judgment is sometimes used to argue that there are no limitations or exceptions to the immunity of State officials from foreign criminal jurisdiction based on the violation of human rights or international humanitarian law or the commission of international crimes.[180]

85. However, it should be noted that the Court itself clearly set out the scope of the judgment: State immunity *stricto sensu*. Suffice it to note that the Court stated that *Pinochet* is not relevant to *Jurisdictional Immunities of the State* because *Pinochet* relates to the immunity of an individual rather than that of the State, and

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[177] *Ibid*., pp.136-137, paras. 83-84. *Sed contra*, see the dissenting opinion of Judge *ad hoc* Gaja.
[178] *Ibid*., pp. 141-143, paras. 99-101. *Sed contra*, see the dissenting opinions of Judge Cançado Trindade and Judge Yusuf and the separate opinion of Judge Bennouna.
[179] *Ibid*., p. 141, para. 95.
[180] For example, see in this section how the European Court of Human Rights cited this judgment as an authority *in Jones and others v. United Kingdom*.

immunity from criminal jurisdiction rather than immunity from civil jurisdiction.[181] The Court thus seems to establish a clear distinction between State immunity and the immunity of State officials from foreign criminal jurisdiction. That conclusion is even more evident in the following unambiguous statement by the Court:

> "The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case."[182]

86. It is not the purpose of this report to analyse the Court's reasoning in its judgment in *Jurisdictional Immunities of the State*. However, while some of the Court's arguments in that judgment may have an abstract value to contribute to the definition of the immunities regime under international law, it should be noted that the conclusions reached in that case cannot automatically be transposed to the regime of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.

### 2. European Court of Human Rights

87. The European Court of Human Rights pronounced on questions that are relevant for the consideration of limitations and exceptions to immunity in its judgments in the cases of *Al-Adsani v. United Kingdom*,[183] *McElhinney v. Ireland*,[184] *Kalogeropoulou and others v. Greece and Germany*,[185] and *Jones and others v. United Kingdom*.[186]

88. In all those cases, the Court concluded that the application of State immunity in civil court did not constitute a violation of the right of access to a court per se, as embodied in article 6, paragraph 1 of the European Convention on Human Rights. According to the Court,[187] restrictions to the right of access to a court may be permissible, provided they meet the following requirements: (a) that they are provided for in law; (b) that there is a relationship of proportionality between the interests to be protected by the restriction and limitations to the right that may arise therefrom; and (c) that the restriction does not in fact imply an absolute loss of the right of access to a court.[188] In the Court's view, the rule relating to State immunity

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[181] See *Jurisdictional Immunities of the State*, *judgment*, *I.C.J. Reports 2012*, pp. 137-138, para. 87.

[182] *Ibid*., p. 139, para. 91.

[183] *Al-Adsani v. United Kingdom*, Application No. 35763/97, judgment of 21 November 2001, *Report of Judgments and Decisions 2001-XI*.

[184] *McElhinney v. Ireland*, Application No. 31253/96, judgment of the Grand Chamber of 21 November 2001, *Report of Judgments and Decisions 2001-XI*.

[185] Application No. 59021/00, judgment of 12 December 2002, *Report of Judgments and Decisions 2002-X*.

[186] *Jones and others v. United Kingdom*, Applications Nos. 34356/06 and 40528/06, judgment of 2 June 2014.

[187] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221.

[188] See *Al-Adsani*, para. 53; *Kalogeropoulou*; *McElhinney*, para. 34; and *Jones*, paras. 186-187.

will satisfy the three requirements, in that it is a recognized norm of customary international law which pursues a legitimate aim, namely to protect the principle of sovereign equality and maintain stable, conflict-free relations between States, and does not entail the complete loss of the right of access to a court, given that alternative means of redress are available to applicants, including judicial action (action before the courts of another State), diplomatic action and international negotiation through the victim's State of nationality.[189]

89. It must be borne in mind that this declaration of compatibility between immunity from jurisdiction and the right of access to a court is defined by the Court in relation to State immunity from civil jurisdiction, with the sole exception being the case of *Jones and others v. United Kingdom*, where it pronounced on the immunity from civil jurisdiction of State officials, applying the same conclusions it had formulated previously in respect of State immunity.[190]

90. Secondly, the Court has also pronounced on possible exceptions to the rule of immunity, in particular with respect to torture and *jus cogens* norms, on the one hand, and the "territorial tort exception", on the other.

91. With regard to torture and *jus cogens* norms, the Court has concluded that, despite the inherent gravity of any conduct that constitutes a violation of a peremptory norm, and in particular the prohibition against torture, it is not possible to find in existing international law any norm that provides an exception to State immunity from civil jurisdiction based on a violation of a *jus cogens* norm.[191] It should also be noted that in *Kalogeropoulou*, the Court followed *Al-Adsani* in its conclusions without presenting any new arguments, adding that the applicant had alternative means of securing redress.[192] Lastly, with respect to *Jones*, it should be noted that even though the Court refused to modify its previous position, it used the uncertainty that exists in international law as to the regime of exceptions to justify its decision, to a certain extent. It referred, *inter alia*, to the fact that the International Law Commission is working on the topic without having taken a decision in that regard, and the fact that international practice is constantly changing and reflects divergent positions on a possible exception based on torture.[193] It is also worth noting that the Court cited the judgment of the International Court of Justice in *Jurisdictional Immunities* as precedent.[194] Nonetheless, the Court expressly acknowledged that there seems to be "some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials", and that, "in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States".[195]

92. On the other hand, it should be borne in mind that a non-negligible number of members of the Court have disagreed with the assertion that such an exception does

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[189] See *Al-Adsani*, paras. 54-56; *Kalogeropoulou*; *McElhinney*, paras. 35-40; and *Jones*, paras. 188-189.
[190] See *Jones*, paras. 204-206.
[191] See *Al-Adsani*, paras. 58, 61 and 63; and *Jones*, para. 215.
[192] See *Kalogeropoulou*.
[193] See *Jones*, paras. 95-154 and 193-195. Conversely, in his dissenting opinion, Judge Kalaydjieva maintained the need to review the case law of the European Court of Human Rights in *Al-Adsani*. See also the concurring opinion of Judge Bianku, albeit to a different end.
[194] See *Jones*, para. 198.
[195] See *Jones*, paras. 213-215.

not exist, issuing dissenting opinions in *Al-Adsani*, *Kalogeropoulou* and *Jones*, in which they emphasized that, as a *jus cogens* norm, the prohibition of torture trumps any other norm of international law that does not fall into said category, including norms of international law governing immunity from civil jurisdiction. Such opinions carried considerable weight in *Al-Adsani*, considering the narrow majority (nine to eight) of the ruling.[196]

93. The Court addressed the "territorial tort exception" in *McElhinney v. Ireland*, where it concluded that there is no territorial tort exception in respect of the acts under dispute, namely the assault of an Irish national by a member of the United Kingdom armed forces in the territory of Ireland during incidents that occurred at the border between Northern Ireland and the Republic of Ireland. The Court applied a narrow interpretation of the territorial tort exception in reaching that conclusion, indicating that such exception applied only to "insurable injury" related to activities *jure gestionis*. Conversely, it maintained that the impugned acts were unequivocally acts performed in an official capacity — acts *jus imperii* — for which the United Kingdom was responsible, hence the deduction that it was the immunity from civil jurisdiction of the United Kingdom that was at issue.[197] On the other hand, the Court seems to have accorded great importance in its reasoning to the fact that the applicant had other means of redress, including by bringing an action in a court of the United Kingdom.[198]

94. Thirdly, special attention should be drawn to the fact that despite refusing to recognize the existence of an exception, the European Court concluded unequivocally that the prohibition of torture was a *jus cogens* norm and that said prohibition was of an absolute nature, permitting no exception to the obligation arising therefrom in the event of a violation of the prohibition against torture and not of any other right which might be related incidentally to the prohibition considered per se.[199] It should be noted, therefore, that in *Al-Adsani*, the Court did not define immunity from civil jurisdiction as an institution which prevents the exercise of jurisdiction by British courts to punish perpetrators of acts of torture, but as an institution which can be used to bar British courts from seeking compensation from a foreign State for torture carried out by British officials.[200] This argument undoubtedly deserves to be reaffirmed in the present report.

95. In any event, in the light of the concrete pronouncements of the Court in respect of exceptions to State immunity from civil jurisdiction in the cases analysed, it is possible to identify a number of elements that are relevant for the purpose of the present report:

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[196] See the joint dissenting opinion of Judges Rozakis and Caflisch, with Judges Wildhaber, Costa, Cabral Barreto and Vajić concurring. See also the dissenting opinion of Judge Loucaides in *McElhinney*.

[197] See *McElhinney*, in particular para. 38. By contrast, see dissenting opinion of Judge Rozakis, the joint dissenting opinion of Judges Caflisch, Cabral Barreto and Vajić, and the dissenting opinion of Judge Loucaides.

[198] See para. 39. Some of the judges disputed that affirmation or considered that its existence was not relevant in the case under consideration, given that the acts were committed against an Irish national, in Ireland, which meant that the national should first seek redress in Irish territorial jurisdiction. See the dissenting opinion of Judge Rozakis, joint dissenting opinion of Judges Caflisch, Cabral Barreto and Vajić, and the dissenting opinion of Judge Loucaides.

[199] See *Al-Adsani*, para. 59.

[200] *Ibid*., paras. 40-41.

(i) State immunity from civil jurisdiction is considered an exception or limitation to the right of access to courts, and therefore an exception to the exercise of jurisdiction by the forum State.

(ii) Such restriction, although compatible with the right of access to justice, cannot give rise to a total loss of the right itself, the Court having introduced the formulation "other means of redress", which the International Court of Justice had used in the *Arrest Warrant* case.

(iii) Prohibition against torture is defined per se as a *jus cogens* norm; it is an absolute prohibition which does not permit any derogation whatsoever.

In addition, given that the European Court of Human Rights circumscribes, directly or implicitly, its pronouncements on State immunity from civil jurisdiction,[201] it does not seem possible to conclude that the judgments in question constitute a sufficient basis for confirming that the immunity of State officials from foreign criminal jurisdiction is of an absolute nature, or that there are no exceptions to such immunity.

### 3. International criminal court or tribunals

96. Various international criminal courts or tribunals have addressed the immunity of State officials from jurisdiction in the performance of their duties. Although the decisions of those tribunals are in the context of international criminal jurisdiction, some of the arguments contained therein are relevant for the purposes of the present report, given that they address very broad questions or the manner in which the immunity of State officials from criminal jurisdiction operates in national criminal courts or tribunals.

97. The International Military Tribunal at Nürnberg had already indicated that the official duties of an accused or the fact that the accused was acting on orders could not be used to exempt the accused from responsibility, and that the crimes under its jurisdiction reflected legal obligations that international law imposed directly on individuals, who could not be exonerated from such responsibility or from legal proceedings on the basis of their connection with the State. The Commission took into account both the statute and the judgments of that Tribunal in the development of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Nürnberg Principles), which are analysed *infra* and which the Commission refers to constantly in its work on other topics, including the draft Code of Crimes against the Peace and Security of Mankind.[202] It is also worth remembering that the contributions of the Nürnberg Tribunal to the definition of the principle of individual criminal responsibility also mark a starting point in modern international criminal law. The decisions of international criminal courts or tribunals that have been performing the functions of that Tribunal since the end of the twentieth century are analysed below.

98. The International Criminal Tribunal for the former Yugoslavia has pronounced on the relationship between the immunity enjoyed by State officials and international crimes, asserting that there is an exception to the norms governing

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[201] On this topic, see the third report of the Special Rapporteur, document A/CN.4/673, para. 43 and the fourth report of the Special Rapporteur, document (A/CN.4/686, paras. 45-46 and the first footnote in para. 46.

[202] See section E *infra*.

immunity *ratione materiae* before both international criminal courts or tribunals and national courts. In the *Blaškić* case, for instance, it stated that the exception:

> "arise[s] from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity".[203]

99. The Tribunal has maintained the same position in other cases, including in relation to immunity *ratione personae*. It is worth noting, however, that in those cases the Tribunal seems to limit the exception to the exercise of its jurisdiction, without extending it to cases brought before domestic courts.[204] In addition, relying on the Statute of the Nürnberg Tribunal,[205] the International Criminal Tribunal for the former Yugoslavia formulated that exception in broad terms, indicating that:

> "it would be incorrect to suggest that such an immunity exists in international criminal courts".[206]

100. The Special Court for Sierra Leone has also held that immunity *ratione personae* cannot be invoked, as it did in the case of *Taylor*, which concerned charges for serious violations of international humanitarian law. In that decision, the Court did not base its assertion on the type of crime committed, but on the very nature of the Special Court, considered an international criminal court. In response to the claim that immunity *ratione personae* protected Mr. Taylor, the Appeals Chamber stated that immunity:

> "derives from the equality of sovereign States and therefore has no relevance to international criminal tribunals which are not organs of a State but derive their mandate from the international community".[207]

It therefore concluded that:

> "the sovereign equality of States does not prevent a Head of State from being prosecuted before an international criminal tribunal or court".[208]

101. The question of the immunity of State officials, in particular but not limited to immunity *ratione personae*, was also raised before the International Criminal Court

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[203] International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Prosecutor v. Tihomir Blaškić*, IT-95-14-AR 108, 29 October 1997, para. 41, second subparagraph.

[204] See the following cases: *Radovan Karadžić*, *Ratko Mladić and Mico Stanišić*, case IT-95-5-D, formal request for deferral of jurisdiction addressed to the Republic of Bosnia and Herzegovina, judgment of the Trial Chamber, 16 May 1995, *Judicial Reports 1994-1995*, para. 24; *Slobodan Milošević*, case IT-02-54-T, preliminary exceptions, decision of the Trial Chamber of 8 November 2001, para. 31; *Anto Furundžija*, case IT-95-17/1-T, judgment of Trial Chamber II, 10 December 1998, *ibid*., *1998*, para. 140; *Dragoljub Kunarac, Radomir Kovać and Zoran Vuković*, cases IT-96-23-T and IT-96-23/1-T, judgment of Trial Chamber I, 22 February 2001, para. 494.

[205] Charter of the International Military Tribunal — Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Charter), 8 August 1945 (United Nations, *Treaty Series*, vol. 82, p. 279.

[206] See *Radislav Krstic*, case IT-98-33-A, decision on subpoenas, Appeals Chamber, 1 July 2003, para. 26.

[207] *Taylor*, case SCSL 2003-01-I, Appeals Chamber, decision on immunity from jurisdiction, of 31 May 2004, para. 51. See *International Law Reports* (ILR), vol. 128, p. 264.

[208] *Ibid*., para. 52.

in relation to the situations in Darfur-Sudan, Libya and Kenya. Many of the accused invoked their official status, and hence their immunity, but were not present (or were not present on a continuous basis) at trial. In other cases, especially in the case of *Al-Bashir*, the topic of immunity was raised in relation to the obligation to cooperate with the Court, as provided for in Part IX of the Rome Statute.

102. Although the disputes in all those cases stemmed from the execution of arrest warrants or subpoenas issued by the Court, they ultimately led to the issue of the scope of the Court's jurisdiction and whether or not the exercise of said jurisdiction could be subject to a "procedural bar". In all those cases, the Court concluded that neither immunity *ratione personae* nor immunity *ratione materiae* could be invoked.

103. With regard to the Darfur-Sudan situation, the International Criminal Court held that immunity could not be invoked in the cases of *Al-Bashir* (*ratione personae*) and *Abdel Hussein* (*ratione materiae*). In both cases, in issuing its arrest warrant, the Pre-Trial Chamber determined that the immunity of the accused State officials could not be invoked, based on article 27 of the Statute and on the powers of the Security Council to refer a case to the Court pursuant to article 13 (b) of the Statute. In a joint interpretation of both provisions, the Court concluded that the irrelevance of official duties and the inability to invoke national and international immunities applied fully in the cases of Darfur, whether said State was a party to the Rome Statute or not. The Court said that:

> "by referring the Darfur situation to the Court, pursuant to article 13 (b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole."[209]

104. The Court also confirmed its jurisdiction in purposive terms, relating to the key goal of combating impunity and ensuring that persons accused of committing serious crimes of concern to the international community as a whole are brought to justice.

105. The Court applied the same reasoning when it ruled on the obligation of the Democratic Republic of the Congo to cooperate by arresting and surrendering President Al-Bashir, concluding that Mr. Al-Bashir did not enjoy immunity under international law, because that immunity had been implicitly waived by the Security Council, which had also imposed on the Sudan a general obligation to cooperate with the Court.[210] The Court employed a similar argument in the cases of *Muammar Gaddafi*, *Saif Al-Islam Gaddafi* and *Al-Senussi* on the Libya situation.[211]

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[209] See *Omar Hassan Ahmad Al-Bashir*, case ICC-02/05-01/09, Pre-Trial Chamber I, decision on the prosecution's application for a warrant of arrest, of 4 March 2009, para. 45. It is worth noting that the Court had previously declared that it was competent to hear the case of a person who is not a national of a State party but who had allegedly committed crimes under the Court's jurisdiction in the territory of a State not party to the Statute, on the basis of the decision taken by the Security Council pursuant to article 13 (b) of the Statute (*ibid*., paras. 41-43). For a similar approach, see *Abdel Raheem Muhammad Hussein*, case ICC-02/05-01/12, Pre-Trial Chamber, decision on the prosecution's application under article 58, of 1 March 2012, para. 8.

[210] See case ICC-02/05-01/09, Pre-Trial Chamber II, decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court, of 9 April

106. By contrast, in the cases of *Kenyatta* and *Ruto*, on the Kenya situation, the Court did not refer expressly to said argument. In both cases, in response to a defence petition for excusal from trial of the accused, to allow them to adequately fulfil their duties as President and Vice-President of Kenya, the Court said that it could not take those circumstances into consideration because, as a consequence of the Second World War:

> "the norm of immunity was revised in favour of jurisdiction of international courts to try Heads of State and other senior public officials, for violation of international criminal law".[212]

In the view of the Court, the chief object of article 27 of the Rome Statute is the incorporation of that principle.[213]

107. A similar approach to the one taken in the cases of *Kenyatta* and *Ruto* can be found in cases which the Court had considered previously concerning the failure by Malawi and Chad to cooperate in the arrest of President Al-Bashir. The Court had noted in those cases that:

> "customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes".[214]

108. In short, the decisions analysed *supra* lead to the conclusion that international criminal courts or tribunals, including the International Criminal Court, have unequivocally rejected the possibility of the immunity of State officials, both *ratione personae* and *ratione materiae*, being invoked in said courts. Moreover, some of the courts have also extended said affirmation to domestic courts, on an exceptional basis. It should be noted that the decisions of international criminal courts or tribunals on this topic have brought into play the special issue of cooperation of domestic courts with international courts and the possible incidence of such cooperation on the immunity of State officials from foreign criminal jurisdiction. That issue will be analysed later in the present report.[215]

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2014, para. 29.

[211] See *Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, case ICC-01/11, Pre-Trial Chamber, decision on the prosecution's petition pursuant to article 58, of 27 June 2011, para. 9.

[212] See *William Samoei Ruto and Joshua Arap Sang*, case ICC-01/09-01/11-777, Trial Chamber V (A), decision on Mr Ruto's request for excusal from continuous presence at trial, of 18 June 2013, para. 67. It should be borne in mind that the Trial Chamber drew on precedents of the Nürnberg Tribunal, other international criminal courts or tribunals, the Charter of the United Nations and the work of the Commission for its decision (see paras. 66-70).

[213] *Ibid*., para. 69. See also *Uhuru Muigal Kenyatta*, case ICC-01/09-02/11-830, Trial Chamber V (B), decision on defence motion for excusal from continuous presence at trial, of 18 October 2013, separate concurring opinion of Judge Eboe-Osuji, para. 32.

[214] See Decision pursuant to article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I, ICC-02/05-01/09-139, para. 43). The same argument was applied in decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, of 13 December 2011 (Pre-Trial Chamber I, ICC-02/05-01/09-140, para. 13, *in fine*).

[215] See chapter III, sect. B.

## D. National judicial practice

109. National judicial practice with regard to persons who enjoy immunity and acts that are covered by immunity was analysed in the third and fourth reports of the Special Rapporteur.[216] In the present section, we will analyse the decisions of national courts that have pronounced on the applicability or non-applicability of immunity on specific circumstances and that contain rulings that are relevant for the study of the limitations and exemptions to immunity. For the sake of clarity, those judicial decisions will be analysed as they relate to immunity *ratione personae* and to immunity *ratione materiae*. Although the analysis will focus preferably on the decisions of criminal courts or tribunals, the decisions of civil courts will also be taken into account if they are considered useful, as was the case in previous reports.

110. With regard to the decisions concerning immunity *ratione personae*, it should be noted that almost all national criminal courts or tribunals have held that Heads of State (and in some cases other high-ranking officials) enjoy immunity from foreign criminal jurisdiction during their time in office. The courts have admitted the full applicability of immunity to a variety of offences,[217] including international crimes.[218] This assertion is based on the existence of principles or norms of

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[216] See, document A/CN.4/673, paras 29-38, and document A/CN.4/686, paras. 49-60.

[217] See the following cases: *Re Honecker*, Federal Republic of Germany, Federal Supreme Court, judgment of 14 December 1984, ILR, vol. 80, p. 366 (a criminal case against the then President of the Council of State of the Federal Democratic Republic of Germany — the equivalent of the Head of State — for illegal detention); *In re Hussein*, Germany, Regional Superior Court of Cologne, judgment of 16 May 2000, 2 Zs 1330/99, paras. 10-15, cited in Pedretti, *Immunity of Heads of State* ..., p. 151 (a case brought against the Head of State of Iraq, Saddam Hussein, for hostage-taking and use of hostages to defend his objectives during the second Gulf war; the court considered that his actions were not crimes under international law); *In re Bouteflika*, France, Court of Cassation, Criminal Chamber No. 01-83440, judgment of 13 November 2001 (a case of defamation and public insults).

[218] See the following cases: *Teodoro Obiang Nguema and Hassan II*, Spain, National High Court, decision of Central Investigation Court No. 5, of 23 December 1998; *Fidel Castro*, Spain, National High Court, Criminal Chamber, decision 1999/2723, of 4 March 1999 (also the decisions of Central Investigation Court No. 2 of Spain, National High Court, of 19 November 1998 and 4 November 1999); *Milosevic*, Spain, National High Court, decision of Central Investigating Court No. 1, of 25 October 1999; *Alan García Pérez and Alberto Fujimori*, Spain, National High Court, decision of 15 June 2001; *Silvio Berlusconi*, Spain, National High Court, decision No. 262/97, of 27 May 2002; *Re Sharon and Yaron, HSA v. SA (Ariel Sharon) and YA (Amos Yaron)*, Court of Cassation of Belgium, 12 February 2003, ILR, vol. 127, p. 123 (the crimes allegedly committed by the accused were genocide, war crimes and serious violations of the Geneva Protocols and the additional protocols thereto); *Hugo Chávez*, Spain, National High Court, Central Investigation Court No. 4, of 24 March 2003; *Re Mofaz*, United Kingdom, Bow St. Magistrates' Court, judgment of 12 February 2004, ILR, vol. 128, p. 712 (involving a request for an arrest warrant against the Israeli Minister of Defence, who was accused of serious violations of the Geneva Conventions); *Tatchell v. Mugabe*, United Kingdom, Bow St. Magistrates' Court, judgment of 14 January 2004, ILR, vol. 136, p. 573 (request for an arrest warrant against the Head of State of Zimbabwe, who was accused of acts of torture); *The Hague City Party v. Netherlands*, Netherlands, The Hague District Court, judgment of 4 May 2005, LJN AT5152, KG 05/432, para. 3.6 (a curious case in which the President of the United States, George Bush, was accused for the powers granted to him under the American Service-Member's Protection Act of 2001, which allow him to order the use of force, in specific circumstances, in relation to persons under the custody of the International Criminal Court); *Re Bo Xilai*, United Kingdom, Bow St. Magistrates' Court, judgment of 8 November 2005, ILR, vol. 128, p. 714 (request for an arrest warrant against the Chinese Minister of Trade, who was accused of torture); *Rwanda*

customary international law. In some cases, the pronouncement in favour of immunity *ratione personae* has also been in the form of an *obiter dictum* in cases concerning immunity *ratione materiae*.[219] In other cases, that declaration stemmed from the exercise of discretionary powers recognized for the Attorney General of a State or for other organs when their intervention is necessary for criminal proceedings to be initiated.[220] Lastly, it is worth noting that while national courts have usually pronounced on immunity in cases brought against State officials, in an exceptional situation, a tribunal made its pronouncement in a case in which an advisory opinion was sought.[221]

111. In some cases, the courts have concluded that only immunity *ratione personae* may cease to apply if an international treaty establishes clearly that it has been waived or lifted, or cannot be invoked, or if the treaty establishes an exception in that regard.[222] Exceptionally, one court has ruled in favour of an exception to immunity *ratione personae* in the case of crimes under international law,[223] or referred to the existence of exceptions to said category of immunity that did not subsequently materialize, save for a generic mention in "specific provisions (….) that oblige the parties concerned".[224] Lastly, it should be noted that a French court has declared that

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*(Kagame)*, Spain, National High Court, decision of case No. 3/2008, of 6 February 2008, *Oxford Reports on International Law in Domestic Courts* (ILDC), 1198 (ES 2008), para. 4 (the National High Court of Spain ruled that President Kagame could not be brought to trial for genocide, war crimes, crimes against humanity and acts of terrorism, whereas it allowed the trial of other persons who qualified as State officials; in so doing, the court implicitly denied them immunity *ratione materiae*).

[219] See: *Re Pinochet*, Brussels Court of First Instance, judgment of 6 November 1998, ILR, vol. 119, pp. 345-349.

[220] See the following cases: *In re Rajapaksa*, decision of the Attorney General of Australia, of 25 October 2011; cited in Pedretti, *Immunity of Heads of State* …, p. 139 (case brought against the Head of State of Sri Lanka for war crimes and crimes against humanity); *In re Jiang*, Germany, Chief Prosecutor, Federal Supreme Court, 24 June 2005, 3 ARP 654/03-2, para. 1 (case against the former Head of State of China, Jiang Zemin, accused of genocide, crimes against humanity and torture; the Federal Chief Prosecutor ruled on both immunity *ratione materiae* and immunity *ratione personae*); *Laurent Kabila*, in response to a complaint against the Head of State of the Democratic Republic of the Congo, the Attorney General decided to withdraw the case based on an application for immunity (cited in Pedretti, *Immunity of Heads of State* …, p. 152).

[221] See also *Sesay (Issa) and ors v. President of the Special Court for Sierra Leone and ors, Supreme Court*, Sierra Leone, Supreme Court, judgment of 14 October 2005, SC 1/2003, ILDC 199 (SL 2005), para. 52 (the Court concluded that the immunity of a Head of State before the courts of a foreign State is applicable, whether it can be invoked in international courts or not).

[222] See also the following cases: *Re Sharon and Yaron, HSA v. SA (Ariel Sharon) and YA (Amos Yaron)*, Court of Cassation of Belgium, 12 February 2003, ILR, vol. 127, pp. 123-124 (the Belgian Court of Cassation considered that the Convention on the Prevention and Punishment of the Crime of Genocide, the Rome Statute and the Geneva Conventions and the Protocols thereto all did not meet those requirements); *The Hague City Party v. Netherlands*, Netherlands, The Hague District Court, judgment of 4 May 2005, LJN AT5152, KG 05/432, para. 3.6 (in that case, the Court considered that the only exception to immunity for Heads of State was provided by article 27 of the Rome Statute).

[223] See *In re Hussein*, Germany, Regional Superior Court of Cologne, judgment of 16 May 2000 (even though the Court considered that the President of Iraq enjoyed immunity *ratione personae*, it stated that said immunity could be bypassed upon the commission of crimes under international law, although it found that no such crime had been committed in that case).

[224] See *Gaddafi*, France, Court of Cassation, judgment of 13 March 2001, Criminal Chamber No. 1414, ILR, vol. 125, p. 509. In its judgment, the Court of Cassation stated, in relation to crimes of terrorism, such as those with which the Head of State of Libya was charged, that "in

an incumbent Head of State does not enjoy immunity from criminal jurisdiction for acts of corruption and other similar acts.[225]

112. Civil courts have also declared that immunity *ratione personae* is applicable in cases where the claim against a Head of State was for the commission of serious crimes.[226] That declaration was also formulated in the form of an *obiter dictum* in some civil cases.[227] However, exceptionally, one court has circumscribed the immunity *ratione personae* of an incumbent Head of State for official acts, excluding private acts.[228]

113. The judgments of South African courts concerning the argument that the South African authorities should arrest President Al-Bashir pursuant to the arrest warrant issued by the International Criminal Court deserve particular consideration. Both the High Court of South Africa and the Supreme Court of Appeal of South Africa ruled that the immunity *ratione personae* of an incumbent foreign Head of State was not applicable.[229] However, those rulings were based on the obligation to cooperate with the International Criminal Court and on South African legislation, which expressly provides that no foreign State official who has committed the crime of genocide, crimes against humanity or war crimes may be granted immunity. An appeal against the judgment of the Supreme Court of Appeal has been filed with the Constitutional Court of South Africa; the case was pending determination when this report was finalized.

114. The immunity *ratione materiae* of foreign State officials has given rise to a greater number of judgments by national criminal courts. The positions adopted by States in those judgments are less uniform, although it can be concluded that domestic courts, in a certain number of cases, have been accepting the existence of limitations and exceptions to immunity in circumstances relating to the commission of international crimes,[230] crimes of corruption or related crimes,[231] and other crimes of

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the current state of international law, the alleged crimes, although serious, do not constitute an exception to the principle of immunity from jurisdiction of an incumbent foreign Head of State". The judgment does not indicate what those exceptions would be; it merely affirms that "international custom protects incumbent Heads of State from foreign criminal jurisdiction, in the absence of specific binding provisions to the contrary for the parties concerned". In any event, the Court declared that Mr. Gaddafi enjoyed immunity *ratione personae*. With regard to that case, it is worth noting that the Court of Appeal of Paris had rejected the immunity, alleging that there is "a generally accepted practice in law in all States, including France, whereby immunity from prosecution covers only government or administrative acts carried out by the Head of State, and those acts could not possibly include international crimes" (Court of Appeal of Paris, judgment of 20 October 2000, ILR, vol. 125, p. 498).

[225] See *Teodoro Nguema Obiang Mangue*, France, Court of Appeal of Paris, *Pôle* 7, Investigating Chamber II, judgment of 13 June 2013; and Court of Appeal of Paris, *Pôle* 7, Investigating Chamber II, application for annulment of judgment of 16 April 2015.

[226] See: *Belgium: Mobutu v. SA Cotoni*, Civil Court of Brussels, judgment of 29 December1988, ILR, vol. 91, p. 260 (case against President Mobutu, Head of State of Zaire).

[227] See: *Margellos v. Federal Republic of Germany*, Greece, Special Supreme Court, judgment of 17 September 2002, 129 ILR, p. 532 (application for damages and prejudice against Germany for acts committed during the Second World War. The court held that despite developments in international law, high-ranking officials of a foreign State continued to enjoy immunity, including when they are accused of war crimes and crimes against humanity).

[228] See *Mobutu and Republic of Zaire v. Société Logrine*, France, Court of Appeal of Paris, judgment of 31 May 1994, 113 ILR, p. 484.

[229] See *Southern Africa Litigation Centre* (see footnote 33 *supra*) section 28.

[230] See the following cases: *R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No.3)*, United Kingdom House of Lords (UKHL) 17, [2000] 1 A.C. 147; *Pinochet*,

international concern, such as terrorism, sabotage, or causing the destruction of property and the death and injury of persons in relation to such crimes.[232] Furthermore, it should be borne in mind that national courts have in some cases tried

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Belgium, Court of First Instance of Brussels, judgment of 6 November 1998, ILR, vol. 119, p. 349; *In re Hussein*, Germany, Higher Regional Court of Cologne, judgment of 16 May 2000, 2 Zs 1330/99, para. 11 (it makes this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office); *Bouterse*, Netherlands, Court of Appeal of Amsterdam, judgment of 20 November 2000 (although the Supreme Court subsequently set aside the judgment, it did not do so in connection with immunity but on the grounds of a violation of the principle of non-retroactivity and the limited scope of universal jurisdiction; see judgment of 18 September 2001); *Ariel Sharon and Amos Yaron*, Belgium, Court of Cassation, judgment of 12 February 2003, ILR, vol.127, p. 123 (although the Court granted immunity *ratione personae* to Ariel Sharon, it tried Amos Yaron, who, at the time the acts were committed, was head of the Israeli armed forces that took part in the Sabra and Shatila massacres); *Fujimori*, Chile, Supreme Court, judge of first instance, judgment of 11 July 2007, case No. 5646-05, paras. 15-17 (the decision was taken in relation to a request for extradition for serious human rights violations and corruption); *H. v. Public Prosecutor*, Netherlands, Supreme Court, judgment of 8 July 2008, ILDC 1071 (NL 2008), para. 7.2; *Lozano v. Italy*, Italy, Court of Cassation, judgment of 24 July 2008, ILDC 1085 (IT 2008), para. 6; *A. v. Office of the Public Prosecutor of the Confederation*, Switzerland, Federal Criminal Court, judgment of 25 July 2012, BB.2011.140; *FF v. Director of Public Prosecutions* (*Prince Nasser* case), High Court of Justice, Queen's Bench Division, Divisional Court, judgment of 7 October 2014 [2014] EWHC 3419 (Admin.) (The significance of this ruling lies in the fact that it was issued as a "consent order", that is to say, based on an agreement reached between the plaintiffs and the Director of Public Prosecutions, in which the latter agrees that the charges of torture against Prince Nasser are not covered by immunity *ratione materiae*). In a civil proceeding, the Italian Supreme Court also asserted that State officials who have committed international crimes do not enjoy immunity *ratione materiae* from criminal jurisdiction (*Ferrini v. Federal Republic of Germany*, Court of Cassation, judgment of 11 March 2004, ILR, vol. 128, p. 674). In *Jones*, although the House of Lords recognized immunity from civil jurisdiction, it reiterated that immunity from criminal jurisdiction is not applicable in the case of torture (*Jones v. Kingdom of Saudi Arabia*, House of Lords, judgment of 14 June 2006 [2006] UKHL 26, [2007] 1 A.C.). Lastly, it should be noted that the Federal High Court of Ethiopia, albeit in the context of a case pursued against an Ethiopian national, affirmed the existence of a rule of international law preventing the application of immunity to a former Head of State accused of international crimes (*Special Prosecutor v. Hailemariam*, Federal High Court, judgment of 9 October 1995, ILDC 555 (ET 1995)).

[231] See the following cases: *Evgeny Adamov v. Federal Office of Justice*, Switzerland, Federal Tribunal, judgment of 22 December 2005, *Decisions of the Federal Tribunal* 132 II (this is a case of misappropriation of public funds); *Fujimori*, Chile, Supreme Court, judge of first instance, judgment of 11 July 2007, case No. 5646-05, paras. 15-17 (the decision was taken in relation to a request for extradition for serious human rights violations and corruption); *Teodoro Nguema Obiang Mangue*, Court of Appeal of Paris, *Pôle* 7, Second Investigating Chamber, judgment of 13 June 2013. Court of Appeal of Paris, *Pôle* 7, Second Investigating Chamber, application for annulment, judgment of 16 April 2015.

[232] See the following cases: *DC 10 UTA*, France, Special Court of Assizes of Paris, judgment of 10 March 1999 (six Libyan officials of various ranks were sentenced *in absentia* to life imprisonment as the perpetrators of the 1989 attack against a UTA DC 10 aircraft, which caused the plane to crash in the Ténéré desert, killing 170 people); *R. v. Mafart and Prieur* (*Rainbow Warrior* case), New Zealand, High Court, Auckland Registry, November 1985 (acts carried out by members of the French armed forces and security forces to mine the ship *Rainbow Warrior*, which led to the sinking of the ship and the death of several people; these were described as terrorist acts); *Association des familles des victimes du Joola* case, France, Court of Cassation, judgment of 19 January 2010, case No. 09-84818 (this confirmed the arrest warrant against the Transport Minister, the Chief of Staff of the Armed Forces and the Navy Chief of Staff in connection with the events that caused the vessel *Joola* to sink).

officials of another State for international crimes without expressly ruling on immunity.[233]

115. However, national courts have used various arguments to conclude that immunity *ratione materiae* is not applicable. For example, while some courts have held that immunity should not apply owing to the gravity of the acts committed by the State official,[234] in other cases, the denial of immunity has been based on the violation of *jus cogens* norms,[235] or even on the consideration that the acts in question cannot be regarded as acts performed in an official capacity since the commission of such crimes cannot, under any circumstances, be considered an ordinary function of the State or of a State official.[236]

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[233] This occurred, for example, in the *Barbie* case before the French courts: *Federation Nationale des Déportés et Internés Résistants et Patriotes and others v. Barbie*, France, Court of Cassation, judgments of 6 October 1983, 26 January 1984 and 20 December 1985, ILR, vol. 78, p. 125; *Federation Nationale des Déportés et Internés Résistants et Patriotes and others v. Barbie*, Rhone Court of Assizes, judgment of 4 July 1987, ILR, vol. 78, p. 148; and Court of Cassation, judgment of 3 June 1988, ILR, vol. 100, p. 330. Previously, the District Court of Jerusalem had found Eichmann guilty of crimes against humanity, war crimes and crimes against the Jewish people, rejecting the accused's argument that, in his capacity as Head of the Gestapo Department for Jewish Affairs, he should be considered to have been performing "acts of State" (*Attorney General v. Eichmann*, Israel, Supreme Court, judgment of 29 May 1962, ILR, vol. 36, pp. 309-310). Meanwhile, the National High Court of Spain has tried various foreign officials for international crimes without deeming it necessary to rule on immunity, in the *Pinochet, Scilingo, Cavallo, Guatemala, Rwanda* and *Tibet* cases. In the *Rwanda* case, however, the National High Court ruled against the prosecution of President Kagame on the grounds that he enjoyed immunity. Similarly, in the *Tibet* case, the National High Court ruled against the prosecution of the then President Hu Jintao; however, following the end of Hu Jintao's term as President of China, the Central Court of Investigation No. 2 of the National High Court allowed his prosecution by order of 9 October 2013, claiming that he no longer enjoyed "diplomatic immunity".

[234] *Eichmann*, Israel, Supreme Court, judgment of 29 May 1962, ILR, vol. 36, pp. 309-310. In the *Ferrini* case, the Italian courts based their ruling both on the gravity of the crimes committed and the fact that the conduct in question is contrary to *jus cogens* (*Ferrini v. Federal Republic of Germany*, Court of Cassation, judgment of 11 March 2004, ILR, vol. 128, p. 674).

[235] In the *Lozano* case, the Italian Court of Cassation based its denial of immunity on the violation of fundamental rights, which have the status of *jus cogens* norms and must therefore take precedence over the rules governing immunity (*Lozano v. Italy*, Italy, Court of Cassation, judgment of 24 July 2008, ILDC, 1085 (IT 2008), para. 6). In *A. v. Office of the Public Prosecutor of the Confederation*, the Federal Criminal Court of Switzerland based its decision on the existence of a customary prohibition concerning the commission of international crimes that the Swiss legislator considers to be *jus cogens*; it also pointed out the contradiction between prohibiting such conduct while continuing to recognize immunity *ratione materiae* that would prevent the launch of an investigation (*A. v. Office of the Public Prosecutor of the Confederation*, Switzerland, Federal Criminal Court, judgment of 25 July 2012, BB.2011.140).

[236] See the following cases: *Pinochet*, Belgium, Court of First Instance of Brussels, judgment of 6 November 1998, ILR, vol. 119, p. 349; *In re Hussein*, Germany, Higher Regional Court of Cologne, judgment of 16 May 2000, 2 Zs 1330/99, para. 11 (it made this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office)). Lastly, it should be pointed out that, in some cases, German courts have concluded that immunity is not applicable based on the fact that the State of the official no longer exists and that, therefore, the accused no longer has the status of official. Among the cases referring to former officials of the German Democratic Republic are: *Border Guards*, Federal Criminal Court, judgment of 3 November 1992, ILR, vol. 100, p. 373; *Stoph*, Federal Constitutional Court, judgment of 21 February 1992, 2BvR 1661/91, para. 4; *Mauerschützen*, Federal Constitutional Court, judgment of 24 October 1996, 2 BvR 1851/94, 2 BvR 1853/94, 2 BvR 1875/94, 2 BvR 1852/94, para. 127.

116. Meanwhile, civil courts have also been holding immunity to be non-applicable in the same scenarios as those mentioned in the previous paragraph, basing their decisions mainly on the *jus cogens* nature of the international norms violated (essentially human rights norms and the prohibition of certain types of conduct such as torture) and the categorization of the acts giving rise to the civil suit as *ultra vires* acts of the official that cannot be described as official acts or that are outside the ordinary scope of a State function.[237]

117. Lastly, it should be noted that national courts, both civil and criminal, have denied immunity in cases involving acts performed by State officials that are closely linked to private interest and whose objective is the personal enrichment of the official and not the benefit of the sovereign, or in corruption-related cases.[238]

118. In any event, national courts have granted immunity *ratione materiae* even in relation to the aforementioned crimes in a small number of cases;[239] contradictory positions have sometimes been evident in the case law of a given State's courts. However, in some of those cases, the differences in position are attributable to differences in the treatment of immunity in relation to the same facts, depending on whether the case is before the criminal or civil courts.[240]

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[237] In that regard, a Greek court found that crimes committed by armed forces are acts attributable to the State for the purposes of international responsibility but cannot be regarded as sovereign acts for the purposes of State immunity (*Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Livadia, judgment of 30 October 1997).

[238] *United States v. Noriega*, United States Court of Appeals, Eleventh Circuit, judgment of 7 July 1997; *Jungquist v. Sheikh Sultan Bin Khalifa al Nahyan*, United States District Court, District of Columbia, judgment of 20 September 1996; *Melleiro v. Isabelle de Bourbon*, *ex-Reine d'Espagne* case; *Seyyid Ali Ben Hammoud*, *Prince Rashid v. Wiercinski*, Tribunal civil de la Seine, judgment of 25 July 1916; *Ex-roi d'Egypte Farouk v. s.a.r.l. Christian Dior* case, Court of Appeal of Paris, judgment of 11 April 1957; *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, judgment of 28 April 1961; *Trajano v. Marcos*, US, 978 F. 2d 493 (Ninth Circuit, 1992); ILR, vol. 103, p. 521; *Doe v. Zedillo Ponce de León*; *Jiménez v. Aristeguieta* (1962) ILR, vol. 32, p. 353; *Jean-Juste v. Duvalier* (1988), No. 86-0459 Civ (US District Court), SD Fla; *Adamov* (see footnote 231 *supra*); *Republic of the Philippines v. Marcos et al*. (1986), ILR, vol. 81, p. 581; *Republic of the Philippines v. Marcos et al. (No. 2)* (1987, 1988), ILR, vol. 81, p. 609. *Republic of Haiti v. Duvalier* [1990] 1 QB 2002 (United Kingdom); *Islamic Republic of Iran v. Pahlavi* (1984), ILR, vol. 81, p. 557 (United States): in this case, it was the United States Government that informed the Court that the claim should not be barred either by application of the sovereign immunity principle or by the act of State doctrine; *Teodoro Nguema Obiang Mangue*, Court of Appeal of Paris, *Pôle* 7, Second Investigating Chamber, judgment of 13 June 2013 and Court of Appeal of Paris, *Pôle* 7, Second Investigating Chamber, application for annulment, judgment of 16 April 2015.

[239] See *Marcos and Marcos v. Federal Office of Police*, Switzerland, Federal Tribunal, judgment of 2 November 1989, Decisions of the Federal Tribunal 115 Ib 496. See also *Revue suisse de droit international et européen* (1991), p. 535 e ILR, vol. 102, p. 201 (this case related to financial activities undertaken by Ferdinand Marcos and his wife when he was President of the Philippines); Senegal, *Prosecutor v. Hissène Habré*, Court of Appeal of Dakar, judgment of 4 July 2000, and Court of Cassation, judgment of 20 March 2001; ILR vol. 125, pp. 571-577 (acts of torture and crimes against humanity). *Jiang Zemin*, Germany, decision of the Federal Prosecutor General of 24 June 2005, 3 ARP 654/03-2 (the Prosecutor General accorded the former Chinese Head of State the same treatment as an incumbent Head of State, based on the need to guarantee the exercise of the functions of a high-ranking State official); *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*, House of Lords, judgment of 14 June 2006 (Jones No. 2), UKHL 2006, 26.

[240] There have been particular differences in the treatment of immunity *ratione materiae* by civil

119. Separate analysis is warranted regarding the practice of the United States courts, which have ruled on the immunity *ratione materiae* of State officials both through application of the Foreign Sovereign Immunities Act (in relation only to civil jurisdiction) and through application of the common law doctrine (in relation to both civil and criminal jurisdiction), although the second formula has generally been applied only since the judgment in the *Samantar* case, in which the Supreme Court held that the Foreign Sovereign Immunities Act applies only when the suit is brought against the State *stricto sensu* and not against one of its individual officials.[241] Under the first formula (Foreign Sovereign Immunities Act), the courts have exclusive responsibility for determining the question of immunity, while under the second formula (common law) the executive has the power to state whether an individual may enjoy immunity or not, through a "suggestion of immunity" that the courts must respect; they are able to decide the matter themselves only if the State Department does not issue a suggestion of immunity.[242]

120. However, in many cases analysed in accordance with the Foreign Sovereign Immunities Act, the United States courts have ruled that immunity from jurisdiction is not applicable in cases concerning international crimes and human rights violations, which are generally regarded as *ultra vires* acts that are performed for the exclusive benefit of the official, do not form part of the regular functions of the State and violate *jus cogens* norms.[243] Nonetheless, this has not prevented the

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and criminal courts in the United Kingdom: see *R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)*, UKHL 17, [2000] 1 A.C. 147; *Jones v. Kingdom of Saudi Arabia*, House of Lords, judgment of 14 June 2006, [2006] UKHL 26, [2007] 1 A.C., and *FF v. Director of Public Prosecutions* (*Prince Nasser* case), High Court of Justice, Queen's Bench Division, Divisional Court, judgment of 7 October 2014 [2014] EWHC 3419 (Admin.). Regarding this difference in practice, see document A/CN.4/686, para. 56. In *Bouzari v. Islamic Republic of Iran*, the Court of Appeal for Ontario granted immunity from civil jurisdiction for the Islamic Republic of Iran in a case of torture, although it referred in that regard to the doctrine established by the House of Lords in the *Pinochet* case for the purpose of distinguishing between immunity from civil jurisdiction and immunity from criminal jurisdiction (2004 CarswellOnt 2681, 243 D.I.R. (4th) 406, 71 O.R. (3d) 675, 122 C.R.R. (2d) 26, 220 O.A.C. 1, para. 91). Similarly, in *Fang v. Jiang Zemin*, the High Court of New Zealand expressly declared that immunity from criminal jurisdiction would not apply in the case of acts of torture (judgment of 21 December 2006, ILR, vol. 141, p. 717). In a radically different approach, the Italian Court of Cassation stated that the fact that the immunity *ratione materiae* of State officials from criminal jurisdiction was not applicable in cases concerning the commission of war crimes and crimes against humanity should be interpreted to mean that State immunity was also not applicable when a civil suit was brought against the State for the same acts (*Ferrini v. Federal Republic of Germany*, Court of Cassation, judgment of 11 March 2004, ILR, vol. 128, p. 674).

[241] *Samantar v. Yousuf*, US 130 S Ct. 2278 (2010). In relation to the position previously held by the said courts, see *Chuidian v. Philippine National Bank*, US, 912 F.2d 1095 (Ninth Circuit, 1990); ILR, vol. 92, p. 480.

[242] Regarding the changes in the way in which the United States courts treat the immunity of State officials, see, inter alia, John B. Bellinger, "The Dog that Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities", *Vanderbilt Journal of Transnational Law*, vol. 44, No. 4, 2011, pp. 819-835; Harold Hongju Koh, "Foreign Official Immunity After *Samantar*: A United States Government Perspective", *Vanderbilt Journal of Transnational Law*, pp. 1141-1161; Chimène I. Keitner, "Annotated Brief of Professors of Public International Law and Comparative Law as *Amici Curiae* in Support of Respondents in *Samantar v. Yousuf*", *Lewis & Clark Law Review*, vol. 15, No. 3 (fourth quarter of 2011), pp. 609-632.

[243] See *Letelier v. Chile*, US, 748 F.2d 790 (Second Circuit, 1984); 79 ILR 561; *Jiménez v. Aristeguieta*, 311 F2d 547 (United States Court of Appeals, Fifth Circuit, 1962); *United States v.*

United States courts from granting immunity *ratione materiae* in some cases, even when the acts in respect of which immunity has been claimed constitute international crimes or serious human rights violations.[244] Immunity *ratione materiae* has been granted with greater frequency in cases where courts have had to make a decision based solely on common law rules, owing essentially to the considerable weight that the executive's opinion, reflected in the "suggestion of immunity", carries in the common law system.[245] That said, there are also some cases where a suggestion of immunity has been issued and the courts have subsequently denied immunity, either in line with the suggestion or because the court, despite the suggestion, has examined the merits of the claim and found the contested acts to be *ultra vires* or contrary to peremptory norms of international law.[246]

121. In short, the above analysis demonstrates that national courts almost unanimously acknowledge that no limitations or exceptions are applicable to immunity *ratione personae*. However, with regard to immunity *ratione materiae*, it can be concluded that the majority trend is to accept the existence of certain limitations and exceptions to such immunity, either in view of the gravity of the crimes, because they violate peremptory norms or undermine values of the international community as a whole, or because the crimes in question cannot be

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*Noriega*; *Hilao and others v. Estate of Marcos*, United States Court of Appeals, Ninth Circuit, judgment of 16 June 1994 (in the court's opinion, the acts of torture, execution and disappearance were acts performed by Marcos that did not come within any official mandate and could not be considered acts of an agency or instrumentality of a foreign State); *In Re Doe I, et al. v. Liu Qi, et al., Xia Deren et. al.*, United States District Court, Northern District of California (C 02-0672 CW, C 02-0695 CW); *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al.*, Supreme Court of the State of New York (United States of America), judgment of 31 October 1988; *Chuidian v. Philippine National Bank*, Court of Appeals, Ninth Circuit (United States of America), judgment of 29 August 1990; *Maximo Hilao, et. al.*, *Vicente Clemente et al.*, *Jaime Piopongco et al. v. Estate of Ferdinand Marcos*, Court of Appeals, Ninth Circuit (United States of America), judgment of 16 June 1994; *Teresa Xuncax, Juan Diego-Francisco*, *J. Doe, Elizabet Pedro-Pascual*, *Margarita Francisco-Marcos*, *Francisco Manuel-Méndez*, *Juan Ruiz Gómez*, *Miguel Ruiz Gómez and José Alfredo Callejas v. Héctor Gramajo and Diana Ortiz v. Héctor Gramajo*, United States District Court, District of Massachusetts, judgment of 12 April 1995; and *Bawol Cabiri v. Baffour Assasie-Gyimah*, United States District Court, Southern District of New York, judgment of 18 April 1996.

[244] See *Saltany v. Reagan and others*, United States District Court, District of Columbia, judgment of 23 December 1988; *Saudi Arabia v. Nelson*, United States Supreme Court, ILR, vol. 100, p. 544; *Lafontant v. Aristide*, United States District Court, Eastern District of New York, judgment of 27 January 1995; *A, B, C, D, E, F v. Jiang Zemin*, October 2002: this case is significant because, once Jian Zemin's term as President ended in 2003, a group of Democratic members of the United States Congress attempted to reopen the case, though without success, as the State Department maintained its suggestion of immunity; *Ye v. Zemin*, 383 F.3d 620 (Seventh Circuit, 2004); *Matar v. Dichter*, 563 F. 3d 9 (Second Circuit, 2009).

[245] On the State Department's practice in relation to the suggestion of immunity, see Erica E. Smith, "Immunity Games: How the State Department Has Provided Courts with a Post-*Samantar* Framework for Determining Foreign Official Immunity", *Vanderbilt Law Review*, vol. 67, No. 3 (March 2014), pp. 569-608.

[246] See *Enahoro v. Abubakar*, 408 F. 3d 877 (Seventh Circuit, 2005); *Yousuf v. Samantar*, 699 F, 3d 763 (Fourth Circuit, 2012) (although in this case the State Department had opposed immunity, the court held that the suggestion was not binding and considered the merits of the case, concluding that there is a growing trend in current international law not to grant immunity to a State official for acts that violate *jus cogens* norms, regardless of whether the act may also be attributed to the State).

regarded as acts performed in an official capacity since they go beyond or do not correspond to the ordinary functions of the State.

122. To conclude this analysis of domestic case law, reference must be made to the judgment of the Italian Constitutional Court of 22 October 2014, the significance of which was mentioned in the Special Rapporteur's fourth report.[247] That judgment refers to the questions arising from the incorporation into the Italian legal system of the judgment of the International Court of Justice in *Jurisdictional Immunities of the State* and, consequently, contains arguments pertaining to the jurisdictional immunity of the State *stricto sensu*. However, the Constitutional Court focuses its arguments to a major extent on jurisdictional immunity and its relationship with the right of access to justice and to effective judicial protection of fundamental rights.[248] Such arguments may be of interest for the present report and are therefore summarized as follows:

(a) The right of access to justice and to effective judicial protection of inviolable human rights is "is one of the greatest principles of legal culture in democratic systems of our times", which can be limited only under specific circumstances;

(b) The jurisdictional immunity of the State may "justify […] the sacrifice of the principle of judicial protection of inviolable rights guaranteed by the [Italian] Constitution" but only when it "is connected — substantially and not just formally — to the sovereign functions of the foreign State, i.e. to the exercise of its governmental powers";

(c) Some acts "such as deportation, forced labour and massacres, recognized to be crimes against humanity [cannot] justify the absolute sacrifice in the domestic legal order of the judicial protection of inviolable rights of the victims of those crimes". "State actions [that] can be considered war crimes and crimes against humanity, [or as] violations of inviolable human rights, (…) [as such] are excluded from the lawful exercise of governmental powers";

(d) Consequently, immunity "does not protect behaviours that do not represent the typical exercise of governmental powers, but are explicitly considered and qualified unlawful, since they are violations of inviolable rights";

(e) Immunity cannot be regarded as an acceptable sacrifice of the aforementioned rights when, as in the case in question, there is no other effective recourse for gaining access to the courts and obtaining effective judicial protection.

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[247] The interest generated by this judgment goes far beyond the topic of State immunities and has implications for issues of great relevance, especially those concerning the relationship between international and national law. As an example of such interest, see the in-depth analysis of decision No. 238/2014 in Robert Kolb, "The relationship between the international and the municipal legal order: reflections on the decision No. 238/2014 of the Italian Constitutional Court", *Questions of International Law (QIL), Zoom out II* (2014), pp. 5-16; Pasquale De Sena, "The judgment of the Italian Constitutional Court on State immunity in cases of serious violations of human rights or humanitarian law: a tentative analysis under international law", *Questions of International Law (QIL), Zoom out II* (2014), pp. 17-31; Cesare Pinelli, "Between undue fiction and respect for constitutional principles", pp. 33-41; Paolo Palchetti, "Judgment 238/2014 of the Italian Constitutional Court: In search of a way out", *Questions of International Law (QIL), Zoom out II* (2014), pp. 44-47.

[248] See, in particular, section 3.4 of the judgment.

## E. Other work of the Commission

123. The Commission has in the past taken up a number of topics of relevance to the present report, in particular the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, the draft Code of Crimes against the Peace and Security of Mankind and the articles on responsibility of States for internationally wrongful acts. Each of these instruments contains provisions that are pertinent for determining the scope of the limitations and exceptions to immunity which are analysed below. The Commission also dealt with issues related to limitations and exceptions to immunity in the draft statute for an international criminal court and the draft articles on jurisdictional immunities of States and their property. These last two instruments, however, are discussed elsewhere in this report.[249]

124. The Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal were adopted by the Commission in 1950[250] in response to an express mandate from the General Assembly,[251] which took note of the Principles in its resolution 488 (V) of 12 December 1950. As is well known, these Principles served as a foundation for the Commission's subsequent work on crimes against the peace and security of mankind and on the development of a draft statute for an international criminal court.

125. The document adopted by the Commission includes three basic principles that are relevant for the purposes of the present report: (a) the principle of individual criminal responsibility, which derives from international law regardless of the provisions of national laws;[252] (b) the principle that official position is irrelevant to the determination of responsibility;[253] and (c) the principle that orders received cannot be invoked as a ground for exemption from responsibility.[254] These three principles are closely interrelated and are intended to ensure that perpetrators of international crimes do not go unpunished. Under these principles, any individual who has committed an international crime is responsible therefor, without regard to his or her official position or to whether he or she has acted *proprio motu* or pursuant to an order received from the Government of a State or from a superior.

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[249] See chap. II, sect. A *supra*.

[250] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, and commentaries thereto (*Yearbook of the International Law Commission*, 1950, vol. II, pp. 374-378, document A/1316, paras. 95-127, in particular paras. 103-104. Text reproduced in *Yearbook ... 1985*, vol. II, Part Two, p. 12, para. 45.

[251] Resolution 177 (II) of 21 November 1947.

[252] Principle I reads as follows: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment". Principle II establishes that "[t]he fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law" (*Yearbook ... 1985*, vol. II, Part Two, p. 12, para. 45).

[253] Principle III establishes that "[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law" (*ibid*.).

[254] Principle IV provides that "[t]he fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him" (*ibid*.).

126. The above-mentioned principles encompass a series of elements of particular interest, which were highlighted by the Commission in its commentaries thereto. These elements can be summed up as follows:

(a) International law may impose duties and liabilities on individuals directly, without the need for intermediation, just as it does in respect of States. As noted in the fourth report, the Commission thus confirmed the dual responsibility of the State and the individual for the commission of international crimes, recalling in that regard the well-known finding of the Nürnberg Tribunal that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced";[255]

(b) International law has supremacy over domestic law, given that, as noted by the Nürnberg Tribunal, "individuals have international duties which transcend the national obligations of obedience imposed by the individual State";[256]

(c) The fact of having acted in an official capacity or pursuant to orders cannot be used to preclude the establishment of individual responsibility for the commission of crimes under international law.[257]

127. Lastly, it should be noted that the Nürnberg Principles, as formulated by the Commission, are essentially substantive in nature and that the adopted text thus does not expressly refer to immunity as a procedural bar to the exercise of jurisdiction by either a national or an international court. This substantive dimension of the Principles should nonetheless be understood in the light of their connection to the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal, in which the Tribunal is assumed to have jurisdiction and the invocation of official capacity or the duty of obedience is seen essentially as a form of substantive defence whose validity is ruled out in the Charter and the Judgment of the Tribunal. This does not mean that the Tribunal never referred, directly or indirectly, to immunity in its Judgment, as shown by the following statements quoted by the Commission in its commentary to Principle III:[258]

> "The principle of international law which, under certain circumstances, protects the representatives of a State cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment."
>
> "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law."

128. In a similar vein, the Commission took up the aforementioned issues in both the draft Code of Offences against the Peace and Security of Mankind, adopted in 1954,[259] and the draft Code of Crimes against the Peace and Security of Mankind, adopted in 1996,[260] although the analysis below refers chiefly to the latter Code. In

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[255] See the commentary to Principle I, *Yearbook ... 1950*, p. 374, para. 99.
[256] *Ibid*., p. 375, para. 102.
[257] See the commentaries to Principles III and IV, especially paras. 103-105, *ibid*.
[258] *Ibid*., para. 103.
[259] *Yearbook ... 1954*, vol. II, p. 151.
[260] *Yearbook ... 1996*, vol. II, Part Two, p. 17, para. 50.

that text, the Commission again reiterates the principles of individual criminal responsibility,[261] irrelevance of official position[262] and the inability to invoke orders received from a Government or a superior.[263]

129. Like the 1950 formulation, the text adopted by the Commission defines these principles in essentially substantive terms and does not expressly refer to immunity in the procedural sense. It should nevertheless be pointed out that the Commission's commentaries to the draft Code go into more detail with respect to immunity in relation to crimes against the peace and security of mankind, which it rejects in both substantive and procedural terms. For example, in the commentary to article 7, on the irrelevance of official position, the Commission affirms as follows:

> "A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required to commit the crime, but also abuses the authority and power entrusted to him. He may, therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act. It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security".[264]

130. In the commentary to this same article it concludes that State officials can invoke neither substantive nor procedural immunity, arguing as follows:

> "Article 7 is intended to prevent an individual who has committed a crime against the peace and security of mankind from invoking his official position

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[261] Under article 2, para. 1, of the 1996 draft Code, "[a] crime against the peace and security of mankind entails individual responsibility" (*ibid*., p. 18), which, under article 3, shall result in "punishment" that "shall be commensurate with the character and gravity of the crime" *(ibid*., p. 2). In a similar vein, see article 1 of the 1954 draft Code, which establishes that "[o]ffences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished" (*Yearbook ... 1954*, vol. II, p. 151).

[262] Under article 7 of the 1996 draft Code, "[t]he official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment" (*Yearbook ... 1996*, vol. II, Part Two, p. 26). The 1954 draft Code, meanwhile, establishes in its article 3 that "[t]he fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code" (*Yearbook ... 1954*, vol. II, p. 152).

[263] The 1996 draft Code enshrines this principle in article 5, which stipulates that "[t]he fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires" (*Yearbook ... 1996*, vol. II, Part Two, p. 23). The 1954 draft Code reflected this principle in article 4, which provides that "[t]he fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order" (*Yearbook ... 1954*, vol. II, p. 152).

[264] *Yearbook ... 1996*, vol. II., Part Two, pp. 26-27, para. (1) of the commentary to article 7. In para. (3) of the commentary, the Commission recalls that "the Nürnberg Tribunal rejected the plea of act of State and that of immunity which were submitted by several defendants as a valid defence or ground for immunity" (*ibid*., p. 27).

> as a circumstance absolving him from responsibility or conferring any immunity upon him, even if he claims that the acts constituting the crime were performed in the exercise of his functions. As recognized by the Nürnberg Tribunal in its Judgment, the principle of international law which protects State representatives in certain circumstances does not apply to acts which constitute crimes under international law. Thus, an individual cannot invoke his official position to avoid responsibility for such an act. As further recognized by the Nürnberg Tribunal in its Judgment, the author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility."[265]

131. These statements in the commentaries are also of particular interest in relation to the topic of the present report, given that the Commission views the rule on the irrelevance of official position as applying to both national and international courts. While it is true that the Commission indicated that "[j]udicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or procedural immunity based on his official position to avoid prosecution and punishment",[266] it is also true that it expects the draft Code to have a particular bearing on domestic laws and courts. Thus, it not only makes the general statement that "national courts are expected to play an important role in the implementation of the Code",[267] but also includes the following remark in its commentary to article 8, on the establishment of jurisdiction over the crimes in question:

> "The Commission considered that the effective implementation of the Code required a combined approach to jurisdiction based on the broadest jurisdiction of national courts together with the possible jurisdiction of an international criminal court."[268]

It goes on to say that "the provision and indeed the Code do not apply to those [international] tribunals which are governed by their respective statutes".[269]

132. It may therefore be concluded that, in the Commission's view, the provisions of the draft Code are intended in particular for national courts.[270] In setting out the

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[265] *Ibid*., p. 27, para. (6) of the commentary to article 7. In the commentary to article 9, concerning the *aut dedere aut judicare* principle, in referring to potential grounds for granting immunity to an alleged offender in exchange for cooperation with the justice system, the Commission also stated that "[i]t would be contrary to the interests of the international community as a whole to permit a State to confer immunity on an individual who was responsible for a crime under international law such as genocide" (*ibid*., p. 31, para. (4) of the commentary).

[266] *Ibid*., p. 27, footnote 69.

[267] *Ibid*., p. 18, para. (13) of the commentary to article 1, para. 2.

[268] *Ibid*., p. 28, para. (5) of the commentary to article 8.

[269] *Ibid*., pp. 29-30, para. (11) *in fine* of the commentary to article 8.

[270] In its commentaries, the Commission also conducts an interesting analysis of the relationship between international criminal courts and national courts, which will be examined in more detail in chap. III, sect. B *infra*.

requirement that the State "enact any procedural or substantive measures that may be necessary to enable it to effectively exercise jurisdiction",[271] it also includes the obligation to adopt provisions that rule out the applicability of immunity under the terms defined by the Commission in its commentaries to the draft Code.

133. Lastly, it should be borne in mind that both the Nürnberg Principles and the draft Code of Crimes against the Peace and Security of Mankind list a series of crimes under international law. The Nürnberg Principles include what are termed crimes against peace, war crimes and crimes against humanity.[272] The draft Code characterizes the crime of aggression, the crime of genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes.[273] The Commission may wish to take this list of crimes, which was developed by the Commission itself, into account in identifying acts which, in principle, could be classified as international crimes for the purpose of determining limitations or exceptions to immunity.

134. While the articles on responsibility of States for internationally wrongful acts[274] do not, for obvious reasons, deal with possible limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, they do contain a number of concepts that may be useful for the purposes of this report, as they are closely related to certain arguments that have been put forward and debated in the literature and in practice as grounds for such limitations or exceptions. Additionally, in its commentaries to the articles, the Commission contributes elements that could be useful for this study, insofar as they help to situate crimes under international law more appropriately in the international legal system. These inputs essentially consist of the following:

(i) the establishment of the primacy of peremptory norms;

(ii) the affirmation of the existence of obligations to the international community as a whole;

(iii) the definition of a specific model for responding to cases involving a serious breach of an obligation arising under a peremptory norm; and

(iv) the identification of the most serious crimes under international law as breaches of peremptory norms.

135. The Commission deals with the first of these issues in its commentary to article 26 (Compliance with peremptory norms), which seeks to preserve the primacy of such norms, even in cases involving "circumstances precluding wrongfulness".[275] In this context, the Commission addresses the relationship between a peremptory norm and a non-peremptory norm, concluding that the former must prevail. In the Commission's view, this primacy is evident when there is a conflict between two primary norms, but it also holds true when the conflict is between primary and secondary norms, with the result that — in the Commission's

[271] *Ibid*., p. 29, para. (10) of the commentary to article 8.
[272] See Principle VI (*Yearbook ... 1985*, vol. II, Part Two, p. 12, para. 45).
[273] *Yearbook ... 1996*, vol. II, Part Two, pp. 42 ff., arts. 16-20. See also article 2 of the 1954 draft Code (*Yearbook ... 1954*, vol. II, pp. 151-152).
[274] *Yearbook ... 2001*, vol. II, Part Two, p. 26, para. 76.
[275] This article provides that "[n]othing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law" (*ibid*., p. 84).

words — the application of secondary rules (in respect of rules precluding wrongfulness) does "not authorize or excuse any derogation from a peremptory norm of general international law".[276] The example given by the Commission in this connection is telling: "a State taking countermeasures may not derogate from such a norm: for example, a genocide cannot justify a counter-genocide".[277]

136. In its reasoning, the Commission also includes another element of considerable interest in relation to the primacy of peremptory norms, noting that sometimes a conflict between primary norms need not be resolved by means of the secondary rules concerning responsibility. On the contrary, "[w]here there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions", given that "peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts".[278] This type of "conforming interpretation" could therefore be of particular importance in relation to the topic of the present report, for the purpose of finding an appropriate balance among various primary norms.

137. Secondly, it should be noted that, in its commentary to Part Two, chapter III, of the articles (Serious breaches of obligations under peremptory norms of general international law), the Commission refers to the existence of "a qualitative distinction ... between different breaches of international law"[279] and to the existence of "the notion of obligations to the international community as a whole",[280] both of which are categories dealt with in the case law of the International Court of Justice. The Commission does not take a position as to whether or not "peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea", but concludes that "there is at the very least substantial overlap between them", as shown by the fact that the examples which the Court has given of obligations towards the international community as a whole "all concern obligations which, it is generally accepted, arise under peremptory norms of general international law".[281] In any event, the Commission takes the view that "[t]he obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values".[282]

138. Also of note is the fact that the Commission mentions, in its commentaries, the existence of a purposive difference between the concepts of *jus cogens* and obligations to the international community as a whole, which is worth repeating here:

> "While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the

[276] *Ibid*., p. 85, para. (4) of the commentary to article 26.
[277] *Ibid*.
[278] *Ibid*., para. (3) of the commentary to article 26.
[279] *Ibid*., p. 110, para. (2) of the commentary to chap. III.
[280] *Ibid*., p. 111, para. (3) of the commentary to chap. III.
[281] *Ibid*., pp. 111-112, para. (7) of the commentary to chap. III.
[282] *Ibid*., p. 112, para. (3) of the commentary to article 40.

> legal interest of all States in compliance – i.e. (…) in being entitled to invoke the responsibility of any State in breach."[283]

139. The consideration of the special nature of obligations towards the international community as a whole that arise under peremptory norms leads the Commission to discern a different regime with respect to the legal action to be taken in response to serious breaches of obligations under peremptory norms of international law, which can be summed up as follows: (*a*) "[these] breaches (...) can attract additional consequences, not only for the responsible State but for all other States" (art. 41); and (*b*) "all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole" (art. 48).[284] This third strand of the Commission's thinking is also of relevance to the present report, especially as it refers to the possibility of establishing a different legal regime for the immunity of State officials from foreign criminal jurisdiction when such immunity is invoked with respect to acts that can be characterized as breaches of obligations towards the international community as a whole that arise under peremptory norms of international law.

140. Lastly, in relation to these articles, the Commission describes as "peremptory norms that are clearly accepted and recognized" several types of prohibited conduct that correspond to acts in respect of which the immunity of State officials from foreign criminal jurisdiction has been invoked,[285] namely: "the prohibitions of (…) genocide, slavery, racial discrimination, crimes against humanity and torture",[286] together with the basic rules of international humanitarian law applicable in armed conflict[287] and the "principles and rules concerning the basic rights of the human person".[288] The Commission can take this list of crimes, which was developed by the Commission itself in 2001, into account in identifying crimes that could be classified as international crimes for the purpose of determining exceptions to immunity.

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[283] *Ibid*., p. 112, para. (7) of the commentary to chap. III. The Commission does not define the concept of "international community as a whole", but the mere fact of its use is of considerable interest, given that it stresses the collective dimension of the values and interests to be protected. The Commission moreover points out that this phrase is frequently used in treaties and other international instruments (*ibid*., p. 84, para. (18) of the commentary to article 25), and the list of treaties cited by the Commission as using this expression is significant: "third preambular paragraph of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; fourth preambular paragraph of the International Convention Against the Taking of Hostages; fifth preambular paragraph of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; third preambular paragraph of the Convention on the Safety of United Nations and Associated Personnel; tenth preambular paragraph of the International Convention for the Suppression of Terrorist Bombings; ninth preambular paragraph of the Rome Statute of the International Criminal Court; and ninth preambular paragraph of the International Convention for the Suppression of the Financing of Terrorism" (*ibid*., p. 84, footnote 404).

[284] *Ibid*., p. 112, para. (7) of the commentary to chap. III.

[285] See document A/CN.4/686, paras. 49-60).

[286] *Yearbook ... 2001*, vol. II, Part Two, p. 85, para. (5) of the commentary to article 26.

[287] *Ibid*., p. 113, para. (5) of the commentary to article 40.

[288] *Ibid*., p. 127, para. (9) of the commentary to article 48.

# III. Limitations and exceptions within the general legal context of immunity from foreign criminal jurisdiction: methodological and conceptual issues

141. After the analysis of practice and before the analysis of factors that could determine the inapplicability of immunity in a particular case, it is necessary at this point to consider some methodological and conceptual elements that will enable us to better define the context in which the draft articles contained in this report are to be understood. To that end, the following general issues are analysed below: (*a*) the legal nature of immunity and its relationship to jurisdiction and criminal responsibility; (*b*) the treatment of immunity in national courts and international criminal courts and its impact on limitations and exceptions to immunity; and (*c*) the concept of limitations and exceptions.

142. These elements are considered on the basis of a view of international law as a normative system that includes, as one of its parts or components, the institution of immunity of State officials from foreign criminal jurisdiction. This approach requires that immunity be analysed not in isolation, but in connection with the rest of the norms and institutions that make up the system. From this standpoint, the immunity of State officials is a useful and necessary institution for ensuring that certain values and legal principles of the international legal order, in particular the principle of sovereign equality, are respected. But at the same time, the immunity of State officials from foreign criminal jurisdiction, as a component of this system, should be interpreted in a systemic fashion to ensure that this institution does not produce negative effects on, or nullify, other components of the contemporary system of international law understood as a whole.[289] This systemic approach requires that other institutions that are also related to the principle of sovereignty, especially the right to exercise jurisdiction, be taken into account, together with other sectors of the international legal order that reflect and embody other values and principles of the international community as a whole, in particular international human rights law and international criminal law. As international law is a genuine normative system, the Commission's development of a set of draft articles meant to assist States in the codification and progressive development of international law with respect to a problematic but highly important issue for the international community cannot (and should not) have the effect of introducing imbalances in significant sectors of the international legal order that have developed over recent decades and that are now among its defining characteristics.

## A. Legal nature of immunity

143. One of the threads that emerge from an analysis of the Commission's debates thus far is the constant presence of three elements that are related to the very nature of immunity and have a bearing on the question of limitations and exceptions: (*a*) the understanding of immunity as a stand-alone right or as an exception to the exercise of the forum State's right to exercise jurisdiction; (*b*) the characterization of immunity as an exclusively procedural institution that does not affect the

[289] The need to ensure a balance among the various values and norms of the system was clearly expressed in the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant*, *I.C.J. Reports 2002*, particularly in paras. 71-79.

individual criminal responsibility of State officials; and (*c*) the idea that immunity from foreign criminal jurisdiction is separate from other forms of sovereign immunity, especially State immunity. While some of these issues have been discussed in the Special Rapporteur's previous reports, it is necessary at this point to revert to them in order to analyse briefly, as an aid to understanding and exclusively in connection with the topic of limitations and exceptions, the relationship between three pairs of concepts: (*a*) immunity and jurisdiction; (*b*) immunity and responsibility; and (*c*) immunity of the State and immunity of State officials.

### 1. Relationship between immunity and jurisdiction

144. The relationship between immunity and jurisdiction has been discussed previously in the course of the Commission's work. In her second report, the Special Rapporteur drew attention to the interaction between these two elements, especially the fact that immunity does not exist in a vacuum and cannot be invoked except in relation to an existing jurisdiction.[290] This echoes the reasoning of the International Court of Justice in *Arrest Warrant*.

145. The existence of jurisdiction is thus the point of departure on which immunity is founded; neither practice nor doctrine has refuted this observation. It suffices to recall that, as a rule, when national courts have taken decisions on claims of immunity, they have not found that they lack jurisdiction in abstract terms, but rather that they are unable to exercise it in respect of an official of a third State who enjoys immunity. There have thus been cases in which, once the circumstance that gave rise to immunity no longer exists, national courts have exercised jurisdiction over the same acts and the same individuals, and no difficulties have arisen with regard to competence.

146. The prior existence of jurisdiction is a logical requirement that does not detract from the importance of immunity as a necessary and useful instrument for protecting certain values and legal principles of the international community, especially the principle of the sovereign equality of States and the maintenance of stable international relations; nor, conversely, can it be understood to mean that the right to exercise jurisdiction has absolute primacy, in all circumstances, over immunity. On the contrary, the purpose of immunity is precisely to freeze or block the exercise of jurisdiction in certain conditions, sometimes on an exclusively temporary basis. Thus, in practice, immunity can prevail over jurisdiction in a particular case.

147. Nonetheless, the view of jurisdiction as a pre-existing power of the State, a *prius* that necessarily precedes immunity, inevitably has certain consequences of considerable importance at the methodological level. These consequences can be summed up as follows:

(a) Immunity is understood *ab initio* as a restriction of the exercise of jurisdiction; it is thus in itself a limitation or exception to the adjudicatory jurisdiction of the forum State.

(b) Like any limitation or restriction of a sovereign power of the State, it should be understood in purposive terms: immunity is recognized in order to safeguard values, interests and principles of the international community which, in

[290] See document A/CN.4/661, paras. 35-42).

this case, are embodied in the principle of sovereign equality, the proper exercise of State functions without undue interference by a third party and the stability of international relations.

(c) Given that immunity constitutes a restriction of a pre-existing sovereign power, the determination of its scope and its interpretation must remain within the limits defined by the ends sought. In particular, it can be invoked only in the interest of the State whose sovereign equality it claims to preserve, and only for the purpose of safeguarding legitimate rights and interests of the State that are protected under international law.

(d) The relationship between the exercise of jurisdiction and immunity must, then, be interpreted in dialectical terms, in order to find an appropriate balance between the rights and interests of the forum State and the rights and interests of the State of the official. Whether the exercise of jurisdiction or immunity prevails in each particular case will depend on the rights and interests at stake and on the set of norms, values and legal principles on which those rights and interests are based.

### 2. Relationship between immunity and responsibility

148. The analysis of immunity from foreign criminal jurisdiction has traditionally been based on the premise that it is a procedural rather than a substantive instrument, the application of which does not imply the disappearance of the responsibility, in this case criminal responsibility that can arise from unlawful conduct. This view of immunity is closely related to the way in which immunity operates in practice, with the primary goal of blocking and preventing the exercise of criminal jurisdiction in a particular case by the courts of the forum State when they seek to take action against an official of a third State. In strictly theoretical terms, this general description of immunity cannot be denied and must be accepted as the point of departure for any analysis that purports to contribute to the effort to define the legal nature of immunity.

149. This view of immunity as a mere procedural bar has been echoed in the literature and in case law, especially at the international level, as reflected by the foregoing analysis of practice. From this standpoint, immunity and responsibility cannot be confused with each other, and immunity cannot be assumed to give rise to impunity. On the contrary, as the International Court of Justice has made clear, it is possible, in spite of immunity, for individual criminal responsibility to be determined by means other than the exercise of jurisdiction by the courts of the forum State. Consequently, it appears that immunity from jurisdiction has the sole effect of preventing the determination of responsibility by means of a specific legal channel, leaving open the possibility that such responsibility may be established through other procedural mechanisms better suited to the purpose.

150. Nevertheless, this description of immunity as a mere procedural bar and the fundamental distinction between immunity and responsibility are difficult to support in absolute terms, especially in the field of criminal law. The analysis of practice and the necessary teleological interpretation of immunity lead to more nuanced conclusions. One example that comes to mind is the fine line that separates the invocation of official position as a substantive defence to avoid responsibility from its invocation as a procedural defence to avoid the exercise of jurisdiction. It suffices to recall how the Nürnberg Tribunal used the term in both senses and how the polysemic

use of the irrelevance of official position has found its way into both case law and quite a few of the international instruments analysed in the present report.

151. The acknowledgement of this issue even prompted the International Court of Justice to offer an alternative model for establishing responsibility that respects immunity and avoids impunity. However, the Court's efforts to overcome the confusion between immunity and impunity are not fully convincing for the purpose of inferring a fundamental separation between immunity and responsibility. This distinction raises no issues whatsoever in cases where there are genuine and accessible means of redress for establishing the criminal responsibility of a particular State official when such responsibility cannot be established before a particular court because immunity has been invoked. Conversely, when such alternative means of redress do not exist or are not effective in achieving this purpose, the distinction between immunity and exemption from criminal responsibility, and even between immunity and impunity, will inevitably become less clear-cut.

152. Thus, the strictly procedural nature of the immunity of State officials from foreign criminal jurisdiction, even when taken as a point of departure, presents certain limitations in practice that must be duly taken into account in analysing the question of limitations and exceptions. This idea is especially relevant in the case of immunity *ratione materiae*, which is closely related to acts that can give rise to the criminal responsibility of an official and which continues even after the State official finishes his or her term of office or loses his or her status as an official. The permanent nature of this type of immunity should also be considered, as it can, in some circumstances, have additional consequences with respect to the distinction between immunity and impunity.

### 3. Relationship between immunity of the State and immunity of State officials

153. The final element to be considered at this stage is the distinction between the immunity of State officials from foreign criminal jurisdiction and the immunity of the State *stricto sensu*. This question was analysed in detail in the Special Rapporteur's fourth report, particularly as it relates to the "single act, dual responsibility" approach and the criminal nature of the jurisdiction from which the immunity of State officials can be invoked.[291]

154. Although both elements have a bearing on the question of limitations and exceptions to immunity, it is unnecessary to revert to that topic at this point. For the purposes of the present report, it suffices to reiterate below the main conclusions set forth in the 2015 report:

(a) The attribution of an act to the State is the point of departure for determining whether an act has been performed in an official capacity. This attribution is not sufficient in itself, however, to conclude that a State official enjoys immunity in respect of the act.

(b) A single act can give rise to two different types of responsibility: international in the case of the State and criminal in the case of the individual. The existence of two types of responsibility translates into two types of immunity (of the State and of its official).

[291] Document A/CN.4/686, paras. 96-117).

(c) While both categories of immunity have the common purpose of protecting State interests, it cannot be concluded that they are subject to identical conditions or to the same legal regime.

155. Accordingly, the regime for limitations and exceptions to immunity may also differ depending on whether the immunity in question is the immunity of the State or the immunity of State officials from foreign criminal jurisdiction, without the possibility of mimetically transposing the first into the second or vice versa.[292]

## B. National and international criminal courts or tribunals

156. A second general element to be considered in addressing the issue of limitations and exceptions to immunity is the existence of international criminal courts mandated to try cases involving crimes with the greatest international impact. Although these courts have been outside the scope of the present topic, they have a clear relationship with national criminal courts, and this relationship has practical consequences for the invocation of immunity. Thus, for the purpose of defining the limitations and exceptions applicable to immunity from foreign criminal jurisdiction, it is useful to analyse the impact that international criminal courts can have on the institution of immunity.

157. This question may be approached from two opposite viewpoints. The first assumes that the establishment of international criminal courts and the impossibility of invoking immunity before them have no bearing on the regime applicable to the immunity of State officials from foreign criminal jurisdiction. According to this view, the different natures of the two types of courts translate into two different immunity regimes. This means that, even though immunity from jurisdiction cannot be invoked before international courts, it remains fully valid and can be invoked in national courts. The second approach, in contrast, is based on the unity of the objectives and principles applicable to the prosecution of international crimes, regardless of whether their perpetrators are tried before an international criminal court or a domestic court. As both jurisdictions serve the purpose of determining individual criminal responsibility and preventing impunity for the most serious international crimes, the rules concerning immunity must be applied in accordance with the same parameters. Thus, the mere existence of international criminal courts and the impossibility of invoking any type of immunity before them should imply that it is impossible for anyone, including State officials, to invoke immunity from criminal jurisdiction before the courts of a State.

158. These two approaches focus on two different elements: the procedural nature of immunity, in the first case, and the substantive nature of individual criminal responsibility for the commission of international crimes, in the second. Moreover, complementary arguments are often adduced in support of each of these views, especially the difference between national and international courts in terms of their

[292] See, in this regard, article IV of the Resolution of the Institute of International Law on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, adopted in 2009 at the session held in Naples: “The above provisions are without prejudice to the issue whether and when a State enjoys immunity from jurisdiction before the national courts of another State in civil proceedings relating to an international crime committed by an agent of the former State” (*Annuaire de l’Institut de droit international*, *Naples session*, vol. 73, p. 230).

relationship to the principle of sovereignty, and the question of whether or not criminal responsibility can be determined by alternative means. As noted *supra*, all these arguments have even been reflected in decisions adopted by international courts, including the International Court of Justice, the European Court of Human Rights and the Special Court for Sierra Leone.

159. The two approaches described above are highly theoretical, however, and overlook some very important elements that characterize the interconnection between national and international courts. Chief among these elements are the identical nature of the criminal offences or prohibited conduct dealt with by the two types of courts, the definition of a system for the division of competences among competing jurisdictions and the establishment of mechanisms for two-way cooperation and judicial assistance between the two categories of criminal courts.

160. The relevance of this model of interconnection is not theoretical; the model has significant practical consequences in the area of cooperation between courts, as illustrated recently in relation to the attempted arrest of President Al-Bashir in South Africa in execution of a warrant issued by the International Criminal Court. But this example, albeit the most high-profile in terms of media coverage, is not unique. It is also important to bear in mind the phenomenon of hybrid and internationalized criminal court or tribunals, the difficulty of categorizing them as either domestic or international tribunals and the consequences that this has for the institution of the immunity of State officials from jurisdiction.[293] It should also be recalled that the exercise of immunity before domestic courts can have an impact on the system for the division of competences in the case of competing jurisdictions, especially under the complementarity principle laid down in the Rome Statute.

161. Given these elements, the relationship between national criminal courts and international criminal courts needs to be considered in a more nuanced and balanced manner that takes into account the distinction between national jurisdiction and international jurisdiction while also bearing in mind the connections referred to above. This relationship will also need to be taken into account in the present report, albeit without altering the scope of the topic approved by the Commission.

162. To that end, it is useful to analyse, first, the immunity regime applicable before international criminal courts or tribunals, especially the International Criminal Court, the International Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Special Tribunal for Lebanon, the Extraordinary Chambers in the Courts of Cambodia, the Kosovo panels, the Special Panels for Serious Crimes in East Timor, the Extraordinary African Chambers within the Senegalese judicial system and the War Crimes Chamber of the State Court of Bosnia and Herzegovina. As all of these tribunals have specialized jurisdiction for the prosecution of international crimes, the way in which immunity is applied before them can shed light on a possible limitation or exception for crimes under international law in the context of the present topic.

163. As noted previously, the International Criminal Court, the International Tribunal for the former Yugoslavia and the Special Court for Sierra Leone have ruled that the immunity of State officials from criminal jurisdiction is not applicable

[293] In this regard, see Sarah Williams, *Hybrid and Internationalised Criminal Tribunals. Selected Jurisdictional Issues*, Oxford, Hart Publishing, pp. 326-348.

before them.[294] Nevertheless, only the Rome Statute includes an express reference to the question of immunity, in its article 27;[295] this model was subsequently followed by the Special Panels for Serious Crimes in East Timor.[296] Meanwhile, the statutes of the *ad hoc* Tribunals contain only a general provision on the irrelevance of official position or orders from a superior as grounds for exemption from or limitation of the scope of individual criminal responsibility;[297] this wording was also followed by the Special Court for Sierra Leone,[298] the Extraordinary Chambers in the Courts of Cambodia,[299] the War Crimes Chamber of the State Court of Bosnia and Herzegovina[300] and the Extraordinary African Chambers within the Senegalese Judicial System.[301] The rules governing the special war crimes panels in Kosovo[302] and the Special Tribunal for Lebanon[303] do not contain any provisions on official capacity; they only state that orders from commanders or superiors may not be invoked. This difference in the applicable rules is explained to some extent by the greater or lesser likelihood that officials of the foreign State will be brought before these tribunals, except in the case of the *ad hoc* Tribunals, where, by definition, this was a real possibility, yet they do not refer to immunity (which did not prevent them from considering that it cannot be invoked). In any event, even in the rules governing the International Criminal Court and the Special Panels for East Timor, the ruling-out of immunity is established in close connection with the clause on the irrelevance of official position.

164. It should be borne in mind that the interpretation of the rule that immunities cannot be invoked before international criminal courts is not without controversy. Although this rule is, in theory, a characteristic feature of these jurisdictions, it is useful to recall, in this regard, the debate on the interpretation of article 98, paragraph 1, of the Rome Statute and its relationship to article 27,[304] which took on special importance in connection with *Al-Bashir* as a result of a number of non-cooperation decisions taken by some African countries and the International Criminal Court decisions on non-cooperation analysed *supra* in the overview of international judicial practice.[305] In any event, it should be noted that, strictly

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[294] See chap. II, sect. C *supra*.

[295] See chap. II, sect. A *supra*.

[296] See sect. 15.2 of United Nations Transitional Administration in East Timor regulation No. 2000/15.

[297] See Statute of the International Tribunal for the former Yugoslavia, art. 7, paras. 2 and 4; and Statute of the International Criminal Tribunal for Rwanda, art. 6, paras. 2 and 4.

[298] Statute of the Special Court for Sierra Leone, art. 6, paras. 2 and 4.

[299] Law on the Establishment of the Extraordinary Chambers, art. 29.

[300] Criminal Code, art. 180.

[301] Agreement between the African Union and Senegal, art. 10.3 of the Statute annexed thereto.

[302] See UNMIK/REG/2003/25, art. 10.

[303] Statute of the Special Tribunal for Lebanon, art. 3.3.

[304] Under art. 98, para. 1, of the Rome Statute, "[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity".

[305] On the scope of the controversy between the African Union and the International Criminal Court, see Maurice Kamto, "L''Affaire Al Bashir' et les relations de l'Afrique avec la Cour pénale internationale", in Maurice Kamga and Makane Moïse Mbengue (eds.), *L'Afrique et le droit international: variations sur l'organisation internationale*: Liber amicorum *Raymond Ranjeva*, Paris, Pedone, 2013, pp. 147-170; and Djacoba Liva Tehindrazanarivelo, "The African Union principle on the fight against impunity and the arrest warrants for Omar Hassan El-Bashir", in

speaking, article 98, paragraph 1, only limits the obligation to cooperate with the Court in respect of the surrender of a person who enjoys immunity under international law, and this limitation, moreover, applies only to a request for the surrender of a national of a State that is not a party to the Statute.[306] From this standpoint, the limitation introduced by article 98, paragraph 1, does not, strictly speaking, affect the non-inability to invoke immunity from the Court's jurisdiction, but rather the ability to invoke such immunity in respect of measures that must be taken by national courts in order to fulfil the obligation to cooperate with the Court. Furthermore, practice shows that controversy has arisen exclusively in relation to Heads of State (Presidents Al-Bashir and Kenyatta), meaning that the issue relates essentially to the topic of immunity *ratione personae*. This, in short, was the issue raised before the South African courts in relation to the arrest of President Al-Bashir,[307] revealing the close relationship between the exercise of immunity before national courts and before international courts and the need for a systemic interpretation of both situations.[308]

165. This topic was further complicated by the African Union's adoption, in 2015, of the Malabo Protocol establishing the International Criminal Law Section of the African Court of Justice and Human Rights. The Protocol was intended to resolve, at the regional level, the problems caused by the disputed interpretation of article 98, paragraph 1, of the Rome Statute in relation to two serving African Heads of State by including the following article in the Statute of the African Court:

> "No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."[309]

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Marcelo Kohen and others (eds.), *Perspectives of international law in the 21st century*. Liber amicorum *Professor Christian Dominicé in honour of his 80th birthday*, Leiden, Martinus Nijhoff, 2012, pp. 397-442; Dire Tladi, "Immunity in the Era of 'Criminalisation': The African Union, the ICC, and International Law", *Japanese Yearbook of International Law*, vol. 58 (2015), pp. 17-44; Joana Abrisketa Uriarte, "Al Bashir: ¿Excepción a la inmunidad del jefe de Estado de Sudán y cooperación con la Corte Penal Internacional?", *Revista Española de Derecho Internacional*, vol. 68, No. 1 (2016), pp. 19-47.

[306] See Concepción Escobar Hernández, "La progresiva institucionalización de la jurisdicción penal internacional", in Mercedes García Arán and others (eds.), *Crimen internacional y jurisdicción universal. El caso Pinochet*, Valencia, Tirant lo blanch, 2000, pp. 213-257; Dapo Akande, "International Law Immunities and the International Criminal Court", *The American Journal of International Law* (AJIL), vol. 98, No. 3 (July 2004), pp. 407-433; Otto Triffterer, "'Irrelevance of Official Capacity' — Article 27 Rome Statute Undermined by Obligations under International Law or by Agreement (Article 98)?", in Isabelle Buffard and others (eds.), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, Leiden, Martinus Nijhoff, 2008, pp. 571-602; C. Kress, "The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute", in Morten Bergsmo and Yan Ling (eds.), *State Sovereignty and International Criminal Law*, Beijing, Torkel Opsahl Academic EPublisher, 2012, pp. 223-265.

[307] See chap. II, sect. D *supra*.

[308] See Dire Tladi, "The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law: Attempting to Make a Collage from an Incoherent Framework", University of Pretoria, 2015 (to be published in *Journal of International Criminal Justice*). The Special Rapporteur had access to this text courtesy of the author.

[309] Malabo Protocol, article 46A *bis*. Article 46B sets out the principle of the irrelevance of official position, subject to the special regime established in article 46A *bis*. The Protocol has not entered into force.

166. This initiative created a model of regional criminal jurisdiction that breaks, albeit only partially, with the rule that State officials cannot invoke immunity from the exercise of jurisdiction by international criminal courts. While it is not necessary to analyse that provision for the purpose of this report,[310] the mere fact of its adoption shows how the exercise of international criminal jurisdiction may, in practice, encounter problems related to the immunity of State officials from jurisdiction. It thus appears that the amendment of the Statute of the African Court may represent a turning point in the conception of international criminal jurisdiction as an alternative to the exercise of national criminal jurisdiction with regard to international crimes.

167. In any case, this was not the only attempt to seek an African solution to the question of the prosecution of Heads of State or former Heads of State for war crimes or crimes against humanity. On the contrary, the establishment of the Extraordinary African Chambers within the Senegalese Judicial System offers another example that is more comparable to the cases of the *ad hoc* Tribunals and internationalized tribunals. This arrangement, under which a court within the Senegalese judicial system was able to try a former Head of State for the commission, *inter alia*, of crimes against humanity and war crimes, confirmed that immunity cannot be invoked in cases involving such crimes. This is demonstrated by the fact that the judgment against Hissène Habré, whereby he was found guilty of these crimes and sentenced to life imprisonment, made no reference to immunity.[311]

168. The paragraph of the preamble to the Rome Statute recalling that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"[312] takes on special significance in this context. That statement lays the foundation for the principle of complementarity laid down in the Rome Statute as an instrument for determining the division of competences between the International Criminal Court and national courts. In line with this principle, the role of national courts should be neither underestimated nor sidelined.[313] On the contrary, strengthening the capacity of national courts to try cases involving international crimes is now an essential element of the new model of international criminal justice and has even given rise to the concept of "positive complementarity".[314]

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[310] For commentary on this provision, see Manisuli Ssenyonjo and Saidad Nakitto, "The African Court of Justice and Human and Peoples' Rights 'International Criminal Law Section': Promoting Impunity for African Union Heads of State and Senior State Officials?", *International Criminal Law Review*, vol. 16 (2016), pp. 71-102; and Dire Tladi, "The Immunity Provision in the AU Amendment Protocol. Separating the (Doctrinal) Wheat from the (Normative) Chaff", *Journal of International Criminal Justice*, vol. 13 (2015), pp. 3-17.

[311] The judgment against Hissène Habré was issued on 30 May 2016. See "Prononcé-résumé du jugement HH 20160528 (620786)", available on the website of the Extraordinary African Chambers: www.chambresafricaines.org.

[312] Preamble, sixth paragraph.

[313] On the principle of complementarity, see, among others, Carmen Quesada Alcalá, *La Corte Penal Internacional y la soberanía estatal*, Valencia, Tirant lo blanch, 2005; Concepción Escobar Hernández, "El principio de complementariedad", in Juan Yáñez-Barnuevo (ed.), *La Justicia Penal Internacional: una perspectiva iberoamericana, Encuentro Iberoamericano sobre Justicia Penal Internacional*, Madrid, Casa de América, 2001, pp. 78-100.

[314] Put forward by the Assembly of States Parties to the Rome Statute of the International Criminal Court, this concept was discussed at the Kampala Review Conference and led to a number of follow-up initiatives within the Assembly itself.

169. Against this backdrop, the recognition of the key role of domestic courts in combating international crimes and the need to ensure the effectiveness of their judicial proceedings are two factors that cannot be overlooked by the Commission. The Commission may therefore find it useful to take this factor into account in its deliberations on the subject of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.[315]

## C. Concept of limitations and exceptions to immunity

170. Throughout this fifth report, the expression "limitations and exceptions to immunity" has as if it represents a single category, in reference to cases where the immunity of a State official does not operate before the courts of another State. However, as indicated in the fourth report, the words "limitations" and "exceptions" each represent a separate concept. A "limitation" refers to any element that marks the boundaries of an institution; it must therefore be situated within those boundaries, because it is related to the elements that make up such an institution. An "exception", on the other hand, lies outside the institution; although the institution still retains its boundaries, it may, in certain circumstances, not apply owing to existence of elements outside the institution.

171. If we apply this distinction to limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, the limitations to immunity are necessarily related to the normative elements that define each category of immunity, whereas exceptions are defined by external elements which may derive from other components of the international legal order and in respect of which normative elements play a secondary role. From that perspective, the beneficiaries of immunity, the concept of acts performed in an official capacity and the temporal dimension of immunity should be considered as categories around which the limitations to immunity are established. By contrast, compliance with the values and legal principles of international law as a whole and the need to ensure that immunity does not generate undesired effects on other areas of international law (such as international criminal law, international humanitarian law or international human rights law) would constitute the starting point for the definition of exceptions to immunity.

172. This theoretical distinction is, however, not so neatly reflected in practice. As indicated in chapter III of the present report, the words "limitation" and "exception" are not used systematically by international tribunals, or in the comments and statements of States, or in judicial, legislative or treaty practice. In the majority of cases, the States and legal operators dealing with the phenomenon of immunity have not always used the same words, and sometimes have not even asserted that there is a limitation or exception to immunity; they merely affirm that immunity does not apply or that it cannot be invoked in national courts. On the other hand, it should be noted that the use of both words in respect of the same act has not been consistent or

[315] Keitner mentions this idea in a number of papers emphasizing what she calls horizontal enforcement: "*Germany v. Italy* and the Limits of Horizontal Enforcement ...". The same approach can be found in her recent contribution to the Symposium on the Immunity of State Officials of the American Society of International Law: "Horizontal Enforcement and the ILC's Proposed Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction", AJIL Unbound, vol. 109 (2015), pp. 161-166.

conclusive, including when legal operators have referred clearly to the distinction between limitations and exceptions. In this connection, the case of torture or international crimes in general, is significant: while for some legal operators such crimes constitute a limitation, for others they are an exception. However, in all those cases, the ultimate goal is the same: to declare that immunity of State officials from foreign criminal jurisdiction cannot be invoked in relation to a given type of conduct. To put it differently, both cases involve the "non-applicability" of the immunity regime, leaving the jurisdiction of the forum State intact.

173. However, this issue is not new or even exclusive to the present topic. In this connection, it suffices to recall past practice as reflected in some conventions dealing with immunity, which were developed from draft articles that had previously been adopted by the Commission. The Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Convention on Special Missions, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character — to name only those that are most closely related to our topic — do not establish any distinction between limitations and exceptions. They merely list cases in which some of the immunities regulated in those instruments do not apply. The most significant example is still the United Nations Convention on Jurisdictional Immunities of States and Their Property, which does not make any distinction between limitations and exceptions, and which treats under the same heading (Part III of the Convention) causes of non-applicability based not only on the acts of the State but also on the consequences of said acts, on the property over which jurisdiction is being sought, or the existence of special dispute-settlement mechanisms agreed between the parties.

174. For the purposes of the present topic, a categorical distinction between limitations and exceptions does not appear necessary. In addition, as noted in the fourth report, deciding between the concepts of limitations and exceptions in relation to specific cases may have consequences far beyond the regime of immunity, especially in the case of international crimes and the consequences that the characterization of such crimes as a limitation or exception might have on the regime of international State responsibility.[316] Consequently, in the view of the Special Rapporteur, it is more sensible (and more reflective of practice) to consider the topic from the general perspective of immunity that it cannot be invoked in specific circumstances, most prominently in the case of crimes under international law. This will be the focus of draft article 7, which is included in the present report.

175. In any event, it should be noted that limitations and exceptions are not treated as separate elements in the present report, solely to ensure that the draft articles proposed could cover both concepts. Nonetheless, the distinction between limitations and exceptions is of methodological interest, especially in light of the hermeneutical criteria that must be used to determine the existence of a limitation or exception to immunity. For example, the criteria for identifying limitations must be intricately linked to the normative elements of immunity, in particular acts that may be covered by immunity, and must be interpreted essentially in light of the existing

[316] See document A/CN.4/686, paras. 122-126. *Sed contra*, see William S. Dodge, "Foreign Official Immunity in the International Law Commission: the Meaning of "Official Capacity", Symposium on the Immunity of State Officials of the American Society of International Law, AJIL Unbound, vol. 109 (2015), pp. 161-166.

relationship between immunity and jurisdiction. In the case of exceptions, however, the normative elements of immunity are not the only basis on which the non-applicability of immunity can be established; the non-applicability can be based on other elements outside that institution which, as has been noted above, derive from the international legal order as a whole. While the non-applicability of immunity must be established following an inductive method in the first case, it may be established following a deductive method in the second. Both methods must be duly taken into consideration in the present report.

176. The methodological considerations mentioned above must be considered in addressing the bases of limitations and exceptions, which are analysed on the chapter below.

# IV. Instances in which the immunity of State officials from foreign criminal jurisdiction does not apply

177. In light of the analysis presented *supra*, the present chapter is intended to identify the scope of the limitations or exceptions to immunity from two perspectives: (a) determining the concrete areas in which such exceptions might operate; and (b) determining whether such exceptions can be invoked in general to both immunity *ratione personae* and immunity *ratione materiae* or only to the latter (section D). On the first point, the following scenarios will be examined in turn: international crimes (section A); harm caused in the territory of the forum State (section B); corruption (section C); and draft article 7 (section E), which deals with situations in which immunity is not applicable.

## A. International crimes

178. As indicated earlier in the present report, the commission of international crimes has been central to the debate on limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, owing undoubtedly to two factors: the connection between international crimes and *jus cogens*, on the one hand, and the inevitable comparison between immunity and the fight against impunity, on the other. The importance of international crimes in the debate on exceptions to immunity is also related to and influenced by the process of institutionalization of international criminal law that has been taking place since the end of the twentieth century, as reflected mainly in the establishment of international criminal courts or tribunals.

179. The practice analysed above shows how national courts have in some way addressed international crimes in the context of immunity. Although varied, the practice reveals a clear trend towards considering the commission of international crimes as a bar to the application of the immunity of State officials from foreign criminal jurisdiction, either because such crimes are not considered official acts, or because they are considered an exception to immunity, owing to their gravity or to the fact that they undermine values and principles recognized by the international community as a whole. On the other hand, although national courts have sometimes recognized immunity from foreign criminal jurisdiction for international crimes, it must be remembered that they always did so in the context of immunity *ratione personae*, and only in exceptional circumstances did they do so with regard to

immunity *ratione materiae*. In any event, it is worth noting that international criminal courts or tribunals have never recognized the immunity of State officials from foreign criminal jurisdiction in the exercise of their own jurisdiction.

180. Consequently, it may be possible to conclude *prima facie* that contemporary international law recognizes a limitation or exception to the immunity of State officials from foreign criminal jurisdiction in situations where the State official is suspected of committing an international crime, even though some publicists take the opposite view.[317] There are also a few practical examples where national courts have recognized the immunity of officials from criminal jurisdiction, including in cases where they were suspected of committing international crimes. In the section below, we analyse the connection between international crimes and the immunity of State officials from foreign criminal jurisdiction, from two separate perspectives: (a) the existence of an international custom marking the contours of such limitation or exception; and (b) the systematic recognition of international crimes as a limitation or exception to immunity. Although both scenarios are closely related, they are treated separately in the present report for the sake of clarity. This sub-section will conclude with a review of the international crimes that might constitute a limitation or exception to the exercise of immunity.

### 1. Limitation or exception based on the commission of international crimes as a customary norm

181. Although the analysis of practice in chapter II *supra*, which focuses on but is not limited to national legislative and judicial practice, shows that international crimes tend to be considered a limitation or exception to the exercise of foreign criminal jurisdiction, there are doubts as to whether such practice is sufficiently consistent and uniform to constitute a material element of an international custom. Some have also wondered whether such practice is accompanied by a sense of legal obligation that might constitute *opinio juris*. Others have pointed out that there is consistent international jurisprudence indicating that such an exception does not exist, and that international jurisprudence takes precedence over national jurisprudence in the identification of a custom whereby the commission of international crimes is considered a limitation or exception to immunity. In short, what is being called into question is the existence of a customary norm whereby international crimes are considered an exception or limitation to the immunity of State officials from foreign criminal jurisdiction.[318]

182. Determining whether or not such a custom exists is no easy task, and the debate around that issue cannot be ignored. The analysis of the issue in the present report is necessary and useful, to the extent that it can affect the Commission's decision whether or not to include such a limitation or exception in the draft articles that it is currently developing. That decision is undoubtedly one of the most sensitive and difficult aspects of our work, yet it is also of the greatest interest to States and the international community as a whole.

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[317] See Ingrid Wuerth, *"Pinochet's* legacy reassessed", AJIL, vol. 106 (2012), pp. 731-768; Roger O'keefe, "An 'International Crime' Exception to Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely", in Symposium on the Immunity of State Officials of the American Society of International Law, AJIL Unbound, vol. 109 (2015), pp. 167-172.

[318] O'keefe, "An 'International Crime'". On the other hand, Pedretti *Immunity of Heads of State* …, pp. 57-98 conducted an interesting study which led her to conclude that such a custom exists.

183. It is useful to conduct this analysis in the light of the ongoing work of the Commission on the identification of custom, and especially in the light of the draft conclusions provisionally adopted by the Drafting Committee,[319] which the Commission took note of on first reading during the first part of the current session. The following elements that are relevant for the purposes of the present report may be deduced from the draft conclusions:

(a) To determine the existence of an international custom, it is necessary to ascertain whether there is a "general practice that is accepted as law (*opinio juris)*";[320]

(b) Relevant practice "is primarily the practice of States",[321] which "consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions";[322]

(c) Practice "may take a wide range of forms" and may, "under certain circumstances, include inaction".[323] The following forms are worth noting for our purposes: "diplomatic acts (…); conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; (…); legislative and administrative acts; and decisions of national courts".[324]

(d) Account is to be taken of all available practice of a particular State, which is to be assessed as a whole,[325] considering that "there is no predetermined hierarchy among the various forms of practice";[326]

(e) In any case, practice "must be general, meaning that it must be sufficiently widespread and representative, as well as consistent";[327]

(f) For practice to constitute international custom, it "must be undertaken with a sense of legal right or obligation";[328]

(g) In assessing practice and *opinio juris*, "regard must be had to the overall context, the nature of the rule, and the particular circumstances in which […] each of the [two] constituent elements"[329] used to that end;

(h) "Decisions of international courts and tribunals, in particular of the International Court of Justice (…) are a subsidiary means for the determination" of customary norms,[330] but they do not constitute practice for the formulation of an international custom.[331]

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[319] See A/CN.4/L.872.
[320] *Ibid.,* draft conclusion 2.
[321] *Ibid*., draft conclusion 4, para. 1.
[322] *Ibid.*, draft conclusion 5.
[323] *Ibid.*, draft conclusion 6, para. 1.
[324] *Ibid.,* draft conclusion 6, para. 2.
[325] *Ibid.*, draft conclusion 7, para. 1.
[326] *Ibid*., draft conclusion 6, para. 3.
[327] *Ibid*., draft conclusion 8, para.1.
[328] *Ibid.*, draft conclusion 9, para.1.
[329] *Ibid*., draft conclusion 3, para.1.
[330] *Ibid*., draft conclusion 13, para.1.
[331] In this connection, see the manner in which draft conclusion 6, para. 2, draft conclusion 10, para.2, and draft conclusion 13, para. 2 refer to the role of the decisions of national courts and the limited manner in which draft conclusion 13, para.1 refers to the decisions of international courts and tribunals (*ibid.*).

184. In the light of these guidelines from the Commission, the Special Rapporteur considers that there are sufficient elements pointing to the existence of a customary norm that recognizes international crimes as a limitation or exception to immunity, for the following reasons:

(a) Despite the diversity of positions taken by national courts in the cases analysed *supra*, it is possible to identify a trend in favour of the exception, in particular but not limited to positions taken by national courts in the context of criminal jurisdiction;

(b) In cases where national courts have applied any form of limitation or exception based on the commission of international crimes, they have always done so in reference to the incompatibility of such crimes with existing norms or principles of contemporary international law; it is therefore possible to affirm that the decisions of national courts are based on the conviction that they are acting pursuant to international law and not in exercise of an absolute discretion, something that would hardly be compatible with the fulfilment of the judicial function. This conclusion is even more important for decisions taken by judicial bodies in countries which, at the time of the decision, did not have specific norms referring to the exercise of immunity, or in which, even when such norms existed, they did not refer expressly to a possible exception for international crimes. The conclusion is also important for cases where national courts exercised their jurisdiction without any reference to immunity in respect of specific State officials when they should have done so if they had considered it applicable, either because they referred to immunity in respect of other State officials (thereby recognizing such immunity), in the judgment in question, or because they had referred to said immunity in relation to international crimes allegedly committed by State officials in other judgments;

(c) The non-applicability of the immunity of State officials from foreign criminal jurisdiction in cases involving the commission of international crimes is reflected not only in judicial practice, but also in national laws adopted over the last two decades, which have gradually expressly incorporated such limitation or exception into domestic laws;

(d) State practice outside the judicial and legislative arenas, in particular within international organizations, also shows that most take the position that international crimes constitute a limitation or exception to immunity, as reflected in particular in statements delivered by States in the Sixth Committee in connection with this topic and in the written contributions of States in response to questions from the Commission under the present topic;

(e) The existence of a limitation or exception to immunity based on the commission of international crimes has also been recognized in writings by publicists, which must be considered a "subsidiary means" of identification of custom. In this connection, the *Institut de Droit international* deserves special commendation, having referred to the existence of such exception in many of its resolutions since the beginning of the current century.

185. It should be noted, however, that some publicists and States have adduced critical arguments against the conclusions set out *supra,* including (a) that there is equally significant practice against the application of a limitation or exception to immunity based on the commission of international crimes; (b) that international

jurisprudence, in particular the decisions of the International Court of Justice and the European Court of Human Rights, has not recognized the existence of a limitation or exception to immunity based on the commission of international crimes; and (c) that State practice which supposedly serves as the basis of a customary norm does not fit in the category of general practice, and is also not sufficiently consistent or representative. Although the importance of these arguments cannot be ignored or minimized, the Special Rapporteur feels that they should be assessed in a nuanced manner.

186. It should be noted that the first objection mentioned above is based on general practice which refers not only to the immunity of State officials, but also, and more importantly, to the immunity of the State. It is doubtful that such arguments might be considered relevant for the purposes of the current discussion because it is unlikely that they take into account the "overall context, the nature of the rule, and the particular circumstances"[332] of the means for determination mentioned *supra*.

187. Second, even though the decisions of the International Court of Justice and the European Court of Human Rights are of great importance in the international legal order, they can only be considered "subsidiary means" of determination of the existence of a practice accompanied by *opinio juris* that is relevant as evidence of a customary norm and can never be able to replace national courts in the process of formation of custom. Furthermore, the role of national courts is especially important for the topic under consideration, because immunity is always invoked before national courts and their decisions are an irrevocable element in ascertaining what a given State considers to be international law. As indicated *supra*, the decisions of the International Court of Justice and the European Court of Human Rights, which are usually cited as authorities, refer directly to State immunity and, when they refer to the immunity of State officials from foreign criminal jurisdiction, they have limited scope (especially those of the International Court of Justice), since they concern immunity *ratione personae* exclusively.

188. Of greater value are the arguments relating to the non-general nature of the practice used to substantiate the existence of a limitation or exception to immunity. In that connection, it is the case that the decisions of national courts, domestic norms and other types of statements by States are limited in number and their content is sometimes not fully consistent or uniform. However, as the Commission itself has just recognized in its work on the identification of customary international law, the relevance of the volume of practice must be assessed in the light of the area in which it is found.[333] In the case at hand, that area is, of necessity, limited by the very nature of the acts to which it refers (international crimes), because, despite their gravity, these acts are carried out exclusively in international society. In addition, the limited number of national orders that allow proceedings to be brought for such crimes when committed on foreign soil or by foreign nationals also limits the volume of practice. It should be noted, however, that the coexistence of judgments that apply a form of limitation or exception alongside judgments that apply immunity even in the presence of international crimes is not entirely unrelated to the process of formation of international custom. Owing to its informal and spontaneous nature, that process allows for the coexistence of divergent practices, at

[332] A/CN.4/L.872, draft conclusion 3.1.

[333] On the "general" nature of practice, see the second report on the identification of international custom document A/CN.4/672, especially paras. 52-57.

least during the initial stages of formation of the norm, without jeopardizing the emergence thereof. Lastly, with regard to the non-representative nature of practice, it should be noted that manifestations of practice can be identified in various regional areas, and that calling into question the relationship between immunity and international crimes in a given regional area does not affect the applicability of the limitation or exception to any form of immunity, except for immunity from jurisdiction *ratione personae*. The debate that has been taking place in Africa over the past few years and mentioned *supra,*[334] is a good example thereof. In any event, even in a situation where there might be doubts as to the existence of a relevant general practice to give rise to an international custom, it does not seem possible under any circumstances to deny the existence of a clear trend that would reflect an emerging custom.

189. Consequently, in the view of the Special Rapporteur, the commission of international crimes may indeed be considered a limitation or exception to State immunity from foreign criminal jurisdiction based on a norm of international customary law.

### 2. Systemic categorization of international crimes as an exception to immunity

190. Whether or not there is a customary norm defining international crimes as limitations or exceptions to immunity, a systemic analysis of the relationship between immunity and international crimes in contemporary international law shows that there are various arguments in favour of such a norm.

#### *(a) Protection of the values of the international community as a whole: jus cogens and the fight against impunity*

191. As stated previously, national judicial practice provides examples in which international crimes are treated as limitations or exceptions to immunity. In the first type of case, the commission of international crimes is not covered by immunity, since the acts in question cannot be characterized as acts performed in an official capacity. In the second type of case, the commission of international crimes would constitute an exception to immunity even where those crimes have been committed as part of a State policy or in connection with the performance of State activities and may therefore be deemed to be acts performed in an official capacity. At any rate, both types of case have the same outcome: the immunity of State officials from foreign criminal jurisdiction cannot apply in the case of international crimes.

192. The reasons adduced in both cases are of a substantive nature and are linked to the characterization of international crimes as acts contrary to fundamental values, norms and legal principles of the international community. Ultimately, they are also linked to the assertion that such crimes violate *jus cogens* norms from which there can be no derogation. In both cases, the characterization of international crimes as constituting a limitation or exception to immunity is also connected with the obligations arising from the fact that the international community as a whole has identified impunity for the most serious international crimes as an undesirable phenomenon and therefore cooperates to eliminate it.

193. It is incontrovertible that international crimes are contrary to the fundamental values, norms and legal principles of the international community; this is admitted

[334] See chapter III, sect. B.

even by those who consider that immunity from foreign criminal jurisdiction can be applied in the case of international crimes. At any rate, this assertion constitutes the premise for the fight against impunity as one of the values and objectives of society and international law today. However, although this is evident and has not been called into question, the legal status of both assertions has been questioned, and the conclusion has been drawn that both represent mere values and trends that are not embodied in norms of international law. However, this questioning of their legal status is not supported by a systemic analysis of the phenomenon in the context of contemporary international law.

194. Although the concepts of impunity and the fight against impunity have an undeniable sociological dimension, it cannot be denied that both have also become legal concepts as a result of the development of international law since the Second World War. The fact that both concepts have taken on a legal dimension is a result of the consolidation of two major areas of contemporary international law: international human rights law and international criminal law.[335]

195. The concept of "impunity" has acquired a legal dimension because social values have taken on the character of legal norms. For the current purposes, this legal dimension has been added essentially through the proclamation under international human rights law and international humanitarian law of a set of obligations relating to rights that are inherent in human dignity both in times of war and in times of peace and which, if not respected, have legal effects both on the State and on individuals. Their effects can be felt first through the rules pertaining to the international responsibility that States may incur by violating human rights and the norms of international humanitarian law, and second through the definition of international crimes for which the perpetrators may incur individual criminal responsibility. Both cases are expressions of the generic concept of responsibility, which, in the field of human rights, international humanitarian law and international criminal law, is conveyed by the term "accountability". The concept of impunity, understood in negative terms as an expression of "unaccountability", stands in opposition to the legal concept of accountability and, like accountability, has a legal dimension.[336] Furthermore, the elements to which "accountability" is applied and

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[335] It is not surprising, therefore, that the relationship between immunity and international crimes, under both international criminal law and international human rights law, has been analysed in studies published in the past 20 years. In this connection, see Van Alebeek, *The immunity of States…* On the human rights component of the debate, see Stacy Humes-Schulz, "Limiting Sovereign Immunity in the Age of Human Rights", *Harvard Human Rights Journal*, vol. 21, No. 1 (Winter 2008), pp. 105-142; Jo Stigen "Which Immunity for Human Rights Atrocities?", in Chile Eboe-Osuji, ed., *Protecting Humanity. Essays in International Law and Policy in Honour of Navanethem Pillay* (Leiden, Martinus Nijhoff, 2010), pp. 749-788; Beth Stephens, "Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses", *Vanderbilt Journal of Transnational Law*, vol. 44 (November 2011), pp. 1163-1183. It should also be borne in mind that the report prepared by Lady Fox for the Institut de Droit International, which served as the basis for the adoption of the Naples resolution (2009), was entitled "The Fundamental Rights of the Person and the Immunity from Jurisdiction in International Law".

[336] On accountability and impunity, see Daniel W. Van Ness, "Accountability", in Jennifer J. Llewellyn and Daniel Philpott, eds., *Restorative Justice, Reconciliation, and Peacebuilding* (Oxford, Oxford University Press, 2014); Paul Craig, "Accountability", in Damian Chalmers and Anthony Arnull, eds., *The Oxford Handbook of European Union Law* (Oxford, Oxford University Press, 2015) (who has stated that accountability may have political, legal and financial elements); Ramesh Thakur and Peter Malcontent, eds., *From Sovereign Impunity to International*

which are left unprotected as a result of "impunity" are also legal values: internationally recognized human rights, the essential norms for the protection of victims in situations of armed conflict and the prohibition of certain means and methods of combat. No one today would doubt that these values constitute norms of international law.

196. Furthermore, the concept of "the fight against impunity" has also taken on a legal dimension, in particular through the launch of mechanisms for international cooperation whose purpose initially was to determine the State's responsibility for the violation of the aforementioned norms and, more recently, has been to determine individual criminal responsibility. These mechanisms operate at the international level through the establishment of bodies of various kinds, including judicial bodies, for international human rights protection, and through the establishment of international criminal courts.

197. However, international cooperation is not limited to the establishment of international bodies and procedures. On the contrary, it should be noted that almost all the international treaties that institute systems for the protection of human rights impose on States the obligation to establish appropriate remedies for that purpose under their domestic law.[337] This is even clearer in the case of cooperation for the punishment of international crimes: under the standard model prior to the establishment of the international criminal courts or tribunals, it was left exclusively

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*Accountability: the Search for Justice in a World of States* (Tokyo, United Nations University Press, 2004); Andrea Bianchi, "Serious violations of human rights and foreign states' accountability before municipal courts", in Lal Chand Vohrah et al., eds., *Man's inhumanity to man: essays on international law in honour of Antonio Cassese* (The Hague, Kluwer, 2003), pp. 149-182. The important role of accountability in the rule of law has been emphasized by the General Assembly. In the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, States "commit to ensuring that impunity is not tolerated for genocide, war crimes and crimes against humanity or for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law, and for this purpose (…) encourage States to strengthen national judicial systems and institutions" (para. 22) and "stress the importance of a comprehensive approach to transitional justice incorporating the full range of judicial and non-judicial measures to ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State and promote the rule of law. In this respect, [they] underline that truth-seeking processes, including those that investigate patterns of past violations of international human rights law and international humanitarian law and their causes and consequences, are important tools that can complement judicial processes" (para. 21) (General Assembly resolution 67/1 of 24 September 2012).

[337] At the international level, see the International Covenant on Civil and Political Rights, arts. 2, para. 3 (a), and 14 (see also general comment No. 32, adopted in 2007) [report of the Human Rights Committee, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI]; and the Convention on the Elimination of All Forms of Discrimination against Women, art. 2 (c). At the regional level, see the European Convention on Human Rights, arts. 6 and 13; the Charter of Fundamental Rights of the European Union, art. 47; the American Convention on Human Rights, arts. 8 and 25; and the African Charter on Human and Peoples' Rights, art. 7. For its part, the Human Rights Council has affirmed the need to "ensure accountability, serve justice [and] provide remedies to victims": Human Rights Council resolution 27/3 on the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (A/HRC/RES/27/3), 3 October 2014.

to States (and their courts) to punish international crimes through their domestic law and institutions. This model persists to a large extent today through the inclusion in international treaties relating to international crimes of an obligation on States to establish, under domestic law, the jurisdiction of their national courts to punish such crimes.[338]

198. Therefore, both the concept of impunity and the concept of the fight against impunity have an unequivocal legal dimension under both international law and States' domestic law. The fact that both terms are polysemous and have a clear sociological meaning does not deprive them of their legal dimension or limit them to being merely non-legal or metalegal concepts.

199. The legal nature of these concepts is also reflected in the link between them and *jus cogens* norms. Suffice it to say that it is generally accepted that many of these norms recognizing human rights or prohibiting certain conduct are unequivocally peremptory norms. For the current purposes, this applies particularly to the crime of genocide, crimes against humanity, the most serious war crimes and torture, which are commonly referred to as violations of peremptory norms. It should also be borne in mind that the Commission itself has characterized them as such in its previous work on the law of treaties, the draft Code of Crimes against the Peace and Security of Mankind and the articles on responsibility of States for internationally wrongful acts. Since international crimes constitute violations of peremptory norms of international law, it is not surprising that some national courts have held that this fact is sufficient to conclude that the immunity of State officials from foreign criminal jurisdiction does not apply in cases in which international crimes have been committed. This explains why article 27 of the Rome Statute states that official capacity and national and international immunities cannot be invoked before the International Criminal Court and therefore cannot be used as a mechanism of procedural defence to bar the Court from exercising its jurisdiction.

200. This understanding of *jus cogens* as the basis for waiving immunity has been accepted by many national courts and a considerable number of States, as shown in the analysis of practice set out in chapter II *supra*. However, it should be remembered that it was expressly rejected by the International Court of Justice in the *Jurisdictional Immunities of the State* case on the grounds that *jus cogens* norms and the norms governing State immunity are distinct sets of rules. Moreover, the European Court of Human Rights has used similar arguments to conclude that the State's immunity from civil jurisdiction is not waived in the case of acts of torture, which are nonetheless expressly recognized as violations of peremptory norms of international law.

201. With regard to the assessment of that judgment in terms of its impact on the definition of *jus cogens* norms — something which does not need to be addressed in the present context — [339] it should be noted that, in the judgment, the Court did not

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[338] See the Convention on the Prevention and Punishment of the Crime of Genocide, art. V; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 5 and 6; the International Convention for the Protection of All Persons from Enforced Disappearance, art. 6; and the International Convention on the Suppression and Punishment of the Crime of Apartheid, art. IV.

[339] With regard to this issue, see, inter alia, Onder Bakircioglu, "*Germany v Italy*: The Triumph of Sovereign Immunity over Human Rights Law", *International Human Rights Law Review*, vol. 1 (2012), pp. 93-109; J. Craig Barker, "International Court of Justice: Jurisdictional Immunities of

address the interpretative effect of this type of norm, a point of particular interest to which the Commission itself has drawn attention in the past. As the Commission has already stated, the conflict between primary norms, as in the case currently under consideration, should not necessarily be resolved by determining responsibility; it should be borne in mind that all *jus cogens* norms have an interpretative effect that allows possible contradictions to be resolved without the need to consider the issue in relation to the rules of responsibility.

202. This interpretative effect should be borne in mind when addressing the relationship between the immunity of State officials from foreign criminal jurisdiction and international crimes. Thus, insofar as an international crime is a violation of a *jus cogens* norm, as is indisputably the case with regard to torture, this circumstance should be borne in mind by legal professionals in order to arrive at an interpretation that reconciles both norms. Such interpretations will have to be made on a case-by-case basis but, in principle, it would be possible to waive immunity from criminal jurisdiction either on the grounds that such crimes cannot be acts performed in an official capacity or on the grounds that immunity must be waived in certain particularly serious circumstances in which fundamental legal values of the international community are undermined.

203. Furthermore, it should be borne in mind that the conclusion of the International Court of Justice with regard to State immunity cannot be applied automatically and in all respects to the relationship between the immunity of State officials from foreign criminal jurisdiction and *jus cogens* norms. As the Court stated in its 2012 judgment, there is no conflict between immunity and *jus cogens* because immunity is a procedural matter and *jus cogens* is substantive in nature. Therefore, the mere establishment of a bar to the exercise of jurisdiction does not prevent a State from incurring responsibility through another channel and, therefore, does not result in a derogation from the *jus cogens* norm; thus one of the essential characteristics of peremptory norms — namely the impossibility of derogating from them under any norm of international law apart from another *jus cogens* norm — is preserved.

204. Bearing in mind that the Court is referring to immunity from civil jurisdiction, a State's responsibility and, above all, the legal consequences thereof (restitution of a right, payment of compensation, payment of damages, etc.) may be determined through another channel, either domestic (the courts of the State that is alleged to bear civil responsibility) or international (international courts, where possible; exercise of diplomatic protection; arbitration; or negotiation, inter alia). Therefore, the Court's assertion that immunity is an exclusively procedural institution cannot be challenged in strictly legal terms.

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the State (*Germany v. Italy*) Judgment of 3 February 2012", *International and Comparative Law Quarterly*, vol. 62 (July 2013), pp. 741-752; Andrea Bianchi, "Gazing at the crystal ball (again): state immunity and *jus cogens* beyond *Germany v. Italy*", *Journal of International Dispute Settlement*, 2013, pp. 1-19; François Boudreault, "Identifying Conflicts of Norms: The ICJ Approach in the Case of the *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*", *Leiden Journal of International Law*, vol. 25 (2012), pp. 1003-1012; Alexander Orakhelashvili, "Jurisdictional Immunities of the State, ICJ, Feb. 3 2012", *American Journal of International Law*, vol. 106, pp. 609-616; Jure Vidmar, "Rethinking *Jus Cogens* After *Germany v. Italy*: Back to Article 53?", *Netherlands International Law Review*, vol. 60, No. 1 (May 2013), pp. 1-25.

205. However, this conclusion cannot be applied absolutely to the type of immunity referred to in the present report. The immunity of State officials from foreign criminal jurisdiction has two specific characteristics that must be borne in mind: (a) it is exercised before the criminal courts; and (b) it has the effect of blocking any legal action whose purpose is to determine individual criminal responsibility for a certain type of crime. Beginning with the second of these characteristics, it cannot be denied that the only way to determine such criminal responsibility and to produce the necessary outcomes (declaration of innocence or guilt and, where appropriate, imposition of a penalty) is through criminal proceedings, which cannot be replaced by any of the alternative mechanisms referred to in the previous paragraph, in particular arbitration, diplomatic protection or inter-State negotiation. Therefore, immunity will fully meet the criteria to be considered a "procedural bar" only where recourse can be had to a criminal law mechanism other than the courts of the forum State in order to determine the possible criminal responsibility of a State official, whether that mechanism be the criminal courts of the State of the official, a competent international criminal court or another national court which, through the application of special rules, is competent to try the State official without the possibility of immunity being claimed before that court. However, it cannot be absolutely guaranteed that proceedings may be brought before one of these alternative courts, since this will depend on many circumstances, such as the existence of special norms in the State of the official that prevent him or her from being tried, the absence of jurisdiction of the international court or the existence of treaty norms that unequivocally allow for the intervention of a third State. If none of these alternative courts can try the international crimes, the phenomenon that has already been analysed in chapter III, section A, *supra* arises: immunity from foreign criminal jurisdiction loses its exclusively procedural nature and acquires a substantive component, so that it becomes both a "procedural bar" and a "substantive bar". The judgment of the International Court of Justice in the *Jurisdictional Immunities of the State* case did not contemplate that possibility and, therefore, it is not possible to conclude that the Court's assertion that there is no conflict between immunity and *jus cogens* norms applies in the case of immunity of State officials from foreign criminal jurisdiction in relation to the commission of international crimes.

*(b) Access to justice and the right of victims to reparation*

206. Closely related to the arguments set out in the preceding paragraphs is the assertion that applying immunity from jurisdiction in relation to international crimes constitutes a denial of victims' right of access to justice and to obtain reparation for the crimes they have endured.

207. Denial of the right of access to justice has traditionally been one of the arguments used to limit the scope of any form of immunity.[340] This right has, without doubt, the benefit of being a basic right without which the right to effective judicial protection and to a fair trial is meaningless.[341] However, as the European Court of Human Rights has stated,[342] the right of access to justice is subject to

[340] See the commentary on the judgment of the Italian Constitutional Court of 22 October 2014 (para. 122 *supra*).

[341] See European Court of Human Rights, case of *Golder v. United Kingdom*, judgment of 21 February 1975, *Series A, No. 18*, paras. 28-36.

[342] See chapter II, section B.2.

limitations and, in the case of the relationship between that right and immunity, requires a purposive approach, taking into account the fact that — by definition — immunity serves to "block" judicial proceedings and that it therefore necessarily entails a limitation on the right of access to justice.

208. Moreover, in the case of the immunity of State officials from foreign criminal jurisdiction, the right of access to justice has some specific characteristics that should be duly taken into account. First, criminal proceedings will not necessarily be brought by those who were the victims of the crime and, the initiation of proceedings against officials of a third State for international crimes may be subject to certain limits established by national laws that allow the organs of the State to control the exercise of jurisdiction on the grounds, in principle, of defence of the State's public interests. Second, proceedings are not initiated solely in defence of the individual interests and rights of the victims, but also for the benefit of national and international public order, so as to ensure compliance with norms that are considered essential by the international community as a whole. Lastly, the purpose of the proceedings is precisely to determine individual criminal responsibility for the commission of international crimes, which can be achieved only through judicial channels, whether that be the courts of the forum State, the courts of the State of the official, or an international criminal court. In this context, it is no simple matter to determine what is meant by the right of access to justice and in what circumstances the right is not guaranteed because immunity from criminal jurisdiction applies, even in cases where international crimes have been committed.

209. It is clear that an individual's right of access to the courts in order to file a complaint or accusation regarding the commission of an international crime will be limited by the application of immunity. However, this right will also be compromised if criminal proceedings are initiated by the competent authorities of the State and those proceedings are stalled by the application of immunity. In order for this limitation to make immunity incompatible with the right of access to justice, it must, as stated by the European Court of Human Rights, amount to a loss of the right itself. In other words, there must be no other means of securing a court decision on whether or not an international crime has been committed and whether, if such a crime has been committed, the State official is criminally responsible for the crime. If no such remedy is available, immunity will not only have the effect of denying the right of access to justice but will also allow the perpetuation of a situation at the root of which is an act — the international crime — that is contrary to peremptory norms of international law. From this perspective, and in these very particular circumstances, the right of access to justice may constitute a sufficient legal basis to conclude that immunity from foreign criminal jurisdiction is inapplicable in the case of international crimes.

210. In the case of the right of victims of international crimes to reparation, it cannot be denied that this is one of the most advanced developments in contemporary international criminal law: the commission of international crimes cannot have as its sole consequence the punishment of the perpetrators of those crimes; there should also be a system of reparations for the harm caused to the victims. This dimension of criminal justice is present in the laws of a number of countries establishing the right to reparation of the victims of a crime. The right is exercised either as an outcome of the criminal proceedings themselves or as a result of civil proceedings for the sole purpose of obtaining reparation for the harm caused by the crime, whether or not a criminal judgment has been issued on the matter.

211. The right to reparation is also a familiar concept in international law. For example, there are decisions of various international bodies that recognize the right to reparation of victims of human rights violations and international crimes.[343] The right to reparation was even claimed before the International Court of Justice in the *Jurisdictional Immunities of the State* case, although the Court did not rule on that point.[344] In any case, the right to reparation of the victims of international crimes is expressly recognized in article 75 of the Rome Statute, which has led to significant institutional[345] and jurisprudential[346] developments.

212. However, the characterization of the right of victims to reparation as the basis for an exception to immunity in the case of international crimes requires a nuanced analysis that is to a large extent related to the ability to initiate legal action for compensation. In that context, it should be borne in mind that such a claim may be filed with the criminal or civil courts and, in civil cases, it is not dependent on a prior criminal conviction. In both cases, the victim's right to reparation has a different effect on the limitation or exception to immunity. It is clear that this should be borne in mind as a basis for a limitation or exception when reparation can be obtained only through criminal proceedings, which therefore become an essential condition for obtaining reparation. In this case, the effect that immunity may have on the victims' right to reparation supplements the argument referred to above on the substantive dimension of immunity from foreign criminal jurisdiction.

213. However, the conclusion is not so clear in cases where reparation can be obtained only through proceedings before the civil courts, since in such cases the alternative mechanisms referred to above may come into operation. Furthermore, in these cases there is a renewed risk of confusion between the immunity of the State

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[343] See General Assembly resolution 60/147 of 16 December 2005 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Human Rights Council resolution 27/3 of 3 October 2014 on the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (A/HRC/RES/27/3); and general comment No. 3 of the Committee against Torture of 13 December 2012 (report of the Committee against Torture, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 44* (A/68/44), p. 254. On the treatment of the right to reparation in the doctrine, see, inter alia, Luis M. Cruz, "El derecho de reparación a las víctimas en el derecho internacional. Un estudio comparativo entre el derecho internacional de responsabilidad estatal y los principios básicos de reparación de víctimas de derechos humanos", *Revista de Derecho Político*, No. 77 (January-April 2010), pp. 185-209.

[344] See chapter II, section C.1, *supra*.

[345] For this purpose, the Assembly of States Parties established the Trust Fund for the benefit of victims, which is playing an important role in the Court's general system. In this regard, see resolution ICC-ASP/1/Res.6 of 9 September 2002 (Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims), in ICC-ASP/1/3, and resolution ICC-ASP/4/Res.3 (Regulations of the Trust Fund for Victims).

[346] International Criminal Court, Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations of 7 August 2012 (ICC-01/04-01/06-2904). See also Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations of 3 March 2015 (ICC-01/04-01/06-3129). In the judgment, the Appeals Chamber concluded that the victims' right to reparation derived from the personal responsibility of the convicted person and instructed the Trust Fund to award collective reparations. See Fernando Val Garijo, *Las víctimas de graves violaciones de los derechos humanos y del derecho internacional humanitario en el derecho internacional penal* (Madrid, UNED, 2007) (thesis).

official and the immunity of the State, which could be considered to bear subsidiary civil responsibility.

214. Consequently, irrespective of the debate on the right of victims to reparation, it does not appear possible to conclude that the right to reparation may constitute in and of itself an autonomous legal basis for an exception to the immunity of State officials from foreign criminal jurisdiction. In any case, this does not prevent the right to reparation from being evaluated as a complementary legal argument in favour of such an exception. In that context, the practice of certain States is particularly relevant; for example, the United States and Canada recognize in their domestic law an exception to immunity from civil jurisdiction in the case of certain claims for damages arising from the commission of international crimes. At a different level, the work of the Institut de Droit International should also be borne in mind: in its resolution on universal civil jurisdiction with regard to reparation for international crimes, it proclaimed both the right of victims to reparation and the right to effective access to justice to claim reparation (art. 1, paras. 1 and 2).

*(c) The obligation to prosecute international crimes*

215. The gravity of international crimes has been reflected in the adoption of a number of treaties that impose on States parties the obligation to exercise jurisdiction over such crimes. This treaty obligation has been regarded by some authors as the legal basis for concluding that the commission of international crimes constitutes a limitation or exception to immunity,[347] with reference in some degree to the experience of the *Pinochet* case. Accordingly, the duty of States parties to establish their own jurisdiction over certain international crimes obliges them to exercise jurisdiction in respect of any person who has committed crimes covered by such treaties, with no possibility of applying immunity. In a sense, States parties have implicitly waived the right to exercise of immunity from foreign criminal jurisdiction in respect of such crimes.

216. This is an interesting interpretation that seeks to preserve the duty of national courts to prosecute international crimes without the need to affect the essential elements of immunity from jurisdiction, in particular the consideration of immunity as an autonomous right of the State, and without the need to give a view on the characterization of international crimes as acts performed in an official capacity. It also has the advantage of being based on a treaty obligation that binds both the forum State and the State of the official, thus obviating the need to debate whether or not there is a customary norm that serves as the basis for limitations or exceptions to immunity. However, its value as a basis for limitations or exceptions is limited, since it would apply only to international crimes governed by treaties and does not take into account the existence of other treaties that do not include the obligation to establish jurisdiction. However, above all it is difficult to reconcile with the model of the relationship between jurisdiction and immunity described above, in which immunity can be applied only in respect of a pre-existing jurisdiction and in which, therefore, it is not logical to maintain that immunity does

[347] See Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes and Foreign Domestic Courts", *European Journal of International Law*, vol. 21, No. 4 (2011), pp. 815-852; Pierre d'Argent, "Immunity of State Officials and the Obligation to Prosecute", in Anne Peters et al., eds., *Immunities in the Age of Global Constitutionalism* (Leiden, Brill/Nijhoff, 2015), pp. 244-266.

not apply precisely because the State has previously established its jurisdiction with regard to international crimes. In any case, this argument has the value of underlining the important contribution that treaties governing the phenomenon of international crimes have made to the definition of limitations and exceptions to immunity from foreign criminal jurisdiction and of emphasizing the fact that limitations and exceptions to immunity may in some cases have a treaty basis.

217. In sum, the arguments that have been analysed above make it clear that there are sufficient grounds in contemporary international law to conclude that the commission of international crimes may constitute a limitation or exception to the immunity of State officials from foreign criminal jurisdiction. In the Special Rapporteur's view, there are therefore grounds to include such a limitation or exception in the draft articles, whether or not it is concluded that international custom establishes such a limitation or exception.

### 3. International crimes that constitute a limitation or exception to immunity

218. In order to define a limitation or exception to immunity from foreign criminal jurisdiction, it is necessary to define the concept of "international crime" and to identify the criminal acts that may be included within that concept.

219. At the outset, it should be noted that the term "international crime" refers to criminal conduct that is of international concern, either because it is undertaken in an international context and has a transnational or transboundary dimension, or because it undermines international legal values, irrespective of where it occurs. In both cases, these crimes are subject to international regulation. The first category includes crimes such as piracy, drug trafficking, human trafficking, corruption and other forms of international organized crime. The second includes the crime of genocide, crimes against humanity, war crimes, the crime of aggression, torture, enforced disappearance and apartheid. Although both categories generally consist of crimes that undermine the values and interests of States and the international community, only the latter category can, strictly speaking, be considered to constitute "international crimes" or "crimes under international law" that undermine the fundamental legal values of the international community as a whole.

220. Furthermore, a review of the practice analysed in chapter II of the present report shows that there are very few crimes identified in national laws as constituting exceptions to immunity from foreign criminal jurisdiction. Similarly, there are very few national court decisions in which immunity was withheld in connection with the commission of any of the established international crimes. The same pattern may be discerned in treaty practice and the Commission's past work on other topics.

221. After analysing that practice, it is possible to conclude that international crimes that constitute a limitation or exception to the application of immunity are generally those which, in the view of the international community, can give rise to criminal proceedings in international criminal courts or tribunals, in particular the International Criminal Court. As a result, these crimes should be placed in the same category as the crime of genocide, crimes against humanity and war crimes.

222. On the other hand, it is difficult, for the purposes of the present report, to extend this characterization to the crime of aggression, even though it, too, is a crime that falls under the jurisdiction of the International Criminal Court. There are

several reasons for this: the Court's jurisdiction over this crime is optional and not automatic, as is the case with the other international crimes; the Commission itself already indicated in the draft Code of Crimes against the Peace and Security of Mankind of 1996 that the crime of aggression must be entrusted primarily to international courts and tribunals, given the political implications it could have for the stability of relations between States; there are very few pieces of national criminal legislation that address this crime; and, lastly, there do not appear to be any cases of State practice in which the crime of aggression has been characterized as a limitation or an exception to the exercise of immunity, at either the legislative or the judicial level.

223. There is nothing to prevent the establishment, by means of a treaty, of an exception to immunity from foreign criminal jurisdiction in relation to the first category of international crimes identified above. However, their inclusion in the category of crimes that give rise to the definition of a custom-based limitation or exception is not supported by practice.

224. Finally, it must be borne in mind that the national case law that has given rise to the limitation or exception analysed in this section was derived primarily from a large number of torture cases. Although the crime of torture may, in principle, be considered to be included under the category of crimes against humanity, it will not always be possible to do so, especially when the acts of torture in question are not part of a plan or policy. Nevertheless, national courts have sometimes withheld immunity from jurisdiction in cases of torture in which this criterion has not always been met. Thus, in view of the seriousness of this crime and the fact that its prohibition has consistently been regarded as a *jus cogens* norm, it seems reasonable to include torture expressly among the international crimes that constitute a limitation or exception to the immunity of State officials from foreign criminal jurisdiction. Enforced disappearances are in a similar situation, although State practice in relation to them is more limited. In any event, owing to its seriousness, torture has been characterized as a "crime under international law" in various treaties when it is committed in a grave or systematic fashion. Given these circumstances, it seems appropriate to include torture in the list of crimes under international law that constitute a limitation or exception to the immunity from the jurisdiction referred to in the present report.

## B. "Territorial tort exception"

225. The "territorial tort exception" had its origin in the law of diplomatic immunities and was later extended to State immunity. It has been incorporated into all national laws governing immunity, with the exception of those of Pakistan, and into the United Nations Convention on Jurisdictional Immunities of States and Their Property. It can be considered that the content of this exception is described in article 12 of the Convention (see paragraph 27 *supra*).

226. As indicated by the Commission in its commentary to article 12, this exception is justified by the preferential nature of the jurisdiction of the State in whose territory the acts are carried out. In addition, it provides a remedy for individuals who have suffered harm as a result of acts committed by a State official and who

would normally not have access to any other legal means of redress.[348] This exception was also analysed in the 2007 memorandum by the Secretariat[349] and in the second report of the Special Rapporteur, Mr. Kolodkin, who concluded that it could constitute an exception to immunity *ratione materiae,* provided that the acts were committed in the territory of the forum State by a foreign official who had been present in the territory of that State without the State's express consent for the discharge of his or her official functions.[350]

227. While the above-mentioned exception was intended to be applied mainly in the context of diplomatic relations and was later extended to the acts of agents and officials of international organizations and to the immunity of the State, it is certainly possible to find examples of State practice in which the courts of the forum State have relied on the "territorial tort exception" to conclude that immunity from jurisdiction is not applicable to the officials of a foreign State. These are cases in which the national courts have applied the territorial tort exception in relation to acts constituting injury, political assassination, espionage or sabotage committed in the territory of the forum State by officials of a foreign State.[351] In such cases, the courts have denied immunity, despite recognizing the person concerned as a State official and establishing a connection between the State of the official and the act in question.

228. In some cases, the courts have concluded that — in spite of everything — immunity would remain applicable, and justified that conclusion by characterizing the acts in question as *acta jure imperii* and immunity as the immunity of the State and not that of its officials. This was the case with the decision of the Irish court in *McElhinney* v. *Ireland* and that of the European Court of Human Rights on the same set of facts. Similarly, it is worth noting the case of *Jurisdictional Immunities of the State,* in which the International Court of Justice denied the claims of Italy with

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[348] See chap. II, sect. A *supra*.

[349] See *Yearbook ... 2008*, vol. II, Part One, Addendum 2, document A/CN.4/596, paras. 162-165.

[350] See document A/CN.4/631, paras. 81-86.

[351] See the following cases: Federal Constitutional Court of Germany, judgment of 15 May 1995 (immunity denied to intelligence officials of the former German Democratic Republic); *R v. Mafart and Prieur* (*Rainbow Warrior*, judicial phase), New Zealand, High Court of Auckland, judgment of 22 November 1985 (attack on a Greenpeace ship that resulted in the death of a Dutch citizen and the sinking of the ship; the Court did not raise the issue of immunity); *Abu Omar*, Italy (cited by Gaeta, P: "*Extraordinary renditions* e inmunità della giurisdizione penale degli agenti di Stati esteri: il caso Abu Omar", *Rivista di diritto internazionale*, vol. 89, 2006, pp. 126-130 (abduction and illegal transfer of a person); *Letelier v. Chile*, US, 748 F.2d 790 (Second Circuit,1984), ILR, vol. 79, p. 561; *Jiménez v. Aristeguieta et al.,* 311 F.2d 547 (US, Court of Appeals, Fifth Circuit, 1962); *Jane Doe I, et al. v. Liu Qi, et al., Plaintiff A, et al. v. Xia Deren, et al.,* United States District Court, N.D. California (C 02-0672 CW, C 02 -0695 CW); *Khurts Bat v. Investigating judge of the German Federal Court,* England, [2011] EWHC2029 (Admin) (abduction and illegal transfer of a person in Germany) (this decision provides an interesting analysis of the issue of exceptions in paragraphs 86 to 101). The courts of Italy and Greece have also accepted this exception, in *Ferrini v. Federal Republic of Germany*, Italy, Court of Cassation, judgment of 11 March 2004, ILR vol. 128, p. 674, and *Prefecture of Voiotia v. Federal Republic of Germany*, Greece, Court of Cassation, judgment of 4 May 2000, ILR, vol. 129 513 (see judgment of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*). The International Criminal Tribunal for the former Yugoslavia has also referred to this exception, in *Prosecutor v. Tihomir Blaškić*, case IT-95-14-AR108 bis, request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, Appeals Chamber judgment of 29 October 1997, para. 41.

regard to the application of this exception, on the grounds that, because the acts that had caused the injury had been committed by the Nazi troops during an armed conflict, they should have been characterized as *acta jure imperii*.

229. In short, State practice, although limited, seems to be consistent in recognizing the application of this limitation or exception to the immunity of State officials from foreign criminal jurisdiction. The Special Rapporteur considers that this conclusion, together with the importance to be accorded the principle of territoriality in this case, justifies the inclusion of the "territorial tort exception" as a limitation or exception to immunity from jurisdiction in the draft articles currently being formulated.

## C. Corruption as a limitation or exception to immunity

230. As already mentioned in the Special Rapporteur's fourth report, immunity has sometimes been invoked before national courts in relation to certain forms of conduct which, even if they have the appearance of having been performed in an official capacity, were carried out in the exclusive interests of the State official in respect of whom the exercise of jurisdiction is sought. Immunity has also been invoked by State officials in the context of criminal proceedings concerning activities which are unrelated to the functions of the State (misappropriation of funds, money-laundering, etc.) but which are only capable of being performed because of the perpetrator's status as an official and which, moreover, usually cause economic harm to the State of the official. In such cases, the response of national courts has generally been to deny immunity.[352] Such activities constitute a broad category, which includes embezzlement, diversion and misappropriation of public funds, money-laundering and other manifestations of corruption.

231. It can be asserted in general terms that, in the light of the criteria established in the fourth report, all these cases do not involve acts that can be considered as having been carried out in an official capacity. In principle, therefore, there appears to be no need at present to analyse them from the perspective of limitations or exceptions. However, practice shows that, in a number of the cases, it was not easy to determine clearly whether the act concerned was official or private, in particular since the act in question was only capable of being performed because of the official status of its perpetrator and the latter's ability to take advantage of the State structure, sometimes by means of acts that were ostensibly official. Nevertheless, even in such cases, in which the boundaries are not clear, national courts have as a rule concluded that immunity is not applicable, relying in most cases on the intention of the perpetrators of the acts, namely to make use of their official position exclusively for their own benefit, thereby causing harm to the State of which they are, or were, officials. Such a

[352] See, in particular, the following cases: Switzerland, *Adamov* (see footnote 231 *supra*); Chile, *Fujimori*, Supreme Court, judge of first instance, judgment of 11 July 2007, case No. 5646-05, paras. 15-17 (the decision was adopted in connection with extradition proceedings relating to grave human rights violations and corruption); France, *Teodoro Nguema Obiang Mangue*, Court of Appeal of Paris, *Pôle* 7, Second Investigating Chamber, judgment of 13 June 2013; Court of Appeal of Paris, *Pôle* 7, Second Investigating Chamber, application for annulment, judgment of 16 April 2015. The Court made the statement cited after re-examining the arguments and statements of the judgment of 13 June 2013; California (C 02-0672 CW, C 02-0695 CW). However, a Swiss court has upheld immunity, even in a case concerning the diversion of public funds: *Marcos and Marcos v. Federal Department of Police* (see footnote 239 *supra*).

scenario therefore constitutes a clear case of what has been characterized above as a limitation to immunity, since immunity cannot be invoked in such cases owing to the incompatibility of the alleged act that gives rise to the attempt to exercise jurisdiction with one of the normative elements of immunity.

232. This is particularly clear in respect of acts that may fall under the term "corruption", where the State official acts unlawfully (in contravention of his or her mandate), or *ultra vires* (beyond his or her mandate). As stated in the previous reports, the fact that the act performed by the official is unlawful does not necessarily mean that he or she is not covered by immunity, if it is possible to determine that the act in question, despite being unlawful, was performed in an official capacity, that is to say, in the performance of State duties. However, *ultra vires* acts cannot in principle be covered by immunity, since, by definition, they are presumed not to have been performed in the exercise of State duties and, consequently, can never have been performed in an official capacity.

233. However, these conclusions, while theoretically indisputable, raise a considerable number of questions, and must in any event be reached on a case-by-case basis by the competent national court. This introduces a certain degree of uncertainty into an area — corruption among public officials — which is a focus of great concern for States, as demonstrated by the conclusion of international treaties dealing with this serious issue at both the global and the regional levels. Although such treaties do not generally refer to the question of immunity for the purpose of precluding its application in corruption cases involving foreign public officials, they have established a set of principles whose central aim is to ensure that State jurisdiction can be exercised effectively in order to suppress such conduct.[353]

234. Consequently, taking into account judicial practice and the fact that the suppression of corruption at the national and international levels constitutes a key objective of international cooperation,[354] it might be appropriate to include in the

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[353] In this connection, see United Nations Convention against Corruption, arts. 42 and 44-46; Criminal Law Convention on Corruption, arts. 17 and 25-27; Inter-American Convention against Corruption, art. V; and African Union Convention on Preventing and Combating Corruption, arts. 13, 15, 18 and 19.

[354] In a development closely related to the present report, it should be noted that the African Union has included corruption among the crimes within the jurisdiction of the International Criminal Law Section of the African Court of Justice and Human Rights. On a more general level, international concern about corruption and the need to combat it has been reflected in various activities undertaken by the Organization for Economic Cooperation and Development (OECD) and the United Nations Office on Drugs and Crime. The General Assembly has affirmed the need for a zero-tolerance approach to corruption, including within the United Nations itself, emphasizing that "the zero-tolerance approach to fraudulent acts and corruption (…) is indispensable for the strengthening of accountability at all levels" (General Assembly resolution 70/255 of 1 April 2016: Progress towards an accountability system in the United Nations Secretariat, para. 4). This concern has also been reflected in the literature. See Martine Boersma, *Corruption: a Violation of Human Rights and a Crime under International Law?*, Cambridge, Intersentia, 2012; American Society of International Law, *Proceedings of the Annual Meeting. April 3-6, 2013*, Panel on "Anti-corruption Initiatives in a Multipolar World" (Nicola Bonucci, "The fight against foreign bribery and international law: an exception or a way forward?", pp.247-252, Susan Rose-Ackerman, "International anti-corruption policies and the U.S. national interest", pp. 252-255, and Pascale Hélène Dubois, "Remarks", pp. 255-259; José Luis de la Cuesta Arazmendi, "Iniciativas internacionales contra la corrupción", *Eguzkilore*, No. 17 (December 2003), pp. 5-26; Radha Ivory, *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys*, Cambridge, Cambridge

draft articles a provision that expressly defines corruption as a limitation or exception to the immunity of State officials from foreign criminal jurisdiction.

## D. Limitations and exceptions to immunity *ratione personae* and immunity *ratione materiae*

235. Having identified the circumstances that might constitute a limitation or exception to immunity, it is necessary to determine if they are generally applicable to all types of immunity of State officials from foreign criminal jurisdiction (*ratione personae* and *ratione materiae*) or only to one (*ratione materiae*). The goal is to determine whether or not Heads of State, Heads of Government and Ministers for Foreign Affairs, during their term of office, are affected by the limitations or exceptions to immunity analysed above.

236. In making such a determination, it is important to bear in mind three considerations: (a) the way in which this matter has been approached in practice; (b) the purpose of, and the property protected by, immunity *ratione personae* and immunity *ratione materiae*; and (c) the differences between the normative elements of each of these types of immunity, in particular the temporal element. The substantive content of each limitation or exception analysed does not provide the information necessary to reach a decision as to the applicability or non-applicability of said limitation or exception to each type of immunity. In essence, crimes under international law, corruption and harm caused to persons and property are of the same gravity irrespective of who committed them.

237. Having said that, practice shows that national courts have generally recognized the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs in all circumstances, without taking into consideration the possible existence of one of the limitations or exceptions examined *supra*. This is especially patent in the case of international crimes, where national courts have generally recognized the immunity of the members of the troika. Moreover, such immunity has been recognized at the highest jurisdictional levels; indeed, even when a court of first instance has ruled that immunity is not applicable in the case of an international crime, the higher courts have overturned said decision and concluded that immunity is applicable.[355] Similarly, it has not been possible to find cases in which a national court has declared non-applicable the immunity of a Head of State, a Head of Government or a Minister for Foreign Affairs during his or her term of office on the grounds of the territorial tort exception or acts of corruption, with the sole exception, in the latter case, of the ruling of the Court of Appeal of Paris in the *Teodoro Nguema Obiang Mangue* case.

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University Press, 2014; Francisco Jiménez García, *La prevención y lucha contra el blanqueo de capitales y la corrupción. Interacciones evolutivas en un derecho internacional global*, Albolote (Granada), Comares, 2015; Ndiva Kofele-Kale, "*Sed quis custodiet ipsos custodies?* (But who will guard the guardians?): the case for elevating official corruption to the status of a crime in positive international law", *Annual Survey of International & Comparative Law*, vol. XIX (2013), pp. 1-16; Kolawole Olaniyan, *Corruption and Human Rights Law in Africa*, Oxford, Hart Publishing, 2014; José Miguel Olivares Tramón, "Democracia, buena gobernanza y lucha contra la corrupción en el derecho internacional", in Juan José Romero Guzmán and others (eds.), *Buen gobierno y corrupción: algunas perspectivas*, Santiago, Eds. Derecho UC, 2009, pp. 319-339.

[355] See the case of *Gaddafi* before the French courts cited in chap. II, sect. D *supra*).

238. National laws that provide for limitations or exceptions to immunity for international crimes generally do not apply said limitations or exceptions in respect of members of the troika during their term of office. Furthermore, national laws that do not distinguish between Heads of State, Heads of Government and Ministers for Foreign Affairs and other State officials with regard to exceptions to immunity generally do so for the sole purpose of cooperating with the International Criminal Court. Only the laws of Burkina Faso, the Comoros, Ireland, Mauritius and South Africa appear to contemplate an exception in cases of international crimes law which apply to all State officials, regardless of rank.[356]

239. In addition, the International Court of Justice has stated expressly that there exists a customary norm which recognizes the complete or absolute immunity of Ministers for Foreign Affairs, which is also applicable to Heads of State and Heads of Government, and which allows no exception, not even for the commission of the most serious crimes, such as genocide, crimes against humanity and war crimes. This limitation of the exception to immunity *ratione materiae* based on the commission of international crimes is also supported by the majority of publicists, especially the Institut de Droit international, as seen in its 2009 resolution.

240. Therefore, it has not been possible to determine, on the basis of practice, the existence of a customary rule that allows for the application of limitations or exceptions to immunity *ratione personae*, or to identify a trend in favour of such a rule. On the other hand, the limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction do apply to State officials in the context of immunity *ratione materiae*.

241. This limitation cannot, however, be construed as a form of immunity. That said, it is important to recall that immunity *ratione personae* is of a highly temporal nature, as established in draft article 4, which was provisionally adopted by the Commission in 2013. Pursuant to that provision, following the end of their term of office, former Heads of State, former Heads of Government and former Ministers for Foreign Affairs enjoy immunity *ratione materiae* in relation to acts carried out in their official capacity during their term of office. Following the end of their term of office, therefore, they are wholly subject to the regime of immunity *ratione materiae*, including the limitations and exceptions thereto. In other words, the exclusion of Heads of State, Heads of Government and Ministers for Foreign Affairs from the regime of limitations and exceptions to immunity is of a temporal nature, owing primarily to the role that they play as representatives of the State in international affairs.

242. Nevertheless, it is true that in specific circumstances, the exclusion may be permanent rather than temporary, especially in the case of monarchs, who are in office for life and who cannot be removed from office, and Heads of State and Government who, for various reasons, become mandate-holders for life. Although in these cases limitations and exceptions to immunity are also non-applicable, it would be useful to recommend that the States concerned consider the possibility of lifting the immunity of their officials when requested, especially in the case of the most serious international crimes. Nevertheless, this recommendation will need to be analysed in the sixth report, in the context of the procedural aspects of immunity.

[356] See chap. II, sect. B *supra*.

## E. Draft article

243. On the basis of the analysis undertaken in this fifth report, a draft article on the limitations and exceptions to immunity from foreign criminal jurisdiction is proposed below. In addition to the arguments developed above, the Special Rapporteur considered a number of other points when formulating the draft article.

244. Firstly, the distinction between limitations and exceptions, while useful in terms of methodology, had been controversial in normative terms, especially as a result of the discrepancies in the characterization of a particular act as a limitation or an exception in line with the analysis *supra*; this is especially true in the case of international crimes. The Commission was faced with a similar situation when formulating its draft articles on jurisdictional immunities of States and their property. At that time, the Commission opted for a cautious formulation which avoided the terms "limitation" and "exception" and instead generically referred to "proceedings in which [...] immunity cannot be invoked". The Special Rapporteur has used the same formulation in the draft article proposed in the present report.

245. Secondly, the draft article does not cover waivers of immunity by the State of an official. Owing to its highly procedural nature, this issue should be dealt with in the sixth report which, according to the programme of work initially proposed by the Special Rapporteur, will be prepared once the substantive issues have been addressed. Taking such an approach to waivers is consistent not only with the study carried out by the Secretariat but also with the third report of Special Rapporteur Kolodkin; it is also in line with the Commission's approach in preparing its draft articles on jurisdictional immunities of States and their property.

246. Thirdly, it is recognized that nothing prevents States from establishing, by means of international treaties, circumstances in which immunity from foreign criminal jurisdiction is not applicable. This has already occurred in practice and is fully consistent with treaty law. Therefore, a specific reference to this possibility has been included in the proposed draft article. For the same reason, a specific reference to the duty to cooperate with international criminal courts or tribunals has also been included.

247. Lastly, the Special Rapporteur wishes to underscore that the application of this draft article should be understood in the light of the procedural rules on the application of immunity that may be established in the future. Although such rules would not change the substantive content of the draft article with regard to the identification of situations in which immunity does not apply, it will be possible at such time to establish specific procedural conditions with a view to ensuring the observance of all the procedural safeguards that protect both States and individuals. However, it does not appear necessary at this time to introduce a specific reference to this issue in the draft article.

248. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

**Draft article 7**
**Crimes in respect of which immunity does not apply**

1. Immunity shall not apply in relation to the following crimes:

(i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances;

(ii) Corruption-related crimes;

(iii) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.

2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.

3. Paragraphs 1 and 2 are without prejudice to:

(i) Any provision of a treaty that is binding on both the forum State and the State of the official, under which immunity would not be applicable;

(ii) The obligation to cooperate with an international court or tribunal which, in each case, requires compliance by the forum State.

# VI. Future workplan

249. Following the programme of work initially proposed by the Special Rapporteur, her sixth report will address the procedural aspects of immunity of State officials from foreign criminal jurisdiction. It will also revisit the concepts of jurisdiction and immunity originally proposed by the Special Rapporteur in her second report. These concepts will have to be analysed from a procedural perspective with a view to identifying, in particular, the acts specific to the investigation and prosecution of a given crime in respect of which immunity is applicable.

250. The analysis of the procedural aspects of immunity is the last issue included in the initial programme of work; therefore, the Commission will be in a position to conclude its consideration of the topic and adopt the draft articles on first reading in 2017. Consequently, after the period required for States to submit written comments, the Commission will be able to review any such comments and the Special Rapporteur's proposals in 2019 and, as appropriate, proceed to the final adoption of the draft articles on second reading.

251. In any event, this workplan is subject to the decisions that will be adopted in the next quinquennium by the Commission members to be elected by the General Assembly in November 2016.

# Annex I

## Draft articles provisionally adopted by the Commission

### Part one
### Introduction

#### Draft article 1
#### Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

#### Draft article 2
#### Definitions

For the purposes of the present draft articles:

[…]

(e) "State official" means any individual who represents the State or who exercises State functions.

### Part two
### Immunity *ratione personae*

#### Draft article 3
#### Persons enjoying immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

#### Draft article 4
#### Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.

3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

# Part three
# Immunity *ratione materiae*

### Draft article 5
### Persons enjoying immunity *ratione materiae*

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

# Annex II

## Draft articles provisionally adopted by the Drafting Committee at the Commission's sixty-seventh session, in 2015

### Part one
### Introduction

#### Draft article 2
#### Definitions

For the purposes of the present draft articles:

[…]

(f) An 'act performed in an official capacity' means any act performed by a State official in the exercise of State authority.

### Part three
### Immunity *ratione materiae*

#### Draft article 6
#### Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

# Annex III

## Draft article proposed for the consideration of the Commission at its sixty-eighth session, in 2016

**Draft article 7**
**Crimes in respect of which immunity does not apply**

1. Immunity shall not apply in relation to the following crimes:

(i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances;

(ii) Corruption-related crimes;

(iii) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.

2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.

3. Paragraphs 1 and 2 are without prejudice to:

(i) Any provision of a treaty that is binding on the forum State and the State of the official, under which immunity would not be applicable;

(ii) The obligation to cooperate with an international tribunal which, in each case, requires compliance by the forum State.

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# AFFAIRE RELATIVE AU MANDAT D'ARRÊT DU 11 AVRIL 2000

(RÉPUBLIQUE DÉMOCRATIQUE DU CONGO c. BELGIQUE)

**ARRÊT DU 14 FÉVRIER 2002**

# 2002

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

(DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM)

**JUDGMENT OF 14 FEBRUARY 2002**

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ARRÊT

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# ARREST WARRANT OF 11 APRIL 2000
# (DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM)

14 FEBRUARY 2002

JUDGMENT

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YEAR 2002

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No. 121

**14 February 2002**

# CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

## (DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM)

*Facts of the case — Issue by a Belgian investigating magistrate of "an international arrest warrant* in absentia *" against the incumbent Minister for Foreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity — International circulation of arrest warrant through Interpol — Person concerned subsequently ceasing to hold office as Minister for Foreign Affairs.*

* *

*First objection of Belgium — Jurisdiction of the Court — Statute of the Court, Article 36, paragraph 2 — Existence of a "legal dispute" between the Parties at the time of filing of the Application instituting proceedings — Events subsequent to the filing of the Application do not deprive the Court of jurisdiction.*

*Second objection of Belgium — Mootness — Fact that the person concerned had ceased to hold office as Minister for Foreign Affairs does not put an end to the dispute between the Parties and does not deprive the Application of its object.*

*Third objection of Belgium — Admissibility — Facts underlying the Application instituting proceedings not changed in a way that transformed the dispute originally brought before the Court into another which is different in character.*

*Fourth objection of Belgium — Admissibility — Congo not acting in the context of protection of one of its nationals — Inapplicability of rules relating to exhaustion of local remedies.*

*Subsidiary argument of Belgium —* Non ultra petita *rule — Claim in Application instituting proceedings that Belgium's claim to exercise a universal jurisdiction in issuing the arrest warrant is contrary to international law — Claim not made in final submissions of the Congo — Court unable to rule on that ques-*

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*tion in the operative part of its Judgment but not prevented from dealing with certain aspects of the question in the reasoning of its Judgment.*

* *

*Immunity from criminal jurisdiction in other States and also inviolability of an incumbent Minister for Foreign Affairs — Vienna Convention on Diplomatic Relations of 18 April 1961, preamble, Article 32 — Vienna Convention on Consular Relations of 24 April 1963 — New York Convention on Special Missions of 8 December 1969, Article 21, paragraph 2 — Customary international law rules — Nature of the functions exercised by a Minister for Foreign Affairs — Functions such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability — No distinction in this context between acts performed in an "official" capacity and those claimed to have been performed in a "private capacity".*

*No exception to immunity from criminal jurisdiction and inviolability where an incumbent Minister for Foreign Affairs suspected of having committed war crimes or crimes against humanity — Distinction between jurisdiction of national courts and jurisdictional immunities — Distinction between immunity from jurisdiction and impunity.*

*Issuing of arrest warrant intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs — Mere issuing of warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs — Purpose of the international circulation of the arrest warrant to establish a legal basis for the arrest of Minister for Foreign Affairs abroad and his subsequent extradition to Belgium — International circulation of the warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs.*

* *

*Remedies sought by the Congo — Finding by the Court of international responsibility of Belgium making good the moral injury complained of by the Congo — Belgium required by means of its own choosing to cancel the warrant in question and so inform the authorities to whom it was circulated.*

## JUDGMENT

*Present:* *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL; *Judges* ad hoc BULA-BULA, VAN DEN WYNGAERT; *Registrar* COUVREUR.

In the case concerning the arrest warrant of 11 April 2000,

*between*

the Democratic Republic of the Congo,

represented by

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Ngele Masudi, Minister of Justice and Keeper of the Seals,
Maître Kosisaka Kombe, Legal Adviser to the Presidency of the Republic,
Mr. François Rigaux, Professor Emeritus at the Catholic University of Louvain,
Ms Monique Chemillier-Gendreau, Professor at the University of Paris VII (Denis Diderot),
Mr. Pierre d'Argent, Chargé de cours, Catholic University of Louvain,
Mr. Moka N'Golo, Bâtonnier,
Mr. Djeina Wembou, Professor at the University of Abidjan,

as Counsel and Advocates;

Mr. Mazyambo Makengo, Legal Adviser to the Ministry of Justice,

as Counsellor,

*and*

the Kingdom of Belgium,

represented by

Mr. Jan Devadder, Director-General, Legal Matters, Ministry of Foreign Affairs,

as Agent;

Mr. Eric David, Professor of Public International Law, Université libre de Bruxelles,
Mr. Daniel Bethlehem, Barrister, Bar of England and Wales, Fellow of Clare Hall and Deputy Director of the Lauterpacht Research Centre for International Law, University of Cambridge,

as Counsel and Advocates;

H.E. Baron Olivier Gilles de Pélichy, Permanent Representative of the Kingdom of Belgium to the Organization for the Prohibition of Chemical Weapons, responsible for relations with the International Court of Justice,
Mr. Claude Debrulle, Director-General, Criminal Legislation and Human Rights, Ministry of Justice,
Mr. Pierre Morlet, Advocate-General, Brussels Cour d'Appel,
Mr. Wouter Detavernier, Deputy Counsellor, Directorate-General Legal Matters, Ministry of Foreign Affairs,
Mr. Rodney Neufeld, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge,
Mr. Tom Vanderhaeghe, Assistant at the Université libre de Bruxelles,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

1. On 17 October 2000 the Democratic Republic of the Congo (hereinafter referred to as "the Congo") filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter referred to as "Belgium") in respect of a dispute concerning an "international arrest warrant issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi".

In that Application the Congo contended that Belgium had violated the "principle that a State may not exercise its authority on the territory of another State", the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations", as well as "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

In order to found the Court's jurisdiction the Congo invoked in the aforementioned Application the fact that "Belgium ha[d] accepted the jurisdiction of the Court and, in so far as may be required, the [aforementioned] Application signifie[d] acceptance of that jurisdiction by the Democratic Republic of the Congo".

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of Belgium by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case; the Congo chose Mr. Sayeman Bula-Bula, and Belgium Ms Christine Van den Wyngaert.

4. On 17 October 2000, the day on which the Application was filed, the Government of the Congo also filed in the Registry of the Court a request for the indication of a provisional measure based on Article 41 of the Statute of the Court. At the hearings on that request, Belgium, for its part, asked that the case be removed from the List.

By Order of 8 December 2000 the Court, on the one hand, rejected Belgium's request that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. In the same Order, the Court also held that "it [was] desirable that the issues before the Court should be determined as soon as possible" and that "it [was] therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition"

5. By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. By Orders of 14 March 2001 and 12 April 2001, these time-limits, taking account of the reasons given by the Congo and the agreement of the Parties, were successively extended. The Memorial of the Congo was filed on 16 May 2001 within the time-limit thus finally prescribed.

6. By Order of 27 June 2001, the Court, on the one hand, rejected a request

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by Belgium for authorization, in derogation from the previous Orders of the President of the Court, to submit preliminary objections involving suspension of the proceedings on the merits and, on the other, extended the time-limit prescribed in the Order of 12 April 2001 for the filing by Belgium of a Counter-Memorial addressing both questions of jurisdiction and admissibility and the merits. The Counter-Memorial of Belgium was filed on 28 September 2001 within the time-limit thus extended.

7. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

8. Public hearings were held from 15 to 19 October 2001, at which the Court heard the oral arguments and replies of:

*For the Congo:* H.E. Mr. Jacques Masangu-a-Mwanza,
H.E. Mr. Ngele Masudi,
Maître Kosisaka Kombe,
Mr. François Rigaux,
Ms Monique Chemillier-Gendreau,
Mr. Pierre d'Argent.

*For Belgium:* Mr. Jan Devadder,
Mr. Daniel Bethlehem,
Mr. Eric David.

9. At the hearings, Members of the Court put questions to Belgium, to which replies were given orally or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. The Congo provided its written comments on the reply that was given in writing to one of these questions, pursuant to Article 72 of the Rules of Court.

*

10. In its Application, the Congo formulated the decision requested in the following terms:

> "The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels Tribunal de première instance against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law', that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000."

11. In the course of the written proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of the Congo,*

in the Memorial:

> "In light of the facts and arguments set out above, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

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1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC;
3. the violation of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 precludes any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that, following the Court's Judgment, Belgium renounces its request for their co-operation in executing the unlawful warrant."

*On behalf of the Government of Belgium,*

in the Counter-Memorial:

"For the reasons stated in Part II of this Counter-Memorial, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the preceding submission, the Court concludes that it does have jurisdiction in this case and that the application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the application."

12. At the oral proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of the Congo,*

"In light of the facts and arguments set out during the written and oral proceedings, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the war-

rant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

*On behalf of the Government of Belgium,*

"For the reasons stated in the Counter-Memorial of Belgium and in its oral submissions, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the Application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the submissions of Belgium with regard to the Court's jurisdiction and the admissibility of the Application, the Court concludes that it does have jurisdiction in this case and that the Application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the Application."

* * *

13. On 11 April 2000 an investigating judge of the Brussels Tribunal de première instance issued "an international arrest warrant *in absentia*" against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.

At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo.

14. The arrest warrant was transmitted to the Congo on 7 June 2000, being received by the Congolese authorities on 12 July 2000. According to Belgium, the warrant was at the same time transmitted to the International Criminal Police Organization (Interpol), an organization whose function is to enhance and facilitate cross-border criminal police co-operation worldwide; through the latter, it was circulated internationally.

15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", as amended by the Law of 10 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law" (hereinafter referred to as the "Belgian Law").

Article 7 of the Belgian Law provides that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed". In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which

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the arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia's alleged offences was also uncontested.

Article 5, paragraph 3, of the Belgian Law further provides that "[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law".

16. At the hearings, Belgium further claimed that it offered "to entrust the case to the competent authorities [of the Congo] for enquiry and possible prosecution", and referred to a certain number of steps which it claimed to have taken in this regard from September 2000, that is, before the filing of the Application instituting proceedings. The Congo for its part stated the following: "We have scant information concerning the form [of these Belgian proposals]." It added that "these proposals . . . appear to have been made very belatedly, namely *after* an arrest warrant against Mr. Yerodia had been issued".

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings (see paragraph 1 above), in which the Court was requested "to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000". The Congo relied in its Application on two separate legal grounds. First, it claimed that "[t]he *universal jurisdiction* that the Belgian State attributes to itself under Article 7 of the Law in question" constituted a

> "[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations".

Secondly, it claimed that "[t]he non-recognition, on the basis of Article 5 . . . of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office" constituted a "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

18. On the same day that it filed its Application instituting proceedings, the Congo submitted a request to the Court for the indication of a provisional measure under Article 41 of the Statute of the Court. During the hearings devoted to consideration of that request, the Court was informed that in November 2000 a ministerial reshuffle had taken place in the Congo, following which Mr. Yerodia had ceased to hold office as Minister for Foreign Affairs and had been entrusted with the portfolio of Minister of Education. Belgium accordingly claimed that the Congo's Application had become moot and asked the Court, as has already been

recalled, to remove the case from the List. By Order of 8 December 2000, the Court rejected both Belgium's submissions to that effect and also the Congo's request for the indication of provisional measures (see paragraph 4 above).

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today.

20. On 12 September 2001, the Belgian National Central Bureau of Interpol requested the Interpol General Secretariat to issue a Red Notice in respect of Mr. Yerodia. Such notices concern individuals whose arrest is requested with a view to extradition. On 19 October 2001, at the public sittings held to hear the oral arguments of the Parties in the case, Belgium informed the Court that Interpol had responded on 27 September 2001 with a request for additional information, and that no Red Notice had yet been circulated.

21. Although the Application of the Congo originally advanced two separate legal grounds (see paragraph 17 above), the submissions of the Congo in its Memorial and the final submissions which it presented at the end of the oral proceedings refer only to a violation "in regard to the . . . Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers" (see paragraphs 11 and 12 above).

* * *

22. In their written pleadings, and in oral argument, the Parties addressed issues of jurisdiction and admissibility as well as the merits (see paragraphs 5 and 6 above). In this connection, Belgium raised certain objections which the Court will begin by addressing.

* *

23. The first objection presented by Belgium reads as follows:

> "That, in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], there is no longer a 'legal dispute' between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case."

24. Belgium does not deny that such a legal dispute existed between the Parties at the time when the Congo filed its Application instituting proceedings, and that the Court was properly seised by that Application. However, it contends that the question is not whether a legal dispute

existed at that time, but whether a legal dispute exists at the present time. Belgium refers in this respect *inter alia* to the *Northern Cameroons* case, in which the Court found that it "may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties" (*I.C.J. Reports 1963*, pp. 33-34), as well as to the *Nuclear Tests* cases (*Australia* v. *France*) (*New Zealand* v. *France*), in which the Court stated the following: "The Court, as a court of law, is called upon to resolve existing disputes between States . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision" (*I.C.J. Reports 1974*, pp. 270-271, para. 55; p. 476, para. 58). Belgium argues that the position of Mr. Yerodia as Minister for Foreign Affairs was central to the Congo's Application instituting proceedings, and emphasizes that there has now been a change of circumstances at the very heart of the case, in view of the fact that Mr. Yerodia was relieved of his position as Minister for Foreign Affairs in November 2000 and that, since 15 April 2001, he has occupied no position in the Government of the Congo (see paragraphs 18 and 19 above). According to Belgium, while there may still be a difference of opinion between the Parties on the scope and content of international law governing the immunities of a Minister for Foreign Affairs, that difference of opinion has now become a matter of abstract, rather than of practical, concern. The result, in Belgium's view, is that the case has become an attempt by the Congo to "[seek] an advisory opinion from the Court", and no longer a "concrete case" involving an "actual controversy" between the Parties, and that the Court accordingly lacks jurisdiction in the case.

25. The Congo rejects this objection of Belgium. It contends that there is indeed a legal dispute between the Parties, in that the Congo claims that the arrest warrant was issued in violation of the immunity of its Minister for Foreign Affairs, that that warrant was unlawful *ab initio*, and that this legal defect persists despite the subsequent changes in the position occupied by the individual concerned, while Belgium maintains that the issue and circulation of the arrest warrant were not contrary to international law. The Congo adds that the termination of Mr. Yerodia's official duties in no way operated to efface the wrongful act and the injury that flowed from it, for which the Congo continues to seek redress.

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26. The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently

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become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction (see *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122; *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 23-24, para. 38; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 129, para. 37).

27. Article 36, paragraph 2, of the Statute of the Court provides:

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> *(a)* the interpretation of a treaty;
> *(b)* any question of international law;
> *(c)* the existence of any fact which, if established, would constitute a breach of an international obligation;
> *(d)* the nature or extent of the reparation to be made for the breach of an international obligation."

On 17 October 2000, the date that the Congo's Application instituting these proceedings was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with the above provision: Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case.

Moreover, it is not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. Such a dispute was clearly a legal dispute within the meaning of the Court's jurisprudence, namely "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" in which "the claim of one party is positively opposed by the other" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 22; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Juagment, I.C.J. Reports 1998*, pp. 122-123, para. 21).

28. The Court accordingly concludes that at the time that it was seised

of the case it had jurisdiction to deal with it, and that it still has such jurisdiction. Belgium's first objection must therefore be rejected.

* *

29. The second objection presented by Belgium is the following:

> "That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . Government [of the Congo], the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case."

30. Belgium also relies in support of this objection on the *Northern Cameroons* case, in which the Court considered that it would not be a proper discharge of its duties to proceed further in a case in which any judgment that the Court might pronounce would be "without object" (*I.C.J. Reports 1963*, p. 38), and on the *Nuclear Tests* cases, in which the Court saw "no reason to allow the continuance of proceedings which it knows are bound to be fruitless" (*I.C.J. Reports 1974*, p. 271, para. 58; p. 477, para. 61). Belgium maintains that the declarations requested by the Congo in its first and second submissions would clearly fall within the principles enunciated by the Court in those cases, since a judgment of the Court on the merits in this case could only be directed towards the clarification of the law in this area for the future, or be designed to reinforce the position of one or other Party. It relies in support of this argument on the fact that the Congo does not allege any material injury and is not seeking compensatory damages. It adds that the issue and transmission of the arrest warrant were not predicated on the ministerial status of the person concerned, that he is no longer a minister, and that the case is accordingly now devoid of object.

31. The Congo contests this argument of Belgium, and emphasizes that the aim of the Congo — to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered — remains unachieved at the point in time when the Court is called upon to decide the dispute. According to the Congo, in order for the case to have become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have to have been obtained.

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32. The Court has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon (see *Questions of Interpretation and Application of the 1971 Mont-*

*real Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 46; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 131, para. 45).

However, it considers that this is not such a case. The change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo's submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium's second objection must accordingly be rejected.

* *

33. The third Belgian objection is put as follows:

> "That the case as it now stands is materially different to that set out in the [Congo]'s Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

34. According to Belgium, it would be contrary to legal security and the sound administration of justice for an applicant State to continue proceedings in circumstances in which the factual dimension on which the Application was based has changed fundamentally, since the respondent State would in those circumstances be uncertain, until the very last moment, of the substance of the claims against it. Belgium argues that the prejudice suffered by the respondent State in this situation is analogous to the situation in which an applicant State formulates new claims during the course of the proceedings. It refers to the jurisprudence of the Court holding inadmissible new claims formulated during the course of the proceedings which, had they been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (see *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 447-448, para. 29). In the circumstances, Belgium contends that, if the Congo wishes to maintain its claims, it should be required to initiate proceedings afresh or, at the very least, apply to the Court for permission to amend its initial Application.

35. In response, the Congo denies that there has been a substantial amendment of the terms of its Application, and insists that it has presented no new claim, whether of substance or of form, that would have transformed the subject-matter of the dispute. The Congo maintains that it has done nothing through the various stages in the proceedings but "condense and refine" its claims, as do most States that appear before the Court, and that it is simply making use of the right of parties to amend their submissions until the end of the oral proceedings.

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36. The Court notes that, in accordance with settled jurisprudence, it "cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character" (*Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173; cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80; see also *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 264-267, in particular paras. 69 and 70). However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international law. The Congo's final submissions arise "directly out of the question which is the subject-matter of that Application" (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72; see also *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 36).

In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence, or that the requirements of the sound administration of justice were infringed. Belgium's third objection must accordingly be rejected.

* *

37. The fourth Belgian objection reads as follows:

> "That, in the light of the new circumstances concerning Mr. Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being pro-

tected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

38. In this respect, Belgium accepts that, when the case was first instituted, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name in respect of the alleged violation by Belgium of the immunity of the Congo's Foreign Minister. However, according to Belgium, the case was radically transformed after the Application was filed, namely on 15 April 2001, when Mr. Yerodia ceased to be a member of the Congolese Government. Belgium maintains that two of the requests made of the Court in the Congo's final submissions in practice now concern the legal effect of an arrest warrant issued against a private citizen of the Congo, and that these issues fall within the realm of an action of diplomatic protection. It adds that the individual concerned has not exhausted all available remedies under Belgian law a necessary condition before the Congo can espouse the cause of one of its nationals in international proceedings.

39. The Congo, on the other hand, denies that this is an action for diplomatic protection. It maintains that it is bringing these proceedings in the name of the Congolese State, on account of the violation of the immunity of its Minister for Foreign Affairs. The Congo further denies the availability of remedies under Belgian law. It points out in this regard that it is only when the Crown Prosecutor has become seised of the case file and makes submissions to the Chambre du conseil that the accused can defend himself before the Chambre and seek to have the charge dismissed.

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40. The Court notes that the Congo has never sought to invoke before it Mr. Yerodia's personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies.

In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application (see *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 26; *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 42, para. 49). Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed

(see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 43-44; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-43). Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium's fourth objection must accordingly be rejected.

* *

41. As a subsidiary argument, Belgium further contends that "[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, . . . the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo]'s final submissions". Belgium points out that, while the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge's lack of jurisdiction, and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs, the Congo no longer claims in its final submissions that Belgium wrongly conferred upon itself universal jurisdiction *in absentia*. According to Belgium, the Congo now confines itself to arguing that the arrest warrant of 11 April 2000 was unlawful because it violated the immunity from jurisdiction of its Minister for Foreign Affairs, and that the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

42. The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the "exercise of an excessive universal jurisdiction" being in this connection only a secondary consideration. The Congo asserts that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at the request of the Congo but, rather, by virtue of the defence strategy adopted by Belgium, which appears to maintain that the exercise of such jurisdiction can "represent a valid counterweight to the observance of immunities".

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43. The Court would recall the well-established principle that "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (*Asylum, Judgment, I.C.J. Reports 1950*,

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p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

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44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo's Application, that the Application is not without object and that accordingly the case is not moot and that the Application is admissible. Thus, the Court now turns to the merits of the case.

* * *

45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo's submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

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47. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability

and to immunity from criminal process being "absolute or complete", that is to say, they are subject to no exception. Accordingly, the Congo contends that no criminal prosecution may be brought against a Minister for Foreign Affairs in a foreign court as long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under customary international law simply in order to enable the foreign State representative enjoying such immunity to perform his or her functions freely and without let or hindrance. The Congo adds that the immunity thus accorded to Ministers for Foreign Affairs when in office covers *all* their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterized or not as "official acts".

48. The Congo states further that it does not deny the existence of a principle of international criminal law, deriving from the decisions of the Nuremberg and Tokyo international military tribunals, that the accused's official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a "ground of exemption from his criminal responsibility or a ground for mitigation of sentence". The Congo then stresses that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. It concludes that immunity does not mean impunity.

49. Belgium maintains for its part that, while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.

50. Belgium further states that, in the circumstances of the present case, Mr. Yerodia enjoyed no immunity at the time when he is alleged to have committed the acts of which he is accused, and that there is no evidence that he was then acting in any official capacity. It observes that the arrest warrant was issued against Mr. Yerodia personally.

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51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain

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holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

52. A certain number of treaty instruments were cited by the Parties in this regard. These included, first, the Vienna Convention on Diplomatic Relations of 18 April 1961, which states in its preamble that the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing States". It provides in Article 32 that only the sending State may waive such immunity. On these points, the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations of 24 April 1963, to which the Congo and Belgium are also parties.

The Congo and Belgium further cite the New York Convention on Special Missions of 8 December 1969, to which they are not, however, parties. They recall that under Article 21, paragraph 2, of that Convention:

> "The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law."

These conventions provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, for

example, Article 7, paragraph 2 *(a)*, of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that chargés d'affaires are accredited.

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

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56. The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the *Pinochet* and *Qaddafi* cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the *Pinochet* decision recognizes an exception to the immunity rule when Lord Millett stated that "[i]nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose", or when Lord Phillips of Worth Matravers said that "no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime". As to the French Court of Cassation, Belgium contends that, in holding that, "under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State", the Court explicitly recognized the existence of such exceptions.

57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the *Pinochet* and *Qaddafi* cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the *Pinochet* case, the Congo cites Lord Browne-Wilkinson's statement that "[t]his immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . .". According to the Congo, the

French Court of Cassation adopted the same position in its *Qaddafi* judgment, in affirming that "international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State".

As regards the instruments creating international criminal tribunals and the latter's jurisprudence, these, in the Congo's view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

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58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus,

although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the

official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

* * *

62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and declare that:

> "[B]y issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States."

63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a "coercive legal act" which violates the Congo's immunity and sovereign rights, inasmuch as it seeks to "subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach" and is fully enforceable without special formality in Belgium.

The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.

64. As regards the international circulation of the said arrest warrant, this, in the Congo's view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium "thus cast upon one of the most prominent members of its Government". The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo's former President. In the Congo's view, Belgium "[thus] manifests an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition". The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly

"no further consideration need be given to the specific responsibility which a State executing it might incur, or to the way in which that responsibility should be related" to that of the Belgian State. The Congo observes that, in such circumstances, "there [would be] a direct causal relationship between the arrest warrant issued in Belgium and any act of enforcement carried out elsewhere".

65. Belgium rejects the Congo's argument on the ground that "the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the [Congo]".

With regard to the legal effects under Belgian law of the arrest warrant of 11 April 2000, Belgium contends that the clear purpose of the warrant was to procure that, if found in Belgium, Mr. Yerodia would be detained by the relevant Belgian authorities with a view to his prosecution for war crimes and crimes against humanity. According to Belgium, the Belgian investigating judge did, however, draw an explicit distinction in the warrant between, on the one hand, immunity from jurisdiction and, on the other hand, immunity from enforcement as regards representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium. Belgium further contends that, in its effect, the disputed arrest warrant is national in character, since it requires the arrest of Mr. Yerodia if he is found in Belgium but it does not have this effect outside Belgium.

66. In respect of the legal effects of the arrest warrant outside Belgium, Belgium maintains that the warrant does not create any obligation for the authorities of any other State to arrest Mr. Yerodia in the absence of some further step by Belgium completing or validating the arrest warrant (such as a request for the provisional detention of Mr. Yerodia), or the issuing of an arrest warrant by the appropriate authorities in the State concerned following a request to do so, or the issuing of an Interpol Red Notice. Accordingly, outside Belgium, while the purpose of the warrant was admittedly "to establish a legal basis for the arrest of Mr. Yerodia . . . and his subsequent extradition to Belgium", the warrant had no legal effect unless it was validated or completed by some prior act "requiring the arrest of Mr. Yerodia by the relevant authorities in a third State". Belgium further argues that "[i]f a State had executed the arrest warrant, it might infringe Mr. [Yerodia's] criminal immunity", but that "the Party directly responsible for that infringement would have been that State and not Belgium".

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67. The Court will first recall that the "international arrest warrant *in absentia*", issued on 11 April 2000 by an investigating judge of the Brussels Tribunal de première instance, is directed against Mr. Yerodia,

stating that he is "currently Minister for Foreign Affairs of the Democratic Republic of the Congo, having his business address at the Ministry of Foreign Affairs in Kinshasa". The warrant states that Mr. Yerodia is charged with being "the perpetrator or co-perpetrator" of:

> "— Crimes under international law constituting grave breaches causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)
> — Crimes against humanity (Article 1, paragraph 2, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)."

The warrant refers to "various speeches inciting racial hatred" and to "particularly virulent remarks" allegedly made by Mr. Yerodia during "public addresses reported by the media" on 4 August and 27 August 1998. It adds:

> "These speeches allegedly had the effect of inciting the population to attack Tutsi residents of Kinshasa: there were dragnet searches, manhunts (the Tutsi enemy) and lynchings.
>
> The speeches inciting racial hatred thus are said to have resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials."

68. The warrant further states that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The investigating judge does, however, observe in the warrant that "the rule concerning the absence of immunity under humanitarian law would appear . . . to require some qualification in respect of immunity from enforcement" and explains as follows:

> "Pursuant to the general principle of fairness in judicial proceedings, immunity from enforcement must, in our view, be accorded to all State representatives welcomed as such onto the territory of Belgium (on 'official visits'). Welcoming such foreign dignitaries as official representatives of sovereign States involves not only relations between individuals but also relations between States. This implies that such welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against its guest and the invitation cannot become a pretext for ensnaring the individual concerned in what would then have to be labelled a trap. In the contrary case, failure to respect this

undertaking could give rise to the host State's international responsibility."

69. The arrest warrant concludes with the following order:

"We instruct and order all bailiffs and agents of public authority who may be so required to execute this arrest warrant and to conduct the accused to the detention centre in Forest;

We order the warden of the prison to receive the accused and to keep him (her) in custody in the detention centre pursuant to this arrest warrant;

We require all those exercising public authority to whom this warrant shall be shown to lend all assistance in executing it."

70. The Court notes that the *issuance*, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The fact that the warrant is enforceable is clearly apparent from the order given to "all bailiffs and agents of public authority . . . to execute this arrest warrant" (see paragraph 69 above) and from the assertion in the warrant that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The Court is bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

71. The Court also notes that Belgium admits that the purpose of the international *circulation* of the disputed arrest warrant was "to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium". The Respondent maintains, however, that the enforcement of the warrant in third States was "dependent on some further preliminary steps having been taken" and that, given the "inchoate" quality of the warrant as regards third States, there was no "infringe[ment of] the sovereignty of the [Congo]". It further points out that no Interpol Red Notice was requested until 12 September 2001, when Mr. Yerodia no longer held ministerial office.

The Court cannot subscribe to this view. As in the case of the warrant's issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed Mr. Yero-

dia's immunity as the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo's conduct of its international relations. Since Mr. Yerodia was called upon in that capacity to undertake travel in the performance of his duties, the mere international circulation of the warrant, even in the absence of "further steps" by Belgium, could have resulted, in particular, in his arrest while abroad. The Court observes in this respect that Belgium itself cites information to the effect that Mr. Yerodia, "on applying for a visa to go to two countries, [apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium", adding that "[t]his, moreover, is what the [Congo] . . . hints when it writes that the arrest warrant 'sometimes forced Minister Yerodia to travel by roundabout routes'". Accordingly, the Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

* * *

72. The Court will now address the issue of the remedies sought by the Congo on account of Belgium's violation of the above-mentioned rules of international law. In its second, third and fourth submissions, the Congo requests the Court to adjudge and declare that:

> "A formal finding by the Court of the unlawfulness of [the issue and international circulation of the arrest warrant] constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
>
> The violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
>
> Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

73. In support of those submissions, the Congo asserts that the termination of the official duties of Mr. Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continue to exist. It argues that the warrant is unlawful *ab initio*, that "[i]t is fundamentally flawed" and that it cannot therefore have any legal effect today. It points

out that the purpose of its request is reparation for the injury caused, requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It states that, inasmuch as the wrongful act consisted in an internal legal instrument, only the "withdrawal" and "cancellation" of the latter can provide appropriate reparation.

The Congo further emphasizes that in no way is it asking the Court itself to withdraw or cancel the warrant, nor to determine the means whereby Belgium is to comply with its decision. It explains that the withdrawal and cancellation of the warrant, by the means that Belgium deems most suitable, "are not means of enforcement of the judgment of the Court but the requested measure of legal reparation/restitution itself". The Congo maintains that the Court is consequently only being requested to declare that Belgium, by way of reparation for the injury to the rights of the Congo, be required to withdraw and cancel this warrant by the means of its choice.

74. Belgium for its part maintains that a finding by the Court that the immunity enjoyed by Mr. Yerodia as Minister for Foreign Affairs had been violated would in no way entail an obligation to cancel the arrest warrant. It points out that the arrest warrant is still operative and that "there is no suggestion that it presently infringes the immunity of the Congo's Minister for Foreign Affairs". Belgium considers that what the Congo is in reality asking of the Court in its third and fourth final submissions is that the Court should direct Belgium as to the method by which it should give effect to a judgment of the Court finding that the warrant had infringed the immunity of the Congo's Minister for Foreign Affairs.

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75. The Court has already concluded (see paragraphs 70 and 71) that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

> "[t]he essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the conse-

quences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47).

In the present case, "the situation which would, in all probability, have existed if [the illegal act] had not been committed" cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy: in particular, the Court cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment's implications might be for third States, and the Court cannot therefore accept the Congo's submissions on this point.

* * *

78. For these reasons,

THE COURT,

(1) (A) By fifteen votes to one,

*Rejects* the objections of the Kingdom of Belgium relating to jurisdiction, mootness and admissibility;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(B) By fifteen votes to one,

*Finds* that it has jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 17 October 2000;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(C) By fifteen votes to one,

*Finds* that the Application of the Democratic Republic of the Congo is not without object and that accordingly the case is not moot;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren,

Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(D) By fifteen votes to one,

*Finds* that the Application of the Democratic Republic of the Congo is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(2) By thirteen votes to three,

*Finds* that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Al-Khasawneh; *Judge* ad hoc Van den Wyngaert;

(3) By ten votes to six,

*Finds* that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated.

IN FAVOUR: *President* Guillaume; *Vice-President* Shi *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; *Judge* ad hoc Van den Wyngaert.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourteenth day of February, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Demo-

cratic Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

*(Signed)* Gilbert GUILLAUME,
President.

*(Signed)* Philippe COUVREUR,
Registrar.

President GUILLAUME appends a separate opinion to the Judgment of the Court; Judge ODA appends a dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a declaration to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judges HIGGINS, KOOIJMANS and BUERGENTHAL append a joint separate opinion to the Judgment of the Court; Judge REZEK appends a separate opinion to the Judgment of the Court; Judge AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* BULA-BULA appends a separate opinion to the Judgment of the Court; Judge *ad hoc* VAN DEN WYNGAERT appends a dissenting opinion to the Judgment of the Court.

*(Initialled)* G.G.

*(Initialled)* Ph.C.

# Chapter VII
# Immunity of State officials from foreign criminal jurisdiction

## A. Introduction

68. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[749] At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session (2008).[750]

69. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).[751] The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.[752]

70. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[753] The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014), her fourth report during the sixty-seventh session (2015) and her fifth report, in a partial debate, during the sixty-eighth session (2016).[754] On the basis of the draft articles proposed by the Special Rapporteur in the second, third and fourth reports, the Commission has thus far provisionally adopted six draft articles and commentaries thereto. Draft article 2 on the use of terms is still being developed.[755]

## B. Consideration of the topic at the present session

71. The Commission had before it the fifth report of the Special Rapporteur analysing the question of limitations and exceptions to the immunity of State officials from foreign

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[749] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[750] *Official Records of the General Assembly*, *Sixty-second Session*, *Supplement No. 10* (A/62/10), para. 386. For the memorandum prepared by the Secretariat, see A/CN.4/596 and Corr.1.

[751] A/CN.4/601, A/CN.4/631 and A/CN.4/646, respectively.

[752] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 207; and *ibid*., *Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

[753] *Ibid*., *Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 266.

[754] A/CN.4/654, A/CN.4/661, A/CN.4/673 and Corr.1, A/CN.4/687 and A/CN.4/701, respectively.

[755] See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 48-49. At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 1, 3 and 4 and, at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto (*ibid*., *Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 48-49). At its 3231st meeting, on 25 July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 and, at its 3240th to 3242nd meetings, on 6 and 7 August 2014, it adopted the commentaries thereto. At its 3329th meeting, on 27 July 2016, the Commission provisionally adopted draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session, and at its 3345th and 3346th meetings, on 11 August 2016, the Commission adopted the commentaries thereto (*ibid*., *Seventy-first Session, Supplement No. 10* (A/71/10), paras. 194-195 and 250 and, *ibid*., *Seventieth Session, Supplement No. 10* (A/70/10), para. 176).

criminal jurisdiction (A/CN.4/701), which it had begun to debate at its sixty-eighth session. The report addressed, in particular, the prior consideration by the Commission of the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, offered an analysis of relevant practice, addressed some methodological and conceptual questions related to limitations and exceptions, and considered instances in which the immunity of State officials from foreign criminal jurisdiction would not apply. The Special Rapporteur drew the conclusion that it had not been possible to determine, on the basis of practice, the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule. On the other hand, she came to the conclusion that limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction did apply to State officials in the context of immunity *ratione materiae*. As a consequence of the analysis, the report contained a proposal for draft article 7 on crimes in respect of which immunity did not apply.[756]

72. At its sixty-eighth session, given that the report had not been available in all languages, the Commission underlined that the debate on the report would continue in order to be finalized at the present session. Accordingly, the Commission continued its debate on the fifth report at its 3360th to 3365th meetings, on 18, 19, 23, 24, 26 and 30 May 2017, respectively.

73. Following its debate on the report, the Commission, at its 3365th meeting, on 30 May 2017, decided to refer draft article 7, as contained in the Special Rapporteur's fifth report, to the Drafting Committee, taking into account the debate in the Commission.

74. At its 3378th meeting, on 20 July 2017, the Commission considered the report of the Drafting Committee and provisionally adopted draft article 7 (see section C.1 below). Provisional adoption was by recorded vote, with 21 votes in favour, 8 votes against and 1 abstention. The members present voted as follows:

| | |
|---|---|
| Mr. Carlos J. Argüello Gomez | Yes |
| Mr. Yacouba Cissé | Yes |
| Ms. Concepción Escobar Hernández | Yes |
| Ms. Patrícia Galvão Teles | Yes |
| Mr. Juan Manuel Gómez-Robledo | Yes |
| Mr. Hussein A. Hassouna | Yes |
| Mr. Mahmoud D. Hmoud | Yes |
| Mr. Huikang Huang | No |

[756] The text of draft article 7, as proposed by the Special Rapporteur in her fifth report, reads as follows:

**Draft article 7**
**Crimes in respect of which immunity does not apply**

1. Immunity shall not apply in relation to the following crimes:

   (a) Genocide, crimes against humanity, war crimes, torture and enforced disappearances;

   (b) Crimes of corruption;

   (c) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.

2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.

3. Paragraphs 1 and 2 are without prejudice to:

   (a) Any provision of a treaty that is binding on the forum State and the State of the official, under which immunity would not be applicable;

   (b) The obligation to cooperate with an international tribunal which, in each case, requires compliance by the forum State.

| | |
|---|---|
| Mr. Charles Chernor Jalloh | Yes |
| Mr. Roman A. Kolodkin | No |
| Mr. Ahmed Laraba | No |
| Ms. Marja Lehto | Yes |
| Mr. Shinya Murase | Yes |
| Mr. Sean D. Murphy | No |
| Mr. Hong Thao Nguyen | Yes |
| Mr. Georg Nolte | No |
| Ms. Nilüfer Oral | Yes |
| Mr. Hassan Ouazzani Chahdi | Yes |
| Mr. Ki Gab Park | Yes |
| Mr. Chris Maina Peter | Yes |
| Mr. Ernest Petrič | No |
| Mr. Aniruddha Rajput | No |
| Mr. August Reinisch | Yes |
| Mr. Juan José Ruda Santolaria | Yes |
| Mr. Gilberto Vergne Saboia | Yes |
| Mr. Pavel Šturma | Abstain |
| Mr. Dire D. Tladi | Yes |
| Mr. Eduardo Valencia-Ospina | Yes |
| Mr. Marcelo Vázquez-Bermúdez | Yes |
| Sir Michael Wood | No |

75. Explanations of vote before the vote were made by Mr. Roman A. Kolodkin, Mr. Sean D. Murphy, Sir Michael Wood, Mr. Huikang Huang, Mr. Aniruddha Rajput, Mr. Ernest Petrič, Mr. Juan Manuel Gómez-Robledo, Mr. Juan José Ruda Santolaria and Mr. Georg Nolte. Explanations of vote after the vote were made by Mr. Dire D. Tladi, Mr. Pavel Šturma, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Mr. Shinya Murase, Mr. Yacouba Cissé, Mr. Hussein A. Hassouna, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Ms. Concepción Escobar Hernández and Mr. Hong Thao Nguyen. Those explanations of vote were recorded in the summary record of the 3378th meeting (A/CN.4/SR.3378).

76. At its 3387th to 3389th meetings, on 3 and 4 August 2017, the Commission adopted the commentaries to the draft article provisionally adopted at the present session (see section C.2 below).

77. Informal consultations on immunity of State officials from foreign criminal jurisdiction, conducted by the Special Rapporteur, were held on 18 July 2017. The informal consultations were open-ended and their aim was to exchange views and share ideas on the procedural aspects of immunity of State officials from foreign criminal jurisdiction, which will be the subject under consideration in the sixth report of the Special Rapporteur, to be submitted in 2018. The consultations were based on an informal concept paper on procedural provisions and safeguards prepared by the Special Rapporteur. At the 3378th meeting, on 20 July 2017, the Special Rapporteur informed the Commission on the development of the informal consultations.

### 1. Introduction by the Special Rapporteur of the fifth report

78. The Special Rapporteur recalled that the fifth report, on limitations and exceptions to immunities of State officials from foreign criminal jurisdiction, dealt with a subject that had been the subject of recurrent debate over the years in the Commission and in the Sixth

Committee, eliciting diverse, and often opposing, views. There was a general desire to proceed cautiously and prudently given the sensitivity of the subject and its importance for States. The report itself had been introduced at the sixty-eighth session of the Commission[757] and had been the subject of a partial debate.[758] The Special Rapporteur noted that, due to the change in composition of the Commission, and in the light of the comments and observations on the report at the sixty-eighth session of the Commission and in the Sixth Committee at the seventy-first session of the General Assembly, she considered it appropriate at the current session to make additional introductory remarks on the report. Accordingly, the Special Rapporteur gave a brief overview of the previous debates on the fifth report in the Commission and the Sixth Committee.

79. Commenting on the fifth report itself, she noted that it followed a similar methodology to previous reports, examining State practice, international jurisprudence, the prior work of the Commission and an analysis of domestic legislation for the present report. The report had also taken into account the information received from Governments in response to questions posed by the Commission and oral statements by States in the Sixth Committee. The Special Rapporteur underlined that the fifth report, like the previous reports, had to be read and understood together with the prior reports on the topic.

80. Building on her presentation at the previous session, which she considered to be an integral part of the prior reports considered by the Commission, the Special Rapporteur highlighted a number of ideas central to the report. First, she noted that the phrase "limitations and exceptions" echoed the different arguments put forward in practice for the non-application of immunity. The Special Rapporteur stressed that the distinction between limitations and exceptions, despite its theoretical and normative value for the systemic interpretation of the immunity regime, had no practical significance, as "limitations" or "exceptions" led to the same consequence, namely the non-application of the legal regime of the immunity of State officials from foreign criminal jurisdiction in a particular case.

81. Second, the report addressed limitations and exceptions within the specific framework of immunity and within the context of the international legal system as a whole. In that regard, the Special Rapporteur underscored: (a) the interrelationship between immunity and jurisdiction, even though the two were different concepts; (b) the procedural nature of immunity; (c) the distinction between immunity of State officials and State immunity; and (d) the distinction between immunity from foreign criminal jurisdiction and immunity before international criminal courts and tribunals. The report further examined immunity from the point of view of international law as a normative system, in which immunity sought to guarantee respect for sovereign equality of States but had to be balanced against other important values of the international legal system.

82. Third, the report focused on the practice of States, which constituted the cornerstone of the Commission's work. The report examined to what extent practice revealed the existence of customary norms that could be codified, following the basic methodology in the Commission's work on the identification of customary international law. It also analysed whether there existed a trend towards progressive development of norms relating to immunity. Going beyond international jurisprudence and treaties, the report studied domestic legislation and decisions of domestic courts. The report also analysed the issues from a systemic perspective, thereby considering the regime of immunity in relation to other aspects of the contemporary international legal system, understood as a whole.

83. On those bases, the report concluded that it had not been possible to determine the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule. On the other hand, the report concluded that limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction were extant in the context of immunity *ratione materiae*. Although varied, the practice showed a clear trend towards considering the commission of international crimes as a bar to the application of immunity *ratione materiae*

[757] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), paras. 196-208.

[758] *Ibid*., paras. 209-246.

of State officials from foreign criminal jurisdiction, for the reason that such crimes did not constitute official acts, that the crimes concerned were grave or that they undermined the values and principles recognized by the international community as a whole.

84. Finally, the Special Rapporteur noted that the Commission should approach the topic of immunity from foreign criminal jurisdiction, and in particular the question of limitations and exceptions, from the perspectives of both codification and the progressive development of international law. The challenge for the Commission was to decide whether to support a developing trend in the field of immunity, or whether to halt such development.

85. The Special Rapporteur also made specific comments on the proposed draft article 7. The three paragraphs of the draft article sought to address, in an integral fashion, all the elements that defined the regime of limitations and exceptions to immunity.

86. Paragraph 1 identified crimes to which immunity would not apply. Following the model of the United Nations Convention on Jurisdictional Immunities of States and Their Property, the expression "does not apply" was used to capture both limitations and exceptions. The paragraph identified situations in which immunity did not apply by reference to the crimes over which jurisdiction was sought, namely in case of (a) international crimes; (b) crimes of corruption; and (c) the so-called "territorial tort" exception.

87. Paragraph 2 defined the scope of limitations and exceptions. It specified that the limitations and exceptions in paragraph 1 did not apply to the persons who enjoyed immunity *ratione personae*, namely Heads of State, Heads of Government and Ministers for Foreign Affairs. It emphasized, however, that the enjoyment of immunity *ratione personae* was time-bound, which meant that the limitations and exceptions to immunity would apply to the troika once they had left office.

88. Paragraph 3 contained a without-prejudice provision in respect of situations covered by special regimes. The first subparagraph related to instances in which immunity of officials was not applicable due to the existence of treaty relations between the States concerned. The second subparagraph covered cases in which immunity might be affected by a general obligation to cooperate with an international criminal court. Both of those situations stemmed from examples in practice.

89. With regard to the future work of the Commission on the topic, the Special Rapporteur indicated her intention to conduct informal consultations on various procedural matters relating to the topic, during the present session of the Commission. It was hoped that such consultations would further inform the content of her sixth report, to be submitted during the seventieth session of the Commission.

### 2. Summary of the debate

90. The debate at the present session was a continuation of the discussion on the fifth report, which had commenced at the sixty-eighth session of the Commission. The summary below should be read in combination with the summary of the topic in the report of the Commission on the work of its sixty-eighth session.

#### (a) General comments

91. Members commended the Special Rapporteur for her rich and well-documented fifth report, which offered a thoughtful analysis of State practice as reflected in treaties and domestic legislation, as well as in international and domestic case law. Members also recalled, with appreciation, the work by the former Special Rapporteur, as well as the study by the Secretariat. Members acknowledged the complex and contentious nature of the topic, in particular the question of limitations and exceptions. The comments made focused generally on methodological and conceptual issues raised in the fifth report, including on the methodology and treatment of State practice, the mandate of the Commission in the progressive development of international law and its codification, the regime of immunity in the international legal system as a whole, as well as the interrelationship between the question of limitations and exceptions and procedural aspects.

*Methodology and treatment of State practice*

92. Several members expressed their appreciation for the detailed and comprehensive analysis of State practice contained in the fifth report. Some members noted their support for the methodology of the Special Rapporteur and maintained that the report provided a firm foundation for the proposed draft article.

93. Other members stated that, while the discussion of practice was extensive, it remained unclear how it related to the specific limitations and exceptions contained in draft article 7. Some members also questioned whether the report, while not finding coherent practice against the non-applicability of immunity, contained sufficient evidence to support the limitations and exceptions to immunity that it proposed. It was noted that many of the examples cited in the report related to State immunity or immunity in civil proceedings, rather than criminal prosecutions. In the view of some members, the report selectively discussed cases that supported the establishment of limitations and exceptions to immunities, while ignoring evidence indicating the opposite. It was noted that the examples in the report were taken from different contexts and time periods and did not demonstrate a linear development towards restrictions on immunity.

94. Members disagreed on the extent and the relevance of treaty practice with regard to limitations and exceptions to immunity. Some members asserted that treaty practice did not establish a trend towards restricting the immunity of foreign State officials. In their view, few treaties provided for limitations and exceptions, and any practice in regard to those treaties could not be counted towards the existence of a customary rule. It was pointed out that many treaties, including treaties relating to diplomatic and consular relations, as well as those relating to international crimes, did not provide for limitations or exceptions. Moreover, a number of members noted that treaties providing for individual responsibility in the case of international crimes, even where they denied immunity before international courts, did not affect the immunity of foreign officials before domestic courts.

95. Other members asserted that treaty practice had marked a deliberate move towards limitations and exceptions of immunity of State officials. Some members placed that development within the context of the work of the Commission on individual criminal responsibility, noting that relevant instruments, such as the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, as well as the work on the draft Code of Crimes against the Peace and Security of Mankind and international criminal jurisdiction rejected immunity for international crimes. Such members maintained that the present draft article should follow the example of the Rome Statute of the International Criminal Court, which in article 27 declares the irrelevance of official capacity. Reference was also made to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), as adopted by the African Union. Furthermore, some members noted that the proliferation of treaties containing a "prosecute or extradite" provision had a bearing on the scope of immunity of State officials. They suggested that the obligation to prosecute international crimes implied a limitation on the scope of immunity of State officials.

96. With regard to domestic legislation, some members noted that there were few examples of domestic laws recognizing limitations and exceptions to immunity of foreign officials, even in cases of international crimes. A few members noted that domestic legislation implementing the Rome Statute typically only dealt with institutional issues or with questions of extradition, rather than immunity. It was highlighted that the few countries whose legislation had contained broader exception clauses had recently revised their laws on immunity of State officials to restrict the scope of the limitations and exceptions.

97. Other members maintained that domestic laws reflected the trend indicated by the Special Rapporteur. The view was expressed that even if domestic legislation often focused on State immunity, at least it demonstrated a trend towards the restriction of immunity. Some members noted that the domestic implementation of the Rome Statute had a direct effect on the regime of immunity in domestic courts.

98. Several members criticized the small number of domestic cases examined in the fifth report. It was noted that many of the cases had been overturned or did not relate to

immunity of State officials from foreign criminal jurisdiction, but to State immunity or immunity in civil proceedings. Some members asserted that the report should have examined the reasons why immunity had been declined or upheld in particular cases; should have analysed cases in which prosecutors had decided not to prosecute due to the immunity of the official involved; and should have considered cases in which States had unsuccessfully invoked immunity.

99. A number of members maintained that the small sample of domestic cases analysed in the report did not affect its substantive analysis. The Special Rapporteur was encouraged to further consider regional practice, including, for example, case law from Asia and the jurisprudence of the Inter-American Court of Human Rights.

100. Several members stressed that the trend in international jurisprudence ran counter to the conclusions drawn in the fifth report. It was emphasized that international and regional courts had repeatedly upheld immunity, even in cases involving international crimes or violations of peremptory norms of international law (*jus cogens*). International jurisprudence had underlined that immunity, which was procedural in nature, was not affected by the gravity of an act. A number of members also emphasized the difference between international and domestic courts. They maintained that the lack of immunity before international criminal tribunals did not entail the non-application of immunity in domestic courts. It was pointed out that international tribunals had only recognized the denial of immunity by domestic courts in cases that related to cooperation with such tribunals.

101. Other members asserted that the analysis of international jurisprudence by the Special Rapporteur supported her approach to limitations and exceptions of immunity. Several members noted that many of the international decisions upholding immunity did not relate to individual criminal responsibility, but dealt with immunity in civil proceedings, State immunity, officials enjoying immunity *ratione personae*, or questions of State responsibility. Some members also pointed out that international courts and tribunals had made the application of immunity conditional on the availability of alternative redress; if no such redress was available, immunity could not be upheld. Reference was made to individual and dissenting opinions that emphasized that the requirements of sovereignty should not override the need for accountability, but that a balance should be struck.

*Progressive development of international law and its codification*

102. In the view of some members, the report could have indicated more clearly whether it sought to determine the scope of existing international law (*lex lata*), whether it followed an emerging trend towards desirable norms (*lex ferenda*) or whether it aimed to set out "new law". It was noted that the Commission's dual mandate of codification and progressive development required it to closely follow established practice or to openly assert the progressive nature of its work, respectively. Several members urged the Commission to focus on existing law, rather than to engage in progressive development. It was noted that the Commission was not drafting a new treaty, the rules of which would ultimately be subject to the approval of States, but that it aimed to produce a set of guidelines on current practice, for use by non-specialists involved in domestic prosecutions.

103. In that regard, a number of members criticized the fifth report for the nature in which it asserted the existence of customary international law with regard to limitations and exception, without establishing a solid foundation for that in practice. In the view of several members, the report did not sufficiently highlight the serious disagreements within the Commission and within the Sixth Committee over the substantive and procedural aspects of that issue. It was suggested that, due to such differences, the Commission ought to proceed cautiously.

104. Other members stated that the Commission's work on the question of limitations and exceptions should reflect both codification and progressive development. It was asserted that the fifth report accurately captured the current state of international law on immunity of foreign officials. Such members noted that the lingering uncertainty over the scope of immunity ought to encourage the Commission to provide guidelines on the issue, irrespective of the views of States. The Commission was urged not to forget its

commitment to the progressive development of international law, as it had displayed in various earlier instruments. For some of those members, the possibility of developing draft articles to form the basis of a treaty on the subject could not be discounted at this stage.

105. Some members questioned whether State practice supported an alleged trend towards limitations and exceptions to immunity of State officials as proposed. Those members maintained that no such trend existed or, if a trend could be discerned, that it pointed in the opposite direction. It was recalled that several States had recently restricted the scope of limitations and exceptions to immunity in their domestic legislation, and international and regional courts had typically upheld the immunity of State officials from foreign criminal jurisdiction in recent cases.

106. Other members asserted that, even if not all aspects of the report found a firm basis in customary international law, a trend towards limitations and exceptions of immunity *ratione materiae* did exist. A number of members claimed that developments in the field of State immunity, international criminal law and international human rights law supported such a trend. Moreover, it was asserted that courts and tribunals increasingly refused to apply immunity, either because the alleged acts violated peremptory norms of international law (*jus cogens*) or because they considered that such acts could not be performed in an official capacity. Further, certain States had expressed their support for restricting the scope of immunity of foreign officials. Some members maintained that the Commission ought to bolster such a trend, in order to fight impunity and lift impediments to the prosecution of international crimes.

*International law as a system*

107. It was emphasized by some members that the draft articles ought to strike a balance between, on the one hand, the sovereign equality of States and the need for stability in international relations and, on the other hand, the interest of the international community as a whole in preventing and punishing the most serious crimes under international law.

108. Other members expressed concern that the limitations and exceptions to immunity proposed by the Special Rapporteur could foster abuse, for example by enabling politically motivated trials of State officials in foreign jurisdictions. This could weaken stability in international relations and run counter to the cause of fighting impunity and promoting human rights. It was emphasized that, as a fundamental principle of international law, the courts of one State should not sit in judgment over the acts of another State.

109. Several members noted that the system of immunity could and should not stand in the way of the protection of the fundamental interests of the international community. It was emphasized that the protection of human rights and the fight against impunity were not peripheral to the sovereignty of States, but had to be reconciled with it. In the view of such members, perpetrators of international crimes ought not to be allowed to hide behind the cloak of sovereignty to shield themselves from prosecution, as their acts caused severe instability in the countries and regions in which they were perpetrated, eventually affecting the international community as a whole. The point was made that the rules on immunity should not be considered in isolation, but in the light of other norms of the international legal system.

*Procedural aspects of immunity*

110. Some members noted that the question of limitations and exceptions was closely related to that of procedural aspects of immunity, including procedural safeguards and guarantees. Several members expressed regret that the Special Rapporteur had not submitted a sixth report on that issue at the present session. A number of members suggested that the Commission ought to postpone its work on limitations and exceptions until after the Special Rapporteur had expounded her views on procedural aspects in her sixth report, so that the two issues could be considered in conjunction.

111. It was noted that procedural safeguards could help to strike the necessary balance between the respect for the sovereign equality of States and the need to fight impunity. Several members referred to the work of the previous Special Rapporteur on the topic, who had dealt with various procedural issues relating to timing, invocation, burden of proof and

the waiver of immunity. With regard to waiver, some members proposed the establishment of a procedure whereby immunity had to be explicitly invoked by the State of the official; or the establishment of a treaty-based duty to "waive or prosecute", according to which States would have to choose whether to waive immunity in a foreign court or to prosecute the case themselves.

112. Emphasizing the procedural nature of immunity, a number of members noted that, when successfully invoked through diplomatic channels or in courts, immunity suspended the jurisdiction of foreign courts, but did not affect the criminal responsibility of the alleged offenders. Given its preliminary nature, courts had to consider the question of immunity before proceeding to the merits. It was stated that, for this reason, the gravity of an alleged act could have no bearing on the application of immunity, or on its sovereign or official nature. Such members maintained that this did not leave an accountability gap, since, for example, a State, by invoking the immunity of its official and recognizing its acts as its own, would trigger its own responsibility and could be sued itself at the national or international level.

113. Other members maintained that, while a discussion of procedural aspects was very important for the topic as a whole, the Commission first had to identify the substantive features of limitations and exceptions to immunity. It was pointed out that procedural aspects were relevant to the draft articles as a whole and could only be considered after all substantive elements had been discussed. Several members wished not to pre-empt the Commission's debate on the topic of the sixth report and urged the Commission not to delay its consideration of the limitations and exceptions to immunity.

114. A number of members asserted that there was a strong link between immunity and impunity for international crimes. It was pointed out that, if no alternative forum or jurisdiction for prosecution of international crimes was available, the procedural barrier of immunity in domestic courts would entail substantive effects. Some members emphasized that substantive justice should not be the victim of procedural justice, particularly in the case of violations of peremptory norms of international law (*jus cogens*). Such members cautioned that an exclusively procedural approach to immunity would have a negative impact on the development of individual responsibility in international law.

115. It was noted that the International Criminal Court, the most obvious forum for the prosecution of State officials, did not have the capacity or the resources to prosecute all alleged perpetrators of international crimes. As the Court operated on the basis of complementarity, those members maintained that domestic courts should remain the principal forums for combating impunity. It was also noted that the responsibility of a State for an act did not negate the individual responsibility of an official and should not stand in the way of individual prosecutions.

### (b) Specific comments on draft article 7

116. Some members questioned why the proposed title of draft article 7 referred to situations "in respect of which immunity does not apply", when the report discussed "limitations and exceptions" to immunity. It was suggested that the uncertainty over the meaning and scope of the phrase "limitations and exceptions" demonstrated that draft article 7 did not reflect settled international law.

117. A number of members considered that the distinction between limitations and exceptions was useful and should be maintained. It helped to distinguish situations in which immunity was not at issue, because the relevant conduct could not be considered as an official act or as performed in official capacity, from cases in which immunity was excluded on the basis of exceptional circumstances.

118. Other members supported the wording proposed by the Special Rapporteur. It was pointed out that the work on the topic so far had proceeded on the assumption that immunity applied and that draft article 7 should thus deal with its "non-application". Some members noted that a distinction might provide theoretical clarity, but that it had no basis in the practice of States.

119. Some members reiterated their general reservations regarding draft article 7, as proposed. It was suggested that one way forward would be to reformulate the draft article on the basis of an obligation to waive or prosecute core international crimes, which would entail a duty of a State either to waive the immunity of its officials before the courts of a foreign State, or to undertake to fulfil its obligation to prosecute its own officials.

120. A number of members questioned whether the list of crimes included in paragraph 1 was exhaustive or merely illustrative. A suggestion was made to include a general reference to the most serious crimes under international law, rather than including a list of crimes. Some members noted that the paragraph should leave open the possibility of the emergence of new crimes to which immunity would not apply. Other members questioned the basis in customary international law for the crimes listed by the Special Rapporteur, as well as the grounds for including some crimes and not others conceivably within the same genre. It was also suggested that the draft article, or the commentaries thereto, should provide appropriate definitions of the crimes listed.

121. With regard to subparagraph (a), several members expressed their support for the inclusion of the core crimes of genocide, crimes against humanity and war crimes. Some members noted that torture and enforced disappearance, both listed by the Special Rapporteur, fell within the scope of crimes against humanity. Suggestions were made to add the crimes of slavery, apartheid, terrorism and crimes against global cultural heritage.

122. Members further debated whether the crime of aggression should be included in the draft article. Those arguing in favour of inclusion pointed to the prominence of the crime of aggression under the Nürnberg Principles and its pending activation in the Rome Statute. It was also noted that the implementing legislation of some States provided for domestic prosecution of the crime. Other members agreed with the Special Rapporteur that the crime of aggression should be excluded, for the reasons outlined in the fifth report. It was maintained that prosecution of State officials for the crime of aggression by other States would affect the sovereign equality of States, an issue that would not arise in the case of prosecution before an international court.

123. Commenting on subparagraph (b), a number of members questioned whether State practice supported the inclusion of corruption as a limitation or exception to immunity. It was also noted that the text proposed by the Special Rapporteur left the definition and scope of corruption rather vague. Some members maintained that corruption could not be performed in an official capacity, as it was always done with an eye to private gain. In that regard, it was noted that immunity for corruption had already been excluded on the basis of draft article 6. It was suggested that the subparagraph could be removed and that a reference to corruption could be included in the commentaries.

124. Other members supported the inclusion of the crime of corruption in the text of the draft article, noting that the international community had to cooperate to prevent and punish the crime. It was pointed out that domestic courts had often rejected claims for immunity in corruption cases, that many States legislated to prevent and punish corruption, and that corruption had been the subject of various international and regional conventions.

125. Some members emphasized that corruption seriously affected the functioning of public institutions and the rule of law and could significantly impact the socioeconomic situation of domestic populations. It was suggested that the draft article should focus on “grand” or large-scale corruption. A suggestion was made that the subparagraph could indicate what should happen to the proceeds of the crime of corruption when officials were prosecuted in foreign jurisdictions. It was pointed out that that was a matter of the political will of the States involved, but that ordinarily the funds would have to be returned to the country from which they had been taken.

126. Some members noted that the territorial tort exception, on which subparagraph (c) was modelled, was well established in civil proceedings but not in the criminal sphere. It was pointed out that the authorities cited by the Special Rapporteur mostly referred to civil cases and that the report insufficiently examined its applicability in criminal law. Several members mentioned that the concept remained controversial in international law and that the report left a number of issues open, for example its application to military activities and other public acts. In that regard, it was suggested that the subparagraph be formulated more

narrowly. Several members referred to the definition proposed by the previous Special Rapporteur on the topic. It was also suggested that the scope of the subparagraph be restricted to specific acts contrary to State sovereignty, such as espionage, political assassination and sabotage.

127. Members generally agreed with the substance of paragraph 2, noting that it reflected existing practice. Members recommended that the commentaries should specify that only the troika of Heads of State, Heads of Government and Ministers for Foreign Affairs could enjoy immunity *ratione personae*. It was emphasized that, in line with international jurisprudence, immunity *ratione personae* was without prejudice to the criminal responsibility of those enjoying it. A suggestion was made to indicate that immunity *ratione personae* did not apply before international courts.

128. Some members suggested that paragraph 2 was superfluous and could be deleted. They proposed to specify in paragraph 1 that the limitations and exceptions listed in the draft article only applied to immunity *ratione materiae*. Other members preferred to retain the paragraph to highlight the difference between immunity *ratione personae* and immunity *ratione materiae*. A suggestion was made to align the temporal scope of the application of immunity *ratione personae* and immunity *ratione materiae* with draft articles 4 and 6. Moreover, the view was expressed that immunity *ratione personae* should be restricted, as it could lead to impunity in cases of lifetime rulers.

129. Several members accepted the inclusion of the without-prejudice clause in paragraph 3. It was noted that, contrary to subparagraph (a), the clause should also apply to treaties under which immunity was applicable. With regard to subparagraph (b), some members considered the reference to an "international tribunal" too vague and suggested that the draft article specify whether that referred to international criminal courts and tribunals, or to any international tribunal. The view was expressed that the paragraph remained prejudicial and should be deleted, as it could potentially affect matters subject to ongoing judicial proceedings.

#### (c) Future work

130. Many members expressed their anticipation of the sixth report, which would deal with procedural aspects of immunity. It was suggested that the Special Rapporteur should discuss the relationship between immunity and statutes of limitation for crimes to which no limitations or exceptions applied. Some members noted that the Commission should revisit some of the texts provisionally adopted, for example the definition of "immunity from jurisdiction", in order to determine whether it included questions of inviolability.

### 3. Concluding remarks of the Special Rapporteur

131. In her summary of the debate, the Special Rapporteur expressed her satisfaction with the wide-ranging and interesting discussion that the fifth report had evoked. Responding to some of the criticism on the structure and content of the report, the Special Rapporteur emphasized that all sections of the report were equally relevant to its conclusions. She also noted that it was the substance of the arguments advanced that mattered, not whether she had followed the approach of the previous Special Rapporteur.

132. With regard to the analysis of practice in the fifth report, the Special Rapporteur recalled the various views expressed. She emphasized that the jurisprudence of international courts did not unequivocally exclude the application of limitations and exceptions to immunity *ratione materiae*, as those decisions primarily dealt with State immunity or immunity *ratione personae*. She also stressed the importance of national jurisprudence, which, although it might have been limited and not sufficiently homogeneous, was at the heart of the project. She thanked members for suggesting the addition of international, regional and domestic case law.

133. The Special Rapporteur stated the report's analysis of domestic legislation helped differentiate immunity of State officials from State immunity; highlighted the relative nature of State immunity; and illustrated the use of the "territorial tort exception". She also noted that domestic legislation implementing the Rome Statute could shine a light on the question of immunity of State officials, particularly when it went beyond the requirements

of the Rome Statute. The Special Rapporteur noted that other forms of State practice, such as decisions by prosecutors or diplomatic demarches, were typically not available in the public domain and could thus not be considered as relevant practice.

134. The Special Rapporteur acknowledged the disagreement between members over a possible customary rule or emerging trend towards limitations and exceptions to immunity of State officials. She maintained that the Commission ought to focus on identifying the relevant rules *lex lata* and *lex ferenda* relating to immunity. She did not support the view that the Commission was engaged in crafting "new law" on the issue, as suggested by some members. In that regard, the Special Rapporteur noted that the draft articles, similar to other projects of the Commission, contained elements of both codification and progressive development and that they should be assessed in that light.

135. The Special Rapporteur reiterated her position that the distinction between limitations and exceptions, as set out in the report, helped to illuminate the concept of immunity of State officials and its role within the international legal system. In her view, that approach was not incompatible with the pragmatic formulation of draft article 7, which focused on the situation in which immunity "does not apply"; rather, that formulation avoided a number of controversies relating to the distinction between limitations and exceptions and found its basis in practice.

136. The Special Rapporteur agreed with members that a discussion of the procedural aspects of immunity was of vital importance to the project. She noted, however, that procedural issues went beyond questions of limitations and exceptions, affected the draft articles as a whole and should be dealt with after the Commission had considered the issue of limitations and exceptions to immunity. She pointed out that the previous Special Rapporteur had taken a similar approach and reiterated her offer to hold informal consultations on that matter, in preparation of submission of the sixth report.

137. Turning to specific comments on the draft article proposed in the fifth report, the Special Rapporteur noted that many members were in favour of retaining paragraph 1, although various suggestions for revision of its content had been made. With regard to subparagraph (a), the Special Rapporteur expressed her readiness to include the crime of apartheid, but continued to have reservations regarding the inclusion of other transnational crimes, as the latter were treaty based and did not derive from custom. Moreover, the Special Rapporteur maintained her hesitancy regarding the inclusion of the crime of aggression, as it risked increased politicization of the entire project. For a similar reason, she preferred to maintain a list of specific crimes, rather than including an open, general reference to international crimes. Definitions of the specific crimes could be provided in the commentaries, possibly by reference to existing treaties.

138. The Special Rapporteur noted that the inclusion of corruption in subparagraph (b) remained controversial. She acknowledged that the provision should principally apply to matters of "grand corruption", a term that was to be further specified in the commentaries. She emphasized that, since corruption was always committed for private gain, it could not be considered as an act performed in an official capacity, to which immunity *ratione materiae* would apply. With regard to the "territorial tort exception", as contained in subparagraph (c), the Special Rapporteur maintained that its application was not restricted to the sphere of civil jurisdiction. In its current form, it aimed at addressing major offences, such as sabotage and espionage.

139. The Special Rapporteur also noted the general agreement on paragraph 2, which highlighted that limitations and exceptions did not apply in case of immunity *ratione personae*, a well-established position in practice and doctrine. In her view, the explicit reference to immunity *ratione personae* provided a balance between the principle of sovereign equality and the need to fight impunity, which might be undone were the paragraph deleted. She also expressed her preference for retaining the non-prejudice clauses in paragraph 3, which would facilitate the resolution of any normative conflict between the draft articles and existing international instruments, in particular those relating to international criminal courts and tribunals.

## C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission

### 1. Text of the draft articles

140. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

**Immunity of State officials from foreign criminal jurisdiction**

**Part One**
**Introduction**

**Article 1**
**Scope of the present draft articles**

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

**Article 2**
**Definitions**

For the purposes of the present draft articles:

...

(e) "State official" means any individual who represents the State or who exercises State functions;

(f) an "act performed in an official capacity" means any act performed by a State official in the exercise of State authority;

**Part Two**
**Immunity *ratione personae****

**Article 3**
**Persons enjoying immunity *ratione personae***

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

**Article 4**
**Scope of immunity *ratione personae***

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.

3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

* The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.

## Part Three
## Immunity *ratione materiae**

### Article 5
### Persons enjoying immunity *ratione materiae*

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

### Article 6
### Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

### Article 7
### Crimes under international law in respect of which immunity *ratione materiae* shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

(a) crime of genocide;

(b) crimes against humanity;

(c) war crimes;

(d) crime of *apartheid*;

(e) torture;

(f) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

### Annex

### List of treaties referred to in draft article 7, paragraph 2

Crime of genocide

- Rome Statute of the International Criminal Court, 17 July 1998, article 6;
- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

Crimes against humanity

- Rome Statute of the International Criminal Court, 17 July 1998, article 7.

War crimes

- Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.

Crime of *apartheid*

* The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.

- International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 30 November 1973, article II.

Torture

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984: article 1, paragraph 1.

Enforced disappearance

- International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.

## 2. Text of the draft article, with commentary thereto, provisionally adopted by the Commission at its sixty-ninth session

141. The text of the draft article, and the commentary thereto, provisionally adopted by the Commission at its sixty-ninth session, is reproduced below.

**Part Two**
**Immunity *ratione personae****

…

**Part Three**

**Immunity *ratione materiae****

…

**Article 7**
**Crimes under international law in respect of which immunity *ratione materiae* shall not apply**

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

(a) crime of genocide;

(b) crimes against humanity;

(c) war crimes;

(d) crime of *apartheid*;

(e) torture;

(f) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

**Annex**
**List of treaties referred to in article 7, paragraph 2**

Crime of genocide

- Rome Statute of the International Criminal Court, 17 July 1998, article 6;
- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

Crimes against humanity

- Rome Statute of the International Criminal Court, 17 July 1998, article 7.

* The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.

War crimes

- Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.

Crime of *apartheid*

- International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 30 November 1973, article II.

Torture

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984: article 1, paragraph 1.

Enforced disappearance

- International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.

**Commentary**

(1) Draft article 7 lists crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* shall not apply under the present draft articles. The draft article contains two paragraphs, one that lists the crimes (para. 1) and one that identifies the definition of those crimes (para. 2).

(2) As draft article 7 refers solely to immunity from jurisdiction *ratione materiae*, it is included in Part Three of the draft articles and does not apply in respect of immunity from jurisdiction *ratione personae*, which is regulated in Part Two of the draft articles.

(3) This does not mean, however, that the State officials listed in draft article 3 (Heads of State, Heads of Government and Ministers for Foreign Affairs) will always be exempt from the application of draft article 7. On the contrary, it should be borne in mind that, as the Commission has indicated, Heads of State, Heads of Government and Ministers for Foreign Affairs "enjoy immunity *ratione personae* only during their term of office"[759] and the cessation of such immunity "is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*".[760] In addition, draft article 6, on immunity *ratione materiae*, provides that "[i]ndividuals who enjoyed immunity *ratione personae* ..., whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office".[761] Accordingly, as this residual immunity is immunity *ratione materiae*, draft article 7 will be applicable to the immunity from jurisdiction enjoyed by a former Head of State, a former Head of Government or a former Minister for Foreign Affairs for acts performed in an official capacity during their term of office. Therefore, such immunity will not apply to these former officials in connection with the crimes under international law listed in paragraph 1 of draft article 7.

(4) Paragraph 1 of draft article 7 lists the crimes which, if committed, would prevent the application of such immunity from criminal jurisdiction to a foreign official, even if those crimes had been committed by the official acting in an official capacity during his or her term of office. Thus, draft article 7 complements the normative elements of immunity from foreign criminal jurisdiction *ratione materiae* as defined in draft articles 5 and 6.

(5) The Commission, by a recorded vote, decided to include this draft article for the following reasons. First, it considered that there has been a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of

[759] Draft article 4, paragraph 1. See paragraph (2) of the commentary to draft article 4, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), p. 66.

[760] Draft article 4, paragraph 3. See paragraph (7) of the commentary to draft article 4, *ibid*., p. 70.

[761] Draft article 6, paragraph 3. See paragraphs (9) to (15) of the commentary to draft article 6, *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), pp. 361-363. See also paragraph (4) of the commentary to draft article 5, *ibid*., *Sixty-ninth Session, Supplement No. 10* (A/69/10), p. 237.

certain types of behaviour that constitute crimes under international law. This trend is reflected in judicial decisions taken by national courts which, even though they do not all follow the same line of reasoning, have not recognized immunity from jurisdiction *ratione materiae* in relation to certain international crimes.[762] In rare cases, this trend has also been reflected in the adoption of national legislation that provides for exceptions to immunity *ratione materiae* in relation to the commission of international crimes.[763] This trend has also

[762] See the following cases, which are presented in support of such trend: *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, United Kingdom, 24 March 1999, [1999] UKHL 17, [2000] 1 AC 147; *Re Pinochet*, Belgium, Court of First Instance of Brussels, judgment of 6 November 1998, *International Law Reports* (ILR), vol. 119, p. 349; *In re Hussein*, Germany, Higher Regional Court of Cologne, judgment of 16 May 2000, 2 Zs 1330/99, para. 11 (makes this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office); *Bouterse*, Netherlands, Amsterdam Court of Appeal, judgment of 20 November 2000, *Netherlands Yearbook of International Law*, vol. 32 (2001), pp. 266 *ff*. (although the Supreme Court subsequently quashed the verdict, it did not do so in relation to immunity but because of the violation of the principle of non-retroactivity and the limited scope of universal jurisdiction; see judgment of 18 September 2001, *International Law in Domestic Courts* [ILDC 80 (NL 2001)]); *Re Sharon and Yaron*, Belgium, Court of Cassation, judgment of 12 February 2003, ILR, vol. 127, p. 123 (although the Court granted immunity *ratione personae* to Ariel Sharon, it tried Amos Yaron, who, at the time the acts were committed, was head of the Israeli armed forces that took part in the Sabra and Shatila massacres); *H. v. Public Prosecutor*, Netherlands, Supreme Court, judgment of 8 July 2008, ILDC 1071 (NL 2008), para. 7.2; *Lozano v. Italy*, Italy, Court of Cassation, judgment of 24 July 2008, ILDC 1085 (IT 2008), para. 6; *A. v. Office of the Public Prosecutor of the Confederation*, Switzerland, Federal Criminal Court, judgment of 25 July 2012, BB.2011.140; *FF v. Director of Public Prosecutions* (Prince Nasser case), High Court of Justice, Queen's Bench Division, Divisional Court, judgment of 7 October 2014 [2014] EWHC 3419 (Admin.) (the significance of this ruling lies in the fact that it was issued as a "consent order", that is to say, based on an agreement reached between the plaintiffs and the Director of Public Prosecutions, in which the latter agrees that the charges of torture against Prince Nasser are not covered by immunity *ratione materiae*). In a civil proceeding, the Italian Supreme Court has also asserted that State officials who have committed international crimes do not enjoy immunity *ratione materiae* from criminal jurisdiction (*Ferrini v. Federal Republic of Germany*, Court of Cassation, judgment of 11 March 2004, ILR, vol. 128, p. 674). In *Jones*, although the House of Lords recognized immunity from civil jurisdiction, it reiterated that immunity from criminal jurisdiction is not applicable in the case of torture (*Jones v. Kingdom of Saudi Arabia*, House of Lords, judgment of 14 June 2006 [2006] UKHL 26, [2007] 1 A.C.). Lastly, it should be noted that the Federal High Court of Ethiopia, albeit in the context of a case pursued against an Ethiopian national, affirmed the existence of a rule of international law preventing the application of immunity to a former Head of State accused of international crimes (*Special Prosecutor v. Hailemariam*, Federal High Court, judgment of 9 October 1995, ILDC 555 (ET 1995)). National courts have in some cases tried officials of another State for international crimes without expressly ruling on immunity. This occurred, for example, in the *Barbie* case before the French courts: *Fédération Nationale des Déportés et Internés Résistants et Patriotes and others v. Barbie*, France, Court of Cassation, judgments of 6 October 1983, 26 January 1984 and 20 December 1985, ILR, vol. 78, p. 125; *Fédération Nationale des Déportés et Internés Résistants et Patriotes and others v. Barbie*, Rhone Court of Assizes, judgment of 4 July 1987, ILR, vol. 78, p. 148; and Court of Cassation, judgment of 3 June 1988, ILR, vol. 100, p. 330. Meanwhile, the National High Court of Spain has tried various foreign officials for international crimes without deeming it necessary to rule on immunity, in the *Pinochet*, *Scilingo*, *Cavallo*, *Guatemala*, *Rwanda* and *Tibet* cases. In the *Rwanda* case, however, the National High Court ruled against the prosecution of President Kagame on the grounds that he enjoyed immunity. Similarly, in the *Tibet* case, the National High Court ruled against the prosecution of the then President Hu Jintao; however, following the end of the latter's term as President of China, the Central Court of Investigation No. 2 of the National High Court allowed his prosecution by order of 9 October 2013, claiming that he no longer enjoyed "diplomatic immunity".

[763] In support of this position, attention has been drawn to Organic Act No. 16/2015 of 27 October, on the privileges and immunities of foreign States, the international organizations based in Spain and international conferences and meetings held in Spain, which establishes a separate regime of immunity for Heads of State, Heads of Government and Ministers for Foreign Affairs, according to which, in respect of "acts performed in the exercise of official functions [by the officials in question] during a term in office, genocide, forced disappearance, war crimes and crimes against humanity shall be excluded from immunity" (art. 23, para. 1, *in fine*). Also of interest is Act No. 24488 of Argentina, on foreign State immunity, article 3 of which was excluded by Decree No. 849/95 promulgating the Act, with the result that the Argentine courts may not decline to hear a claim against a State for

been highlighted in the literature, and has been reflected to some extent in proceedings before international tribunals.[764]

violation of international human rights law. Meanwhile, from a far more limited perspective, the United States Foreign Sovereign Immunities Act, as amended by the Torture Victim Protection Act, establishes a "terrorism exception to the jurisdictional immunity of a foreign State" (section 1605A), which makes it possible to exclude the application of immunity for certain types of acts such as torture or extrajudicial executions, provided that they were carried out by officials of a State previously designated by the competent authorities of the United States as a "State sponsor of terrorism". A similar exception is contained in the State Immunity Act of Canada. Lastly, it should be borne in mind that some limitations or exceptions to immunity in relation to international crimes are contained in national legislation concerning such crimes, either in separate laws (see the Belgian Repression of Serious Violations of International Humanitarian Law Act, as amended in 2003; the 2003 International Crimes Act of the Netherlands; or the Criminal Code of the Republic of the Niger, as amended in 2003) or in legislation implementing the Rome Statute of the International Criminal Court. For implementing legislation that establishes a general exception to immunity, see: Burkina Faso, Act No. 50 of 2009 on the determination of competence and procedures for application of the Rome Statute of the International Criminal Court by the jurisdictions of Burkina Faso, arts. 7 and 15.1 (according to which the Burkina Faso courts may exercise jurisdiction with respect to persons who have committed a crime that falls within the competence of the Court, even in cases where it was committed abroad, provided that the suspect is in their territory. Moreover, official status shall not be grounds for exception or reduction of responsibility); Comoros, Act No. 11-022 of 13 December 2011 concerning the application of the Rome Statute, art. 7.2 ("the immunities or special rules of procedure accompanying the official status of a person by virtue of the law or of international law shall not prevent national courts from exercising their competence with regard to that person in relation to the offences specified in this Act"); Ireland, International Criminal Court Act 2006, art. 61.1 ("In accordance with article 27, any diplomatic immunity or state immunity attaching to a person by reason of a connection with a state party to the Statute is not a bar to proceedings under this Act in relation to the person"); Mauritius, International Criminal Court Act 2001, art. 4; South Africa, Act No. 27 of 18 July 2002 implementing the Rome Statute of the International Criminal Court, arts. 4 (2) (a) (i) and 4 (3) (c) (stating that South African courts are competent to prosecute crimes of genocide, crimes against humanity and war crimes when the alleged perpetrator is in South Africa and that any official status claimed by the accused is irrelevant). For implementing legislation that establishes procedures for consultation or limitations only in relation to the duty to cooperate with the International Criminal Court, see: Argentina, Act No. 26200 implementing the Rome Statute of the International Criminal Court, adopted by Act No. 25390 and ratified on 16 January 2001, arts. 40 and 41; Australia, International Criminal Court Act No. 41 of 2002, art. 12.4; Austria, Federal Act No. 135 of 13 August 2002 on cooperation with the International Criminal Court, arts. 9.1 and 9.3; Canada, 1999 Extradition Act, art. 18; France, Code of Criminal Procedure (under Act No. 2002-268 of 26 February 2002), art. 627.8; Germany, Courts Constitution Act, arts. 20.1 and 21; Iceland, 2003 Act on the International Criminal Court, art. 20.1; Ireland, 2006 International Criminal Court Act No. 30, art. 6.1; Kenya, Act No. 16 of 2008 on International Crimes, art. 27; Liechtenstein, Act of 20 October 2004 on cooperation with the International Criminal Court and other international tribunals, art. 10.1 (b) and (c); Malta, Extradition Act, art. 26S.1; Norway, Act No. 65 of 15 June 2001 concerning implementation of the Rome Statute of the International Criminal Court of 17 July 1998 in Norwegian law, art. 2; New Zealand, International Crimes and International Criminal Court Act 2000, art. 31.1; United Kingdom, International Criminal Court Act 2001, art. 23.1; Samoa, Act No. 26 of 2007 on the International Criminal Court, arts. 32.1 and 41; Switzerland, Act on Cooperation with the International Criminal Court, art. 6; and Uganda, Act No. 18 of 2006 on the International Criminal Court, art. 25.1 (a) and (b). Denmark is a special case: its Act of 16 May 2001 on the International Criminal Court (art. 2) attributes the settlement of questions on immunity to the executive branch without defining a specific system for consultations.

[764] The existence of a trend towards limiting immunity for international crimes was noted by Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 88, para. 85. For its part, the European Court of Human Rights, in *Jones and Others v. the United Kingdom*, expressly recognized that there appeared to be "some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture", and that, "in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States" (*Jones and Others v. the United Kingdom*, Applications Nos. 34356/06 and 40528/06, judgment of 2 June 2014, ECHR 2014, paras. 213 and 215).

(6) Second, the Commission also took into account the fact that the draft articles on immunity of State officials from foreign criminal jurisdiction are intended to apply within an international legal order whose unity and systemic nature cannot be ignored. Therefore, the Commission should not overlook other existing standards or clash with the legal principles enshrined in such important sectors of contemporary international law as international humanitarian law, international human rights law and international criminal law. In this context, the consideration of crimes to which immunity from foreign criminal jurisdiction does not apply must be careful and balanced, taking into account the need to preserve respect for the principle of the sovereign equality of States, to ensure the implementation of the principles of accountability and individual criminal responsibility and to end impunity for the most serious international crimes, which is one of the primary objectives of the international community. Striking this balance will ensure that immunity fulfils the purpose for which it was established (to protect the sovereign equality and legitimate interests of States) and that it is not turned into a procedural mechanism to block all attempts to establish the criminal responsibility of certain individuals (State officials) arising from the commission of the most serious crimes under international law.

(7) In the light of the above two reasons, the Commission considers that it must pursue its mandate of promoting the progressive development and codification of international law by applying both the deductive method and the inductive method. It is on this premise that the Commission has included in draft article 7 a list of crimes to which immunity *ratione materiae* shall not apply for the following reasons: (a) they are crimes which in practice tend to be considered as crimes not covered by immunity *ratione materiae* from foreign criminal jurisdiction; and (b) they are crimes under international law that have been identified as the most serious crimes of concern to the international community, and there are international, treaty-based and customary norms relating to their prohibition, including an obligation to take steps to prevent and punish them.

(8) However, some members disagreed with this analysis. First, they opposed draft article 7, which had been adopted by vote, stating that: (a) the Commission should not portray its work as possibly codifying customary international law when, for reasons indicated in the footnotes below, it is clear that national case law,[765] national statutes,[766] and

[765] Those members noted that only nine cases are cited (see footnote 762 above) that purportedly expressly address the issue of immunity *ratione materiae* of a State official from foreign criminal jurisdiction under customary international law, and that most of those cases actually provide no support for the proposition that such immunity is to be denied. For example, in the United Kingdom case of *Regina v. Bow Street Metropolitan Stipendiary Magistrate*, immunity was denied only with respect to acts falling within the scope of a treaty in force that was interpreted as waiving immunity (the Convention against Torture). The German case of *In re Hussein* did not concern any of the crimes listed in draft article 7, and the judgment did not assert, in relation to the hypothesis that the then President Hussein had ceased to hold office, that immunity *ratione materiae* from jurisdiction was not or should not be recognized in that instance. The *Bouterse* case was not upheld by the Netherlands Supreme Court and the reasoning of the lower court on immunity remained an untested *obiter dictum*. The Belgian decision in *Re Sharon and Yaron* was controversial and led the Parliament thereafter to alter Belgian law, resulting in the Court of Cassation affirming a lack of jurisdiction over the case. The same law was at issue in *Re Pinochet* before the Court of First Instance of Brussels. In the case of *Lozano v. Italy*, the foreign State official was accorded, not denied, immunity *ratione materiae*. The case *Special Prosecutor v. Hailemariam* concerned prosecution by Ethiopia of one of its own nationals, not of a foreign State official. Other cases cited concern situations where immunity has not been invoked, or has been waived; they provide no support for the proposition that a State official does not enjoy immunity *ratione materiae* from foreign criminal jurisdiction under customary international law if such immunity is invoked. Further, those members noted that the relevance for the topic of *civil* cases in national courts must be carefully considered; to the extent they are relevant, they tend not to support the exceptions asserted in draft article 7. For example, the case *Ferrini v. Federal Republic of Germany* (see footnote 762 above) was found by the International Court of Justice as to be inconsistent with the obligations of Italy under international law. See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99. In the case of *Jones v. Kingdom of Saudi Arabia* (see footnote 762 above), the House of Lords recognized the immunity of the State official. By contrast, in addition to those cases indicated above, those members pointed to several cases where immunity *ratione materiae* has been invoked and

treaty law[767] do not support the exceptions asserted in draft article 7; (b) the relevant practice showed no "trend", temporal or otherwise, in favour of exceptions to immunity *ratione materiae* from foreign criminal jurisdiction; (c) immunity is a procedural matter and, consequently, (i) it is not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precludes immunity from foreign criminal jurisdiction; (ii) immunity does not depend on the gravity of the act in question or on the fact that such act is prohibited by the peremptory norm of international law; (iii) the issue of immunity must be considered at an early stage of the exercise of jurisdiction, before the case is considered on the merits;[768] (d) the lack of immunity before an international criminal court is not relevant to the issue of immunity from the jurisdiction of national courts; and (e) the establishment of a new system of exceptions to immunity, if not agreed upon by treaty, will likely harm inter-State relations and risks undermining the international community's objective of ending impunity for the most serious international crimes. Furthermore, these members took the view that the Commission, by proposing draft article 7, was conducting a "normative policy" exercise that bore no relation to either the codification or the progressive development of international law. For those members, draft article 7 is a proposal for "new law" that cannot be considered as either *lex lata* or desirable progressive development of international law. Second, those members of the Commission also stressed the difference between procedural immunity from foreign jurisdiction, on the one hand, and substantive criminal responsibility, on the other, and maintained that the recognition of exceptions to immunity was neither required nor necessarily appropriate for achieving the required balance. Rather, in the view of those members, impunity can be avoided in situations where a State official

accepted by national courts in criminal proceedings. See, for example, Senegal, *Prosecutor v. Hissène Habré*, Court of Appeal of Dakar, judgment of 4 July 2000, and Court of Cassation, judgment of 20 March 2001; ILR vol. 125, pp. 571-577 (immunity accorded to former head of State); Germany, *Jiang Zemin*, decision of the Federal Prosecutor General of 24 June 2005, 3 ARP 654/03-2 (same).

766 These members noted that very few national laws addressed the issue of immunity *ratione materiae* of a State official from foreign criminal jurisdiction under customary international law. As acknowledged in the Special Rapporteur's fifth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701), para. 42: "Immunity of the State or of its officials from jurisdiction is not explicitly regulated in most States. On the contrary, the response to immunity has been left to the courts". Of the few national laws that purportedly address such immunity (Burkina Faso, Comoros, Ireland, Mauritius Niger, Spain, South Africa), none support draft article 7 as it is written. For example, the Spanish Organic Act No. 16/2015 of 27 October, art. 23, para. 1, only addresses the immunity *ratione materiae* of former Heads of State, Heads of Government and Ministers for Foreign Affairs. Statutes such as the Repression of Serious Violations of International Humanitarian Law Act, as amended in 2003, of Belgium or the 2003 International Crimes Act of the Netherlands, only provide that immunity shall be denied as recognized under international law, without any further specification. Further, those members observed that national laws implementing an obligation to surrender a State official to the International Criminal Court, arising under the Rome Statute or a decision by the Security Council, are not relevant to the issue of immunity of a State official under customary international law from foreign criminal jurisdiction. Also irrelevant are national laws focused on the immunity of States, such as Act No. 24488 of Argentina, the Foreign Sovereign Immunities Act of the United States, and the State Immunity Act of Canada (further, it was noted that the Foreign Sovereign Immunities Act was not amended by the Torture Victim Protection Act, which has nothing to do with terrorism).

767 These members noted that none of the global treaties addressing specific types of crimes (e.g., genocide, war crimes, *apartheid*, torture, enforced disappearance) contain any provision precluding immunity *ratione materiae* of State officials from foreign criminal jurisdiction, nor do any of the global treaties addressing specific types of State officials (e.g., diplomats, consular officials, officials on special mission).

768 See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 765 above), p. 137, para. 84 ("customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated"); *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 25, para. 60 ("Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law").

is prosecuted in his or her own State; is prosecuted in an international court; or is prosecuted in a foreign court after waiver of the immunity. Asserting exceptions to immunity that States have not accepted by treaty or through their widespread practice risks creating severe tensions, if not outright conflict, among States whenever one State exercises criminal jurisdiction over the officials of another based solely on an allegation that a heinous crime has been committed.

(9) It should be borne in mind that these members also expressed the view that no decision can be taken on the issue of limitations and exceptions to immunity until the Commission has taken a position on the issue of procedural safeguards. This opinion was not, however, accepted by the majority of Commission members, who, while recognizing the importance of clearly defining procedural safeguards to prevent abuse in the exercise of foreign criminal jurisdiction over State officials, took the view that the issue of the crimes to which immunity from jurisdiction *ratione materiae* does not apply can be dealt with separately at the present stage of the Commission's work. Nevertheless, in order to reflect the great importance attached by the Commission to procedural issues in the context of the present topic, it was agreed that the current text of the draft articles should include the following footnote: "At its seventieth session, the Commission will consider the procedural provisions and safeguards applicable to the present draft articles." The footnote marker was inserted after the headings of Part Two (Immunity *ratione personae*) and Part Three (Immunity *ratione materiae*) of the draft articles, since procedural provisions and safeguards may refer to both categories of immunity, and should also be considered in relation to the draft articles as a whole.

*Paragraph 1*

(10) Paragraph 1 (a)-(f) of draft article 7 lists the crimes under international law which, if allegedly committed, would prevent the application of immunity from criminal jurisdiction to a foreign official, even if the official committed those crimes while acting in an official capacity during his or her term of office. The crimes are as follows: the crime of genocide, crimes against humanity, war crimes, the crime of *apartheid*, torture and enforced disappearance.

(11) The chapeau of the draft article uses the phrase "shall not apply" in order to reflect the fact that in both practice and doctrine two different interpretations have been followed with regard to whether or not such crimes are to be considered "acts performed in an official capacity". One view is that the commission of such crimes can never be considered a function of the State and they therefore cannot be regarded as "acts performed in an official capacity". The contrary view holds that crimes under international law either require the presence of a State element (torture, enforced disappearance) or else must have been committed with the backing, express or implied, of the State machinery, so that there is a connection with the State, and such crimes can therefore be considered in certain cases as "acts performed in an official capacity".[769] Although the Commission did not find it necessary to come down in favour of one or the other of these interpretations, it noted that some national courts have not applied immunity *ratione materiae* in the exercise of their criminal jurisdiction in respect of these crimes under international law, either because they do not regard them as an act performed in an official capacity or a characteristic function of the State,[770] or because they take the view that, although crimes under international law may constitute such an act or function, such crimes (by virtue of their gravity or because they

[769] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 765 above), p. 125, para. 60 (discussing *acta jure imperii* in the context of State immunity).

[770] See, for example, the following cases: *Re Pinochet*, Belgium, Court of First Instance of Brussels, judgment of 6 November 1998 (see footnote 762 above), p. 349; *In re Hussein*, Germany, Higher Regional Court of Cologne, judgment of 16 May 2000 (see footnote 762 above), para. 11 (makes this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office). A similar argument has also been used in some cases when the question of immunity has been raised before the civil courts. See, for example, *Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Livadeia (Greece), judgment of 30 October 1997.

contravene peremptory norms) may not give rise to recognition of the perpetrator's immunity from criminal jurisdiction.[771]

(12) Therefore, bearing in mind that, in practice, the same crime under international law has sometimes been interpreted as a limitation (absence of immunity) or as an exception (exclusion of existing immunity), the Commission considered it preferable to address the topic in terms of the effects resulting from each of these approaches, namely, the non-applicability to such crimes of immunity *ratione materiae* from foreign criminal jurisdiction that otherwise might be enjoyed by a State official. The Commission opted for this formulation for reasons of clarity and certainty, in order to provide a list of crimes which, even if committed by a State official, would preclude the possibility of immunity from foreign criminal jurisdiction.

(13) To that end, the Commission used the phrase "immunity ... shall not apply", following, *mutatis mutandis*, the technique once used by the Commission in relation to jurisdictional immunity of the State, when it used the phrase "proceedings in which State immunity cannot be invoked" in a similar context.[772] However, in draft article 7, the Commission decided not to use the phrase "cannot be invoked" in order to avoid the procedural component of that phrase, preferring instead to use the neutral phrase "shall not apply".

(14) The expression "from the exercise of foreign criminal jurisdiction" is included in the chapeau for consistency with the formulation used in draft articles 3 and 5, as provisionally adopted by the Commission.

(15) The expression "crimes under international law" refers to conduct that is criminal under international law whether or not such conduct has been criminalized under national law. The crimes listed in draft article 7 are the crimes of greatest concern to the international community as a whole; there is a broad international consensus on their definition as well as on the existence of an obligation to prevent and punish them. These crimes have been addressed in international treaties and are also prohibited by customary international law.

(16) The expression "crimes under international law" was used previously by the Commission in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[773] and in the 1954 draft Code of

[771] As happened, for example, in the case of *Eichmann*, Israel, Supreme Court, judgment of 29 May 1962, ILR, vol. 36, pp. 309-310. In the *Ferrini* case, the Italian courts based their ruling on both the gravity of the crimes committed and the fact that the conduct in question was contrary to *jus cogens* norms (*Ferrini v. Federal Republic of Germany*, Court of Cassation, judgment of 11 March 2004 (see footnote 762 above), p. 674). In the *Lozano* case, the Italian Court of Cassation based its denial of immunity on the violation of fundamental rights, which have the status of *jus cogens* norms and must therefore take precedence over the rules governing immunity (*Lozano v. Italy*, Italy, Court of Cassation, judgment of 24 July 2008 (see footnote 762 above), para. 6). In *A. v. Office of the Public Prosecutor of the Confederation*, the Federal Criminal Court of Switzerland based its decision on the existence of a customary prohibition of international crimes that the Swiss legislature considers to be *jus cogens*; it also pointed out the contradiction between prohibiting such conduct and continuing to recognize immunity *ratione materiae* that would prevent the launch of an investigation (*A. v. Office of the Public Prosecutor of the Confederation*, Switzerland, Federal Criminal Court, judgment of 25 July 2012 (see footnote 762 above)).

[772] Draft articles on jurisdictional immunities of States and their property, adopted by the Commission at its forty-third session, *Yearbook of the International Law Commission, 1991*, p. 33. The Commission used the phrase cited above as the title of part III of those draft articles and reiterated a variant (the "State cannot invoke") in articles 10 to 17 in the same part. For an explanation of the reasons that led the Commission to use this phrase, see, in particular, paragraph (1) of the general commentary to part III (p. 33) and paragraphs (1) to (5) of the commentary to article 10 (pp. 33-34). The United Nations Convention on Jurisdictional Immunities of States and Their Property, done at New York on 2 December 2004 (General Assembly resolution 59/38, annex), likewise uses the phrase "Proceedings in which State immunity cannot be invoked" in the title of part III and the variant "the State cannot invoke" in articles 10 to 17.

[773] See principle I of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal: "Any person who commits an act which constitutes a

Offences against the Peace and Security of Mankind.[774] In this context, the Commission took the view that the use of the expression "crimes under international law" means that "international law provides the basis for the criminal characterization" of such crimes and that "the prohibition of such types of behaviour and their punishability are a direct consequence of international law".[775] What follows from this is "the autonomy of international law in the criminal characterization" of such crimes[776] and the fact that "the characterization, or the absence of characterization, of a particular type of behaviour as criminal under national law has no effect on the characterization of that type of behaviour as criminal under international law".[777] Accordingly, the use of the expression "crimes under international law" directly links the list of crimes contained in paragraph 1 of draft article 7 to international law and ensures that the definition of such crimes is understood in accordance with international standards, and any definition established under domestic law to identify cases in which immunity does not apply is irrelevant.

(17) The category of crimes under international law includes (a) the crime of genocide, (b) crimes against humanity and (c) war crimes. The Commission included these crimes among the crimes in respect of which immunity does not apply for two basic reasons. First, these are crimes about which the international community has expressed particular concern, resulting in the adoption of treaties that are at the heart of international criminal law, international human rights law and international humanitarian law, and the international courts have emphasized not only the gravity of these crimes, but also the fact that their prohibition is customary in nature and that committing them may constitute a violation of peremptory norms of general international law (*jus cogens*). Second, these crimes arise, directly or indirectly, in the judicial practice of States in relation to cases in which the issue of immunity *ratione materiae* has been raised. Lastly, it should be noted that these three crimes are included in article 5 of the Rome Statute of the International Criminal Court, where they are described as "the most serious crimes of concern to the international community as a whole".[778] Some members noted, however, that the inclusion of those crimes in draft article 7 found little if any support in practice, in national and international jurisprudence or in national legislation.

(18) The Commission decided not to include the crime of aggression at this time, even though it too is included in article 5 of the Rome Statute and is characterized as a crime under the amendments adopted at the Review Conference of the Rome Statute held in Kampala in 2010.[779] The Commission took this decision in view of the nature of the crime of aggression, which would require national courts to determine the existence of a prior act of aggression by the foreign State, as well as the special political dimension of this type of

crime under international law is responsible therefor and liable to punishment" (*Yearbook ... 1950*, vol. II, document A/1316, p. 374).

[774] See article 1 of the draft Code of Offences against the Peace and Security of Mankind adopted in 1954: "Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished" (*Yearbook ... 1954*, vol. II, document A/2693, p. 150). For its part, article 1, paragraph 2, of the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission in 1996 states that: "Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law" (*Yearbook ... 1996*, vol. II (Part Two), p. 17).

[775] See paragraph (6) of the commentary to article 1 of the 1996 draft Code of Crimes against the Peace and Security of Mankind (*Yearbook... 1996*, vol. II (Part Two), p. 17).

[776] *Ibid*., para. (9), p. 18.

[777] *Ibid*., para. (10). It should be borne in mind that the Commission, in commenting on principle I of the Nürnberg principles, had stated that: "The general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law" (*Yearbook ... 1950*, vol. II, document A/1316, p. 374, para. 99).

[778] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, art. 5, para. 1, and preamble, fourth paragraph.

[779] See the definition of aggression in article 8 *bis*, *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010*, publication of the International Criminal Court, RC/9/11, resolution 6, "The crime of aggression" (RC/Res.6).

crime,[780] given that it constitutes a "crime of leaders"; and also in view of the fact that the Assembly of States Parties to the Rome Statute of the International Criminal Court has not taken a decision to activate the Court's jurisdiction over this crime. However, some members stated that the crime of aggression should have been included in paragraph 1 of draft article 7, as it is the most serious of the crimes under international law, it was previously included by the Commission itself in the 1996 draft Code of Crimes against the Peace and Security of Mankind[781] and it is one of the crimes covered by the Rome Statute. Furthermore, a substantial number of States have included the crime of aggression within their national criminal law.[782] Accordingly, they expressed their opposition to the majority decision of the Commission and reserved their position on the matter.

(19) On the other hand, the Commission considered it necessary to include in paragraph 1 of draft article 7 the crimes of (d) *apartheid*, (e) torture and (f) enforced disappearance as separate categories of crimes under international law in respect of which immunity does not apply. Although these crimes are included in article 7 of the Rome Statute under the category of crimes against humanity,[783] the Commission took into account the following elements to consider them as separate crimes. First, the crimes of *apartheid*, torture and enforced disappearance have been the subject of international treaties that establish a special legal regime for each crime for the purposes of prevention, suppression and

[780] In this regard, it should be borne in mind that in the commentaries to the 1996 draft Code of Crimes against the Peace and Security of Mankind, the Commission stated the following: "The aggression attributed to a State is a *sine qua non* for the responsibility of an individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security." (*Yearbook … 1996*, vol. II (Part Two), p. 30, para. (14) of commentary to article 8).

[781] *Ibid*., pp. 42-43 (art. 16).

[782] The following are examples of national legislation that include the crime of aggression: Austria, Criminal Code § 321k, No. 60/1974 of 23 January 1974, as amended by BGBl. I No. 112/2015 of 13 August 2015; Azerbaijan, Criminal Code of 2000, arts. 100-101; Bangladesh, International Crimes (Tribunals) Act, art. 3, International Crimes (Tribunals) Act No. XIX of 1973, as amended by the International Crimes (Tribunals) (Amendment) Act No. LV of 2009 and Act No. XXI of 2012; Belarus, Criminal Code, arts. 122-123, Law No. 275-Z of 9 July 1999 (as amended on 28 April 2015); Bulgaria, Criminal Code, arts. 408-409, *State Gazette*, No. 26 of 2 April 1968, as amended by *State Gazette*, No. 32 of 27 April 2010; Croatia, Criminal Code, arts. 89, 157, *Official Gazette of the Republic of Croatia "Narodne novine",* No. 125/11; Cuba, Criminal Code, arts. 114-115, Código Penal, Ley No. 62 de 29 de diciembre de 1987, modificada por la Ley N° 87 de 16 de febrero de 1999; Ecuador, Criminal Code, art. 88; Estonia, Criminal Code, §§ 91-92; Finland, Criminal Code of Finland, Act No. 39/1889 as amended by Act No. 1718/2015, §§ 4 (a), 4 (b), 14 (a); Germany, Criminal Code, Strafgesetzbuch vom 13. November 1998 (BGBl); Luxembourg, Criminal Code, art. 136; Macedonia, Criminal Code, art. 415; Malta, Criminal Code § 82(C), Criminal Code of the Republic of Malta (1854, as amended 2004); Republic of Moldova, Criminal Code of the Republic of Moldova, arts. 139-140, adopted by Law No. 985-XV on 18 April 2002 (as amended 2009); Mongolia, Criminal Code of Mongolia (2002), art. 297; Montenegro, Criminal Code, art. 442, *Official Gazette of the Republic of Montenegro*, No. 70/2003, Correction, No. 13/2004; Paraguay, Codigo Penal de la Republica del Paraguay, art. 271, Ley No. 1.160/97; Poland, Criminal Code, art. 17, Law of 6 June 1997; Russia, Criminal Code, The Criminal Code of the Russian Federation, arts. 353-354, Federal Law No. 64-FZ of 13 June 1996 (as amended); Samoa, International Criminal Court Act 2007, as amended by Act 2014, § &A, No. 23; Slovenia, Criminal Code of 2005, arts 103 and 105; Tajikistan, Criminal Code of the Republic of Tajikistan, art. 395-396; Timor-Leste Criminal Code of the Democratic Republic of Timor-Leste, Decree Law No. 19/2009, art. 134. See, for discussion, A. Reisinger Coracini, "National legislation on individual criminal responsibility for conduct amounting to aggression' in *International Criminal Justice: Law and Practice from the Rome Statute to Its Review National Legislation on Individual Responsibility for Conduct Amounting to Aggression*, R. Bellelli, ed. (Abingdon and New York, Routledge, 2016).

[783] Rome Statute, art. 7, para. 1, subparas. (j), (f) and (i), respectively.

punishment,[784] which imposes specific obligations on States to take certain measures in their domestic legislation, including the obligation to define such crimes in their national criminal legislation and to take the necessary measures to ensure that their courts are competent to try such crimes.[785] It should be added that the treaties in question establish systems of international cooperation and judicial assistance between States.[786] Second, the Commission also noted that the crimes of *apartheid*, torture and enforced disappearance are subject under the Rome Statute to a specific threshold that is defined as the commission of such crimes "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack",[787] which, however, does not exist in the instruments specifically related to these crimes. Third, the Commission observed that the conventions against torture and enforced disappearance expressly establish that such acts can only be committed by State officials or at their instigation or with their support or acquiescence.[788] In addition, the Commission took into account the fact that, in many cases, when national courts have dealt with these crimes in relation to immunity, they have done so by treating them as separate crimes. The treatment of torture is a good example of this.[789] Some members noted, however, that the inclusion of those crimes in draft article 7 found little if any support in practice, in national and international jurisprudence or in national legislation.

(20) While some members of the Commission suggested that the list should include other crimes such as slavery, terrorism, human trafficking, child prostitution and child pornography, and piracy, which are also the subject of international treaties that establish special legal regimes for each crime for the purposes of prevention, suppression and punishment, the Commission decided not to include them. In doing so, it took into account the fact that these crimes either are already covered by the category of crimes against humanity or do not fully correspond to the definition of crimes under international law *stricto sensu*, being more correctly described in most cases as transnational crimes. In addition, such crimes are usually committed by non-State actors and are not reflected in national judicial practice relating to immunity from jurisdiction. In any event, the non-inclusion of other international crimes in draft article 7 should not be taken to mean that the Commission underestimates the seriousness of such crimes.

(21) Lastly, it should be noted that the Commission did not include in draft article 7, paragraph 1, the crimes of corruption or crimes affected by the so-called "territorial tort

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[784] See the International Convention on the Suppression and Punishment of the Crime of *Apartheid* (New York, 30 November 1973), United Nations, *Treaty Series*, vol. 1015, No. 14861, p. 243; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), *ibid*., vol. 1465, No. 24841, p. 85 (hereinafter "Convention against Torture"); and the International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), *ibid*., vol. 2716, No. 48088, p. 3.

[785] International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. IV; Convention against Torture, arts. 4 to 6; International Convention for the Protection of All Persons from Enforced Disappearance, arts. 4, 6 and 9.

[786] International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. XI; Convention against Torture, arts. 6-9; International Convention for the Protection of All Persons from Enforced Disappearance, arts. 10, 11, 13 and 14.

[787] Rome Statute, art. 7, para. 1. The definition of the threshold is contained in article 7, paragraph 2 (a).

[788] Convention against Torture, art. 1, para. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 2.

[789] As in the case, for example, of the United Kingdom, where cases relating to immunity from jurisdiction *ratione materiae* which raised the question of the non-applicability of such immunity to acts of torture have been based on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, United Kingdom, 24 March 1999 (see footnote 762 above); *FF v. Director of Public Prosecutions* (Prince Nasser case), High Court of Justice, Queen's Bench Division, Divisional Court, judgment of 7 October 2014 (see footnote 762 above). The Convention against Torture also served as the basis of a matter related to immunity from civil jurisdiction: *Jones v. Saudi Arabia*, House of Lords, judgment of 14 June 2006 (see footnote 762 above).

exception" proposed by the Special Rapporteur.[790] This does not mean, however, that the Commission considers that immunity from foreign criminal jurisdiction *ratione materiae* should apply to these two categories of crimes.

(22) With regard to corruption (understood as "grand corruption"), several members of the Commission pointed out that crimes of corruption are especially serious as they directly affect the interests and stability of the State, the well-being of its population and even its international relations. Consequently, those members were in favour of including an exception to immunity *ratione materiae*. However, other members of the Commission argued that, while the seriousness of the crime of corruption cannot be called into question, its inclusion in draft article 7 posed a problem, related essentially to the general nature of the term "corruption" and the wide range of acts that can be included in this category, as well as the fact that, in their view, treaty practice and case law do not provide sufficient grounds for including such crimes among the limitations and exceptions to immunity. Other members questioned whether corruption met the test of gravity of the other crimes listed in draft article 7. Lastly, several members of the Commission pointed out that corruption cannot under any circumstances be regarded as an act performed in an official capacity and therefore need not be included among the crimes for which immunity does not apply.

(23) Especially in view of that last argument, the Commission decided not to include crimes of corruption in draft article 7, on the grounds that they do not constitute "acts performed in an official capacity", but are acts carried out by a State official solely for his or her own benefit.[791] Although some members of the Commission pointed out that the involvement of State officials in such acts cannot be ignored, because it is precisely their official status that facilitates and makes possible the crime of corruption, some members of the Commission took the view that the fact that the crime is committed by an official does not change the nature of the act, which remains an act performed for the official's own benefit even if the official uses State facilities that might give the act a semblance of official status. Accordingly, since the normative element contained in draft article 6, paragraph 1, does not apply to the crime of corruption, several members of the Commission took the view that immunity from jurisdiction *ratione materiae* does not exist in relation to the crime of corruption and therefore the latter does not need to be included in the list of crimes for which immunity does not apply.[792]

(24) The Commission also considered the case of other crimes committed by a foreign official in the territory of the forum State without that State's consent to both the official's presence in its territory and the activity carried out by the official that gave rise to the commission of the crime (territorial exception). This scenario differs in many respects from the crimes under international law included in paragraph 1 of draft article 7 or the crime of corruption. Although the view was expressed that immunity could exist in these circumstances and the exception should not be included in draft article 7 because there was insufficient practice to justify doing so, the Commission decided not to include it in the draft article for other reasons. The Commission considers that certain crimes,[793] such as murder, espionage, sabotage or kidnapping, committed in the territory of a State in the aforementioned circumstances are subject to the principle of territorial sovereignty and do not give rise to immunity from jurisdiction *ratione materiae*, and therefore there is no need to include them in the list of crimes for which this type of immunity does not apply. This is without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, as set forth in draft article 1, paragraph 2.

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[790] See the Special Rapporteur's fifth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701), paras. 225-234.

[791] In the same vein, see paragraphs (3) and (5) of the commentary to draft article 2 (f), dealing with the definition of an "act performed in an official capacity", *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), pp. 354-355.

[792] *Ibid*., para. (13), p. 358.

[793] Referring to an exception in the context of State immunity, see *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)* (see footnote 765 above).

*Paragraph 2 and annex*

(25) Paragraph 2 of draft article 7 establishes a link between paragraph 1 of the article and the annex to the draft articles, entitled "List of treaties referred to in draft article 7, paragraph 2". While the concept of "crimes under international law" and the concepts of "crime of genocide", "crimes against humanity", "war crimes", "crime of *apartheid*", "torture" and "enforced disappearance" belong to well established categories in contemporary international law, the Commission is mindful that the fact that draft article 7 refers to "crimes" means that the principle of legal certainty characteristic of criminal law must be preserved and tools must be provided to avoid subjectivity in identifying what is meant by each of the aforementioned crimes.

(26) However, the Commission did not consider it necessary to define the crime of genocide, crimes against humanity, war crimes, the crime of *apartheid*, torture and enforced disappearance, as this is not part of its mandate within the framework of the present draft articles. On the contrary, the Commission found it preferable to simply identify the treaty instruments that define the aforementioned categories, for inclusion in a list that will enable legal practitioners to act with greater certainty in applying draft article 7. The outcome of this exercise is the list contained in the annex to the draft articles.

(27) As indicated in paragraph 2 of draft article 7, the linkage of each crime with the treaties listed in the annex is only for the purposes of draft article 7 on the immunity of State officials from foreign criminal jurisdiction, in order to identify the definitions of the crimes listed in paragraph 1 of the article without assuming or requiring that States must be parties to those instruments.

(28) On the other hand, it should be borne in mind that the listing of certain treaties has no effect on the customary nature of these crimes, as recognized under international law, or on the specific obligations that may arise from those treaties for States parties. Similarly, the inclusion of only some of the treaties that define the crimes in question has no effect on other treaties that define or regulate the same crimes, whose definitions and legal regimes remain intact for States parties in their application of those treaties. In conclusion, the reference to a specific treaty for the definition of each of the crimes listed in paragraph 1 of draft article 7 is included for reasons of convenience and appropriateness and solely for the purposes of draft article 7 and in no way affects the other rules of customary or treaty-based international law that refer to such crimes and that contain legal regimes of general scope for each of them.

(29) The choice of treaties whose articles are included in the annex to provide a definition of the various crimes under international law was based on three fundamental criteria: (a) the desire to avoid possible confusion when several treaties use different language to define the same crime; (b) the selection of treaties that are universal in scope; and (c) the selection of treaties providing the most up-to-date definitions available.

(30) Genocide was defined for the first time in the Convention on the Prevention and Punishment of the Crime of Genocide[794] and its definition has remained constant in contemporary international criminal law, notably in the statute of the International Tribunal for the Former Yugoslavia (art. 4),[795] the statute of the International Criminal Tribunal for Rwanda (art. 2)[796] and, in particular, the Rome Statute of the International Criminal Court, article 6 of which reproduces the definition contained in the Convention on the Prevention and Punishment of the Crime of Genocide. For its part, the Commission defined genocide in article 17 of the 1996 draft Code of Crimes against the Peace and Security of Mankind.[797] For the purposes of the present draft articles, the Commission has included in the annex both the Rome Statute (art. 6) and the Convention on the Prevention and Punishment of the

[794] Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277, art. II.

[795] Security Council resolution 827 (1993), annex.

[796] Security Council resolution 955 (1994), annex.

[797] *Yearbook ... 1996*, vol. II (Part Two), p. 44.

Crime of Genocide (art. II), given that the wording used in the two instruments is practically identical and has the same meaning.

(31) With regard to crimes against humanity, it should be recalled that some international treaties have identified certain behaviours as "crimes against humanity"[798] and that international courts have ruled on the customary nature of this category of crimes. The statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Criminal Tribunal for Rwanda (art. 3) have also defined this crime. The Commission itself defined this category of crimes in the 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 18).[799] However, the Rome Statute was the first instrument to define this category of crimes separately and comprehensively. For this reason, the Commission considered that article 7 of the Rome Statute should be taken as the definition of crimes against humanity for the purposes of the present draft article. This is consistent with the decision taken earlier by the Commission on the draft articles on crimes against humanity, draft article 3 of which reproduces the definition of this category of crimes contained in article 7 of the Rome Statute.[800]

(32) The concept of war crimes has a long tradition that was originally associated with treaties on international humanitarian law. The Geneva Conventions of 12 August 1949 for the protection of war victims and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), define that category of crimes as "grave breaches".[801] War crimes were defined in the statute of the International Tribunal for the Former Yugoslavia (arts. 2 and 3) and the statute of the International Criminal Tribunal for Rwanda (art. 4), as well as by the Commission itself in the 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 20).[802] The latest definition of war crimes is contained in article 8, paragraph 2, of the Rome Statute, which draws on previous experience and refers comprehensively to war crimes committed in both international and internal armed conflicts, as well as to crimes recognized on the basis of treaties and customary law. For the purposes of the present draft article, the Commission decided to retain the definition contained in article 8, paragraph 2, of the Rome Statute, as the most up-to-date version of the definition of this category of crimes. This does not imply, however, that the importance of the Geneva Conventions of 1949 and the Additional Protocol thereto in relation to the definition of war crimes should be overlooked.

(33) The crime of *apartheid* was defined for the first time in the International Convention on the Suppression and Punishment of the Crime of *Apartheid* of 30 November 1973, which, although it describes *apartheid* as a crime against humanity and a crime under international law (art. I), contains a detailed and separate definition of the crime of *apartheid* (art. II). For this reason, the Commission decided to retain the definition in the 1973 Convention for the purposes of the present draft article.

(34) Torture is defined as a violation of human rights in all the relevant international instruments. Its characterization as prohibited conduct liable to criminal prosecution is

[798] International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. I; International Convention for the Protection of All Persons from Enforced Disappearance, preamble, fifth paragraph.

[799] *Yearbook… 1996*, vol. II (Part Two), p. 47.

[800] See *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), pp. 56-58, article 3 and paragraph (3) of the commentary thereto.

[801] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), art. 51; Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 130; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 147 (United Nations, *Treaty Series*, vol. 75, Nos. 970-973); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (Geneva, 8 June 1977), art. 85 (*ibid*., vol. 1125, No. 17512, p. 3).

[802] *Yearbook … 1996*, vol. II (Part Two), pp. 53-54.

found for the first time in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which defines it as a separate crime in article 1, paragraph 1. This definition includes, moreover, the significant requirement that an act cannot be characterized as torture unless it is carried out by or at the instigation of or with the consent of public officials, which places this crime squarely within the scope of the present draft articles. A similar definition is contained in the Inter-American Convention to Prevent and Punish Torture (arts. 2 and 3).[803] The Commission considers that, for the purposes of the present draft article, torture is to be understood in accordance with the definition in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(35) The enforced disappearance of persons was defined for the first time in the Inter-American Convention on Forced Disappearance of Persons, of 9 June 1994 (art. II).[804] The International Convention for the Protection of All Persons from Enforced Disappearance, of 20 December 2006, also defines this crime (art. 2). As in the case of torture, this definition requires that the act be carried out by or at the instigation of or with the consent of public officials, which places this crime squarely within the scope of the present draft articles. The Commission therefore considers that, for the purposes of the present draft article, the definition of enforced disappearance should be understood in accordance with article 2 of the 2006 Convention.

[803] Inter-American Convention to Prevent and Punish Torture (Cartagena, Colombia, 9 December 1985), Organization of American States, *Treaty Series*, No. 67.

[804] Inter-American Convention on Forced Disappearance of Persons (Belem, Brazil, 9 June 1994), Organization of American States, *Official Records*, OEA/Ser.A/55.

**Minister of Justice and Constitutional Development and others v Southern African Litigation Centre (Helen Suzman Foundation and others as *amici curiae*)**
**2016 (4) BCLR 487 (SCA)**

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| **Division:** | Supreme Court of Appeal |
| **Date:** | 15/03/2016 |
| **Case No:** | **867/15** |
| **Before:** | CH Lewis, SA Majiedt, VM Ponnan, JB Shongwe and MJD Wallis, Judges of Appeal |

***International agreements*** *- international agreements enacted into law by national legislation - Rome Statute of the International Criminal Court - Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 - obligations of the RSA under the Rome Statute and Act 27 of 2002 to arrest a person against whom the International Criminal Court has issued an arrest warrant - foreign head of state against whom warrant for arrest issued by the International Criminal Court in respect of war crimes, crimes against humanity, and genocide entering the RSA for purpose of attending African Union Summit - Cabinet having taken decision to grant him immunity from arrest - government parties failing to take steps to arrest and detain such person - such failure unlawful and inconsistent with the RSA's obligations in terms of the Rome Statute and section 10 of Act 27 of 2002.*

***International law*** *- diplomatic immunity - head of state immunity - apparent conflict between section 4(1)(a) of the Diplomatic Immunities and Privileges Act 37 of 2001 and section 4(2) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 - head of state immunity does not constitute a bar to the RSA's co-operating with the International Criminal Court by way of the arrest and surrender of persons charged with such crimes before the International Criminal Court where an arrest warrant has been issued and a request for co-operation made.*

***Practice and procedure*** *- Supreme Court of Appeal - amicus curiae submissions - process to be followed by a prospective amicus - admission as an amicus not automatically entitling the amicus to make oral submissions - whether an amicus will be entitled to make oral submissions will be determined by the Court hearing the appeal - admission as an amicus will be granted only to parties that show that they have new contentions to advance - an amicus will not be permitted to traverse ground already covered by other parties, but will be confined to making submissions on the new contentions that it wishes to place before the Court.*

**Editor's Summary**

President Al Bashir of Sudan attended the African Union ("AU") Summit hosted by the RSA Government in June 2015. At the time there were warrants for his arrest issued by the International Criminal Court ("the ICC") in respect of war crimes, crimes against



humanity, and genocide. The Statute of the International Criminal Court was adopted in Rome on 17 July 1998. The RSA is a State Party to the Rome Statute. As a State Party, the RSA was obliged to bring about the domestication of the provisions of the statute into RSA law. It did so by enacting the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("the Implementation Act"). This obliges the government to co-operate with the ICC to effect the arrest of persons suspected of war crimes, genocide and crimes against humanity. The ICC had requested State Parties to the Statute including South Africa to arrest Bashir in the event that he entered their jurisdictions.

When Bashir was in the RSA on 14 and 15 June 2015 the Government failed to arrest him. The Southern Africa Litigation Centre, a human rights organisation, brought an urgent application aimed at requiring the RSA Government to arrest Bashir and surrender him to the ICC. The Government opposed the application, contending that Bashir, as a foreign head of state attending the AU summit, was immune from arrest. The Government relied on a hosting agreement that it had concluded with the AU which provided that the RSA would grant members and staff of the AU Commission, delegates, and representatives of intergovernmental organisations attending the meeting certain privileges and immunities. The Government also relied on the AU Convention which conferred immunity from arrest or detention on representatives of member states. This purported recognition of immunity was formalised by the adoption of a Cabinet minute and the publication of a Government Notice issued under section 5(3) of the Diplomatic Immunities and Privileges Act 37 of 2001. The Notice stated the terms of the hosting agreement.

On 14 June 2015 when the urgent application first came before the High Court an interim order was made prohibiting Bashir from leaving the RSA and ordering the Government to enforce that prohibition. The matter was postponed until the next day to give the Government an opportunity to file answering affidavits. However, Bashir left the RSA at about 11:30am on 15 June 2015 from Waterkloof Air Base while the matter was still being argued. At the commencement of the hearing, Counsel for the Government, upon being asked by the Court, gave an assurance that Bashir was still in the country. The Court made an order at about 1pm declaring that the conduct of the Respondents to the extent that they had failed to take steps to arrest and detain Bashir was inconsistent with the Constitution, and an order requiring Respondents forthwith to take all reasonable steps to prepare to arrest Bashir and detain him, pending a formal request from the International Criminal Court for his surrender. After this order was made Counsel for the Government informed the Court that Bashir had left the RSA earlier that day.

The High Court refused the Government leave to appeal against its order, considering that Bashir's departure had rendered the litigation moot. On petition to the Supreme Court of Appeal, the application for leave to appeal was set down for argument in terms of section 17(2)(d) of the Superior Courts Act 10 of 2013.

In the Supreme Court of Appeal the Government abandoned its earlier argument that the hosting agreement

provided for certain immunities and privileges which prevented the Government from arresting Bashir "during the duration of the Summit and an additional two days after the conclusion of the Summit". Instead, the Government pointed to section 4(1)(a) of the Diplomatic Immunities and Privileges Act 37 of 2001 ("the DIPA") which provides that "a head of state is immune from the criminal and civil jurisdiction of the Courts of the Republic, and enjoys such privileges as heads of state enjoy in accordance with the rules of customary international law". The Government contended that the general immunity that a head of state enjoys under customary international law and section 4(1) of the DIPA qualified the obligation of the RSA, that would otherwise exist

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as a State party to the Rome Statute, to arrest and surrender a head of state for whom the ICC had issued an arrest warrant in respect of the commission of international crimes.

A question therefore arose of the relationship between the Implementation Act and the head of state immunity conferred by customary international law and the DIPA.

A further issue was whether there was now an international crimes exception to the principle of head of state immunity, enabling a State or national court to disregard such immunity when called upon by the ICC to assist in implementing an arrest warrant. It was accepted that once a head of state had been brought before the ICC no plea of head of state immunity could be invoked. However, this did not necessarily mean that a State was entitled to ignore head of state immunity when requested to co-operate with the ICC to bring such a person before it. A question of an international crimes exception to head of state immunity arose in this context. In the absence of a binding treaty or other international instrument creating such an exception guidance had to be sought in the decisions of international courts. After a survey and consideration of such decisions, the majority found that it was unable to hold that at this stage of the development of customary international law there was an international crimes exception to the immunity and inviolability that heads of state enjoyed when visiting foreign countries and before foreign national courts.

The Court then turned to the question of whether the enactment of the Implementation Act altered the position.

Whether the Implementation Act had the effect of removing the immunity that Bashir would otherwise enjoy was a matter of the proper construction of the Implementation Act. The principles to be followed in that regard were settled, and were in the present case strongly influenced by the fact that the Implementation Act was a statute that incorporated an international agreement into South African law. The Court was required by section 233 of the Constitution to construe it in a manner consistent with international law. An interpretation of the Implementation Act that resulted in the RSA not complying with its obligations under the Rome Statute was to be avoided if possible. Furthermore, section 39(2) of the Constitution obliged the Court to interpret the Implementation Act in a way that promoted the spirit, purport and objects of the Bill of Rights. There were a number of provisions of the Bill of Rights that informed its spirit, purport and objects in this context.

Section 4(2) of the Implementation Act provides that "[d]espite any other law to the contrary, including customary and conventional international law, the fact that a person is or was a head of State or government . . . is neither a defence to a crime nor a ground for any possible reduction of sentence once a person has been convicted of a crime". This was relevant to the interpretational exercise. It was an indication that the RSA did not support immunities when people were charged with international crimes. Recognition of head of state immunity alongside the provisions of section 4(2) to preclude someone from being brought to trial in South Africa would create an anomaly. Under the Criminal Procedure Act an accused was brought to court either by arrest or indictment. Either procedure would compel the accused to submit to the criminal jurisdiction of a South African Court, which was inconsistent with immunity. Under section 4(3)(c) a South African Court had jurisdiction to try someone for an international crime if they were present in the territory of the RSA. In such a trial it would be no answer for the accused to raise immunity. But on the argument for the Government this would not matter because it would be impossible for the accused to be brought before the Court in terms of the Criminal Procedure Act. A construction of section 4(2) that would exclude claims of immunity if a person were being tried before a South African Court, but would not

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exclude immunity in seeking to bring that person to trial before that Court would be a serious anomaly.

The Court was driven to conclude that when the RSA decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in the RSA or to the RSA co-operating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for co-operation made.

The Court accepted that the relief granted by the High Court (having to deal with the matter as an urgent application) was not as well-formulated as more mature consideration would have permitted. An appropriate order to have made would have read: "The conduct of the Respondents in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful."

Accordingly, the application for leave to appeal was granted and the order of the High Court was varied to read as set out in the preceding paragraph.

Ponnan JA (with Lewis JA concurring) produced a separate judgment concurring in this order.

Several entities had applied for admission as *amici curiae*. All but one of such applications were dismissed. The majority judgment dealt at some length with the process to be followed by a party desirous of admission as an *amicus curiae*, the requirements to be admitted as such, and the rights that such admission conferred. In particular, admission as an *amicus* does not automatically entitle the *amicus* to make oral submissions. Whether an *amicus* will be entitled to make oral submissions will be determined by the Court hearing the appeal. Only those parties which show that they have new contentions to advance will be considered for admission as *amici*. An *amicus* will not be permitted to traverse ground already covered by other parties, but will be confined to making submissions on the new contentions that it wishes to place before the Court. New contentions are those that may materially affect the outcome of the case. Prospective *amici* and their advisers must consider the nature and scope of the dispute between the parties and, on that basis, determine whether they have distinct submissions to make that may alter the outcome or persuade the Court to adopt a different line of reasoning in determining the outcome of the appeal.

**Judgment**

**Wallis JA:**

**Introduction**

[1] The International Criminal Court ("ICC") was established by the Rome Statute of the International Criminal Court (the "Rome Statute") to exercise jurisdiction over the most serious crimes of concern to the international community as a whole. Article V identifies them as genocide, crimes against humanity and war crimes - collectively international crimes - and defines them in articles VI, VII and VIII respectively. Article V also foreshadows the crime of aggression, which remains to be



defined. The Rome Statute affirms that these crimes must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation.1 In addition to the jurisdiction of national courts to prosecute these crimes the Rome Statute confers jurisdiction on the ICC to try such crimes and convict and sentence those who commit such crimes. It is a matter of pride to citizens of this country that South Africa was the first African state to sign the Rome Statute. It did this on 17 July 1998 and ratified it on 27 November 2000. It incorporated it into the domestic law of South Africa in terms of section 231(4) of the Constitution by enacting the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the "Implementation Act"). The Rome Statute is annexed to the Implementation Act as a matter of information.

[2] Chapter 4 of the Implementation Act provides the mechanism whereby South Africa co-operates with the ICC in regard to the arrest and surrender of persons accused of international crimes. The failure by the applicants, to whom I will, in accordance with the terminology of their Counsel, refer collectively as the Government, to pursue those mechanisms to arrest the president of Sudan, Omar Hassan Ahmad Al Bashir ("President Al Bashir"), when he was in Johannesburg on 14 and 15 June 2015 to attend the 25th ordinary session of the Assembly of the Africa Union ("AU"), gave rise to the present litigation.

[3] President Al Bashir is a controversial figure as a result of the actions of his government and their supporters, such as the Janjaweed Militia, principally in Darfur, but also elsewhere in Sudan. On 31 March 2005, the Security Council of the United Nations adopted Resolution 1593 (2005). It noted the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur, and decided to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC. As a result of the investigations by the ICC, President Al Bashir stands accused of serious international crimes. The Pre-Trial Chamber of the ICC has issued two warrants for his arrest. The first warrant was issued on 4 March 2009 and related to charges of war crimes and crimes against humanity. The second warrant was issued on 12 July 2010 and related to charges of genocide. The warrants have been forwarded to all countries that are parties to the Rome Statute, including South Africa, with a request that they co-operate under the Rome Statute and cause President Al Bashir to be arrested and surrendered to the ICC. Sudan is not a party to the Rome Statute.



[4] When President Al Bashir arrived in South Africa to attend the AU assembly in June 2015 the Government took no steps to arrest him. Indeed it adopted, and continues to adopt, the stance that it was obliged not to do so as President Al Bashir enjoyed immunity from such arrest. I will revert to the grounds for it taking this stance in due course. Its failure to do so resulted in the respondent, the South African Litigation Centre ("SALC"), bringing an urgent application on Sunday 14 June 2015, in the Gauteng Division of the High Court, Pretoria (to which I shall refer as the "High Court"), seeking orders declaring the failure to take steps to arrest President Al Bashir to be in breach of the Constitution and to compel the Government to cause President Al Bashir to be arrested and surrendered to the ICC to stand trial pursuant to the two warrants.

[5] The Government opposed the urgent application and sought and obtained a postponement until 11:30am on Monday, 15 June 2015 to enable affidavits to be prepared. But there was an obvious concern that President Al Bashir might leave the country in the interim in order to escape arrest. Accordingly, in granting the postponement, the High Court made the following order:

"1. President Omar Al Bashir of Sudan is prohibited from leaving the Republic of South Africa until a final order is made in this application, and the respondents are directed to take all necessary steps to prevent him from doing so;

2. The eighth respondent, the Director-General of Home Affairs is ordered:

2.1 to effect service of this order on the official in charge of each and every point of entry into, and exit from, the Republic; and

2.2 once he has done so to provide the applicant with proof of such service, identifying the name of the person on whom the order was served at each point of entry and exit."

[6] At the hearing the following day before a specially constituted Full Court of three judges presided over by Judge President Mlambo, it stood down further because the affidavits were not yet ready. The hearing commenced at about 1pm and the Court sought the assurance from Counsel then leading for the Government, Mr W Mokhari SC, that President Al Bashir was still in the country. He informed the Court that according to his instructions President Al Bashir was still in the country and this was repeated during the course of the argument. At about 3pm, the Court made the following order:

"1. That the conduct of the Respondents to the extent that they have failed to take steps to arrest and/or detain the President of the Republic of Sudan Omar Hassan Ahmad Al Bashir (President Bashir), is inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;

2. That the respondents are forthwith compelled to take all reasonable steps to prepare to arrest President Bashir without a warrant in terms of section 40(1)(k) of the Criminal Procedure Act 51 of 1977 and detain him, pending a formal request for his surrender from the International Criminal Court;

3. That the applicant is entitled to the cost of the application on a *pro-bono* basis."

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[7] Immediately after this order was made, Counsel for the Government told the Court that President Al Bashir had left the country earlier that day. According to an affidavit later filed by the Director-General: Home Affairs, the eighth applicant, he appears to have left on a flight from Waterkloof Air Base at about 11:30 am that morning. The affidavit failed to explain how a head of state, using a military air base reserved for the use of dignitaries, could possibly have left the country unobserved. The Director-General said that President Al Bashir's passport was not among those shown to officials of his department, but as an explanation that is simply risible. Senior officials representing Government must have been aware of President Al Bashir's movements and his departure, the possibility of which had been mooted in the press. In those circumstances, the assurances that he was still in the country given to the Court at the commencement and during the course of argument were false. There seem to be only two possibilities. Either the representatives of Government set out to mislead the Court and misled Counsel in giving instructions, or the representatives and Counsel misled the Court. Whichever is the true explanation, a matter no doubt being investigated by the appropriate authorities, it was disgraceful conduct.

[8] Largely because of President Al Bashir's departure the High Court refused leave to appeal, saying that the litigation had become moot. On petition to this Court it ordered that the application for leave to appeal be set down for argument in terms of the provisions of section 17(2)(d) of the Superior Courts Act 10 of 2013. The President of this Court directed that it be set down as an urgent matter before the commencement of the Court's term. The parties were directed to deliver a full record and to be prepared to address full argument to us on the merits of the case. It is on that basis that the case is before us.

**Litigation history**

[9] The foundation for SALC's argument before the High Court was the obligations undertaken by South Africa in terms of the Rome Statute and the Implementation Act. It contended that, by virtue of these, South Africa was obliged to give effect to the request of the ICC to enforce the two warrants for President Al Bashir's arrest and surrender to the ICC for prosecution in respect of the charges of war crimes, genocide and crimes against humanity. Perhaps anticipating resistance by the Government, it annexed to its founding affidavit a judgment delivered by the Pre-Trial Chamber of the ICC on 13 June 2015 declaring that South Africa was obliged to arrest and surrender President Al Bashir.2

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[10] The Government did not make any attempt to challenge these propositions. Instead, it founded its defence to the application on certain special arrangements that it had made with the AU for the holding of the Assembly in Johannesburg. These were explained in detail in affidavits by Ms Sindane, the second applicant and the Director-General of Justice and Constitutional Development, and Dr Lubisi, the Director-General of the Presidency and the Secretary of Cabinet.

[11] Ms Sindane said that after South Africa agreed to host the AU Summit in June 2015 it entered into an agreement (the "hosting agreement") with the Commission of the AU relating to the material and technical organisation of the various meetings that were to take place at the Summit including the 25th Assembly of the AU. Based on this agreement she said that President Al Bashir had been invited to attend by the AU and not by the South African Government. She then referred to article VIII of the hosting agreement, which was headed "Privileges and Immunities", and read:

"The Government shall afford the members of the Commission and Staff Members, delegates and other representatives of Inter-Governmental Organisations attending the Meetings the privileges and immunities set forth in Sections C and D, Article V and VI of the General Convention on the Privileges and Immunities of the OAU."

[12] On 5 June 2015, and pursuant to section 5(3) of the Diplomatic Immunities and Privileges Act 37 of 2001 ("DIPA"), the Minister of International Relations and Co-operation, the fifth applicant, published GN 470 in the *Government Gazette*3 recognising the hosting agreement for the purposes of granting the immunities and privileges as provided for in article VIII, which was annexed to the notice. Dr Lubisi testified that the matter

was discussed at a Cabinet meeting where it was decided, after seeking the advice of the Chief State Law Adviser, that "the South African government as the hosting country is first and foremost obliged to uphold and protect the inviolability of President Bashir *in accordance with the AU terms and conditions*".[4] He added that "Cabinet collectively appreciated and acknowledged that the aforesaid decision can only apply for the duration of the AU Summit."

[13] On this basis, and this basis alone, Ms Sindane claimed that the immunities and privileges referred to in article VIII of the hosting agreement prevented the Government from arresting President Al Bashir "during the duration of the Summit and an additional two days after the conclusion of the Summit". The application was argued on this basis and the High Court quite correctly summarised the issue before it as being "whether a Cabinet resolution coupled with a Ministerial Notice are capable of suspending this country's duty to arrest a head of state against whom the International Criminal Court (ICC) has issued arrest warrants for war crimes, crimes against humanity and genocide".



[14] With the advent of new Counsel, led by Mr JJ *Gauntlett* SC, an entirely different argument emerged in the application for leave to appeal to this Court. It was now based upon what were said to be the provisions of customary international law and the provisions of section 4(1)(a) of DIPA, which reads:

> "(1) A head of state is immune from the criminal and civil jurisdiction of the Courts of the Republic, and enjoys such privileges as -
>
> (a) heads of state enjoy in accordance with the rules of customary international law . . . "

[15] The previous argument about the provisions of the hosting agreement and the ministerial notice under section 5(3) of DIPA was relegated to a backseat. Indeed, it was not pursued in that form. Instead, it was said that as the ministerial notice had not been set aside on application to a competent court it continued to be effective to confer immunity on President Al Bashir, even if misconceived.[5]

[16] This change of tack by the Government effectively challenged the foundation of SALC's claim that the Government was under an obligation, by virtue of its accession to the Rome Statute and the enactment of the Implementation Act, to arrest President Al Bashir and surrender him to the ICC. The Government contended that the general immunity that a head of state enjoys under customary international law and section 4(1) of DIPA qualified the obligation of South Africa, that would otherwise exist as a state party to the Rome Statute, to arrest and surrender a head of state for whom the ICC has issued an arrest warrant in respect of the commission of international crimes. The response by SALC was two pronged. It said that the provisions of sections 4(2) and 10(9) of the Implementation Act dealt specifically with these issues and affirmed the obligations of arrest and surrender assumed by South Africa under the Rome Statute. That alone would be decisive, as Mr *Trengove* SC emphasised in oral argument, but, if not, SALC joined issue with the Government on whether the rules of customary international law relied on by the Government in support of the claim to immunity afforded immunity to a head of state charged with international crimes before the ICC.

[17] Five parties applied to be admitted as *amici curiae* and permitted to present written and oral submissions to the Court. One, the Helen Suzman Foundation (the "Foundation"), was granted such leave in advance of the hearing. The applications by the other four[6] were not submitted timeously as required by rule 16 of the rules of this Court. Nor were they dealt with by the President or Acting President as contemplated by the same rule. As



this created uncertainty, the presiding judge, in consultation with the remaining members of the Court, permitted them to deliver written argument and to make oral submissions at the hearing encompassing both whether they should be admitted as *amici* and the merits. An application by two of them, the African Centre for Justice and Peace Studies and the International Refugee Rights Initiative, to submit extensive evidence of what they alleged were atrocities still being committed by and at the behest of President Al Bashir, was however dismissed.[7] It is not and never has been a function of this litigation to determine whether the allegations made against President Al Bashir are well-founded and, even if admissible, evidence concerning his alleged conduct would not assist the Court to resolve the legal issues that confront it.

**The issues**

[18] The following issues fall to be determined:

(a) Did the departure of President Al Bashir render the issues moot?

(b) Should leave to appeal be granted?

(c) Should the four *amici* other than the Foundation, or any of them, be given leave to intervene as *amici*?

(d) Did article VIII of the hosting agreement, together with the ministerial proclamation, provide President Al Bashir with such immunity, at least for so long as the proclamation was not set aside?

(e) If not, was President Al Bashir entitled to immunity from arrest and surrender in terms of the arrest warrants issued by the ICC by virtue of customary international law and section 4(1) of DIPA?

(f) If President Al Bashir would ordinarily have been entitled to such immunity did the provisions of the Implementation Act remove that immunity?

(g) If not, have Security Council Resolution 1593 (2005) and the Genocide Convention (1948) removed his immunity?

(h) If the appeal does not succeed, should the order stand or should it be varied in certain respects?

(i) What orders should be made in respect of costs?

**Is the appeal moot?**

[19] The High Court based its refusal of leave to appeal on section 16(2)(a)(i) of the Superior Courts Act 10 of 2013 (the "Superior Courts Act"), which provides that when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the court may dismiss the appeal on that ground alone. The High Court reasoned that because President Al Bashir had left the country the case no longer presented a live controversy. It cited *Janse van Rensburg NO v*



*Minister of Trade and Industry and another NNO*[8] in support of that proposition. But that case and others like it[9] dealt with situations where the legislation, the constitutional validity of which was the subject of the litigation, had been repealed or replaced by different legislation. That is very different from the present case. Here a declaration had been made that the Government's conduct breached the Constitution and the legislation in point is very much in force. The central issue is what effect it has on the important question whether South Africa is obliged to arrest and surrender to the ICC the head of state of a foreign nation, who has been charged with international crimes before the ICC.

[20] It is correct that no present effect can be given to the order that the Government take steps to prepare to arrest President Al Bashir, because he is not in South Africa. But the order remains in existence and SALC indicated that any attempt by President Al Bashir to return to this country would prompt it to seek its enforcement. As such the order had a continuing effect that would have to be taken into account by the Government in the future conduct of its diplomatic relations. This was well illustrated by certain newspaper reports that were annexed to the opposing affidavit in the application for leave to appeal. These indicated that the South African government had wanted to invite President Al Bashir to a Forum on China-Africa Co-operation to be held in this country in December 2015, but in view of the High Court's decision had suggested to Sudan that it send someone else to represent it. Any invitation to host future gatherings of AU heads of state, for example, would have to bear the judgment of the High Court in mind and could preclude this country from extending such an invitation.

[21] In those circumstances, the High Court erred in holding that there had ceased to be a live and justiciable controversy between the parties.

**Leave to appeal**

[22] Apart from its finding that the appeal had become moot the High Court also referred to section 17(1)(a)(i) of the Superior Courts Act and held that an appeal had no reasonable prospect of success. But in reaching that conclusion it did not consider the new basis upon which the Government sought to justify its opposition to SALC's claim. So we do not have the benefit of the High Court's view in regard to those contentions.

[23] After expressing its conclusion on prospects of success the High Court also said that it had no discretion once it reached that conclusion to grant



leave to appeal. But it failed to consider the provisions of section 17(1)(a)(ii) of the Superior Courts Act which provide that leave to appeal may be granted, notwithstanding the Court's view of the prospects of success, where there are nonetheless compelling reasons why an appeal should be heard. This is linked to the question of mootness. In that regard there is established jurisprudence in this Court that holds that even where an appeal has become moot the Court has a discretion to hear and dispose of it on its merits. The usual ground for exercising that discretion in favour of dealing with it on the merits is that the case raises a discrete issue of public importance that will have an effect on future matters.[10] That jurisprudence should have been considered as a guide to whether, notwithstanding the High Court's view of an appeal's prospects of success, leave to appeal should have been granted. In my view, it clearly pointed in favour of leave to appeal being granted.

[24] That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive. Furthermore, where the purpose of the appeal is to raise fresh arguments that have not been canvassed before the High Court, consideration must be given to whether the interests of justice favour the grant of leave to appeal. It has frequently been said by the Constitutional Court that it is undesirable for it as the highest court of appeal in South Africa to be asked to decide legal issues as a court of both first and last instance. That is equally true of this Court. But there is another consideration. It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of a legal error on the part of one of the parties in failing to identify and raise the point at an appropriate earlier stage.[11] But the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued.[12]

[25] In the present case SALC accepted that the fresh argument advanced by the Government was foreshadowed by the factual material before the Court. No prejudice would be caused by permitting it to be raised at this stage. It is undoubtedly a point of substantial public importance. The new arguments cannot be said to lack

reasonable prospects of success and they

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were forcefully and cogently argued before us. In those circumstances, leave to appeal should be granted.

***Amici***

[26] Applications for admission as *amici curiae* in this Court have hitherto been dealt with *ad hoc* and the provisions of the rule governing such applications have not yet been the subject of detailed consideration in a judgment. It is as well therefore to deal shortly with this topic. Such applications are made in terms of rule 16 of the rules of this Court.[13] In

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terms of rule 16(1) if all parties agree to the admission of an *amicus* they are admitted as such.[14] The rule contemplates that the parties when agreeing to the admission of an *amicus* will agree on the terms on which the *amicus* is to be admitted. Under rule 16(2) those are then the terms that govern their admission, subject to the power of the President of the Court to amend or vary those terms under rule 16(3). It is apparent that the terms can relate only to the delivery of written argument, which is limited to 20 pages, because rule 16(8) provides that no *amicus* has a right to address oral submissions to the Court unless the Court so orders. Given the wording of the rule it is plain that this is a reference to the Court hearing the appeal and not the President when dealing with an application for admission as an *amicus*. The general experience of the members of this Court is that the President leaves the question of oral argument to the presiding judge or Court hearing the appeal. Accordingly, leave to make oral submissions can only be sought after the written submissions have been delivered and the Court has the opportunity of considering whether hearing oral submissions from the *amicus* will assist in its deliberations. If an *amicus* seeks leave to make oral submissions it must set out the grounds therefor in its written argument.

[27] Adherence to this procedure will ensure that the written argument of the *amicus* can be considered along with the reading of the record and the consideration of the heads of argument of the parties when the members of the Court are engaged in preparing the appeal. It is only then that it will be possible to determine whether the *amicus* can add anything by way of oral submissions. But the Court will nonetheless consider its argument. Whether it will permit the *amicus* to make oral submissions will depend upon its assessment of whether those submissions can add anything to an argument already before it in written form.

[28] Where there is no agreement among the parties as to the admission of an *amicus* it is entitled to seek its admission by way of an application to the President of the Court in terms of rule 16(4). The basis upon which such an application shall be made is set out in rules 16(5) and (6). The rule does not make provision for any opposition to such an application, but the general practice is for the President to invite a response from other parties who oppose the admission. The President then determines the application in accordance with rule 16 and, if the *amicus* is admitted, determine the terms upon which they are admitted and permitted to deliver written

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argument. The rule's constraints on the length of written argument apply unless relaxed by the President.[15]

[29] An *amicus* is not entitled to submit further evidence to the Court but is confined to the record. That is expressly provided in rule 16(8). It is unnecessary to consider whether there are exceptional circumstances in which the Court hearing the appeal may relax that rule.[16] In making submissions the *amicus* is not permitted to traverse ground already covered by other parties, but is confined to making submissions on the new contentions that it wishes to place before the Court.[17] In that regard it is apposite to point out that adding additional references, whether to case law or to academic writings, on the matters canvassed in the heads of argument of the litigants, does not amount to advancing new contentions. That obviously does not exclude placing material before the Court to demonstrate that a point of controversy between the parties has been settled by way of an authoritative judgment. It would only be if there had, for example, been an authoritative decision placing a legal issue thought to be controversial beyond dispute that an *amicus* may include that in its argument. Otherwise it is confined to its new and different contentions and these must be clearly stated.

[30] Finally, new contentions are those that may materially affect the outcome of the case. It is not feasible to be prescriptive in this regard but prospective *amici* and their advisers must start by considering the nature and scope of the dispute between the parties and, on that basis, determine

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whether they have distinct submissions to make that may alter the outcome or persuade the Court to adopt a different line of reasoning in determining the outcome of the appeal. Obvious examples would be urging the Court to adopt reasoning based on provisions of the Constitution in construing a statute, where the parties have not taken that course, or a submission that the fundamental legal principles to be applied in determining the dispute are other than those submitted by the parties where their adoption would materially affect the outcome of the case. No doubt others can be imagined.[18]

[31] It is appropriate to comment that the applications appear to have paid little heed to the language of rule 16. In the first place other than that of the Foundation, none of the letters addressed to the Government and

SALC sought to define with any clarity the new contentions that the prospective *amici* wanted to raise or why they would be of assistance to the Court. The complaints concerning this by the Government in its responses to the requests were in my view generally well-founded.

[32] An even clearer difficulty is that, again with the exception of the Foundation, the letters did not spell out the terms on which the prospective *amici* sought admission as such. Nor in every case did the response from SALC. It merely indicated its willingness to agree to admit the *amici* without dealing with the terms upon which they should be admitted. When applications were brought they overlooked the fact that an application to the President of the Court is an application for admission as an *amicus*, but not an application to be permitted to make oral submissions. It is the Court hearing the appeal that makes that decision. If an *amicus* wishes to make oral submissions it should indicate that when it submits its written submissions.

[33] The Deputy President of this Court granted the Foundation leave to intervene as an *amicus* prior to the hearing. While there was some procedural confusion about that order and the Government indicated that it would have opposed it had it been afforded the opportunity to do so,19 it was in my judgment an order that was properly made. The Foundation's approach to the dispute was wholly distinct from that of SALC. The latter approached the case on the basis of its view of the content of customary

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international law and an interpretation of the relevant provisions of the Implementation Act and DIPA. The Foundation's starting point was the constitutional provisions that make international law part of South African law and from that foundation developed submissions as to the proper construction of section 4(1) of DIPA and its relationship to the obligations undertaken by this country under the Rome Statute and the Implementation Act. These contentions were clearly new and of assistance to the Court in dealing with the merits of the appeal.

[34] Notwithstanding the refusal of their application to submit further evidence to the Court, the African Centre for Justice and Peace Studies and the International Refugee Rights Initiative submitted heads of argument in support of the dismissal of the appeal and Counsel appeared on their behalf. It was unclear from their application that in addition to the further evidence they had any new contentions to advance, because they said that the legal arguments would be addressed by SALC "and there is no need for the applicants to address it any further". The stated purpose of their intervention was to place "vital evidence" before the Court in order "to make it plain to the Court that the only real hope of justice for the victims of Sudan is for President Al-Bashir and the members of his government who have been indicted by the ICC to be arrested and surrendered to the ICC by a third state". Nonetheless on 8 February 2016, four days before the hearing they delivered heads of argument and a bundle of authorities running to some 750 pages.

[35] The purpose of this, according to the heads of argument and as explained by Counsel, was to stress that, in the absence of a remedy before the ICC, victims of international crimes perpetrated by President Al Bashir and persons for whose actions he might be held responsible, would have no effective remedy. But that added nothing to the resolution of the issues before us. The principle of complementarity that underpins the Rome Statute20 makes it clear that the ICC exists to provide a forum for prosecution of international crimes where national courts are unable or unwilling to do so. So, it is apparent that where victims are unable to proceed in their own national court the ICC will necessarily be the tribunal to which they will turn for justice and protection,21 as well as reparations for crimes of which they have been the victims.22

[36] Not only were the matters that these parties sought to raise apparent to the Court from the terms of the Rome Statute itself, but no indication was given of how knowledge of them would affect the determination of the issues in the case. Those involved the construction of a South African statute, DIPA, and the question whether it afforded President Al Bashir

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immunity against arrest under the Implementation Act pursuant to the warrants issued by the ICC. For those reasons, the application for admission as *amici curiae* by the African Centre for Justice and Peace Studies and the International Refugee Rights Initiative must be refused. In view of the valuable work that these organisations perform in their field of activities, and their genuine concern in regard to the issues raised in this case and the background facts giving rise to the ICC's decision to charge President Al Bashir with international crimes, it would be inappropriate to order them to pay any costs incurred by other parties arising out of their application.

[37] Then there is the application by the Peace and Justice Initiative and the Centre for Human Rights. Again there is no doubting their legitimate concerns about events in Sudan and the continuing inability of the ICC to bring President Al Bashir to trial in respect of the charges he faces of having committed international crimes. But legitimate concern over issues providing the background to an appeal is not of itself a justification for admission as an *amicus curiae*. The prospective *amicus* must either have the agreement of the other parties, which was not forthcoming in this case, or must satisfy the President of the Court that it is entitled to be so admitted in terms of rule 16.

[38] These two bodies sought to advance argument on five matters set out in their heads of argument. These heads were accompanied by a bundle of documents amounting to a little short of 1000 pages delivered on 8 February 2016. The contentions advanced in the heads of argument differed somewhat from the matters described in their application, but the differences did not appear to be significant. The five matters were the international nature of the crimes and the ICC; the import of Security Council Resolution 1593 (2005); the effect of Sudan and South Africa being a signatory to the Genocide Convention (1948);23 the interpretation of articles 27 and 98 of the Rome Statute, especially in the light of the *travaux préparatoires* and "the original

intent of the drafters"; and the unavailability of fora akin to the ICC with international jurisdiction, in Africa or elsewhere, to prosecute the alleged perpetrators in this case.

[39] The last of these overlapped with the contentions by the African Centre for Justice and Peace Studies and the International Refugee Rights Initiative and does not provide a ground for the admission of these parties as *amici*. Proof of the content of the *travaux préparatoires* and "the original intent of the drafters" would require evidence, which is impermissible and leave to lead which was neither sought nor granted. As regards the other three matters they were all dealt with in the arguments of the Government and SALC. They were not new contentions. For those reasons the application for their admission as *amici curiae* must be refused, but again and for similar reasons no adverse order for costs should follow.



**Article VIII of the hosting agreement**

[40] This was not only the principal, but also the only, argument advanced by Government before the High Court. It assumed secondary importance when the application for leave to appeal was brought. It was pursued in this Court principally on the footing that until the ministerial proclamation was set aside it afforded President Al Bashir immunity from arrest and surrender under the Implementation Act. I deal with it first in order to stress that, contrary to the Government's criticism, the High Court's understanding of the issue argued before it was undoubtedly correct and to affirm the correctness of its conclusions on that issue.

[41] The High Court gave the argument short shrift. It said that on its terms the hosting agreement conferred immunity on members or staff of the AU Commission and on delegates and other representatives of Inter-Governmental Organisations. This did not include member states or their representatives or delegates. Furthermore the section of DIPA relied on by the Minister in making her proclamation was section 5(3). That section empowered the Minister to confer immunity on:

> "Any organisation recognised by the Minister for the purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of section 7(2)."

Plainly, so the High Court held, the section did not cover heads of state or representatives of states attending meetings of the AU, but only the AU itself and other organisations such as the Inter-Governmental Organisations referred to in article VIII. The definition of an organisation in section 1 of DIPA demonstrates that it does not apply to member states but to intergovernmental organisations.

[42] There is little that can be added to that reasoning. I mention the following. Section 5 has the heading "Immunities and privileges of United Nations, specialised agencies and other international organisations". That fortifies the conclusion that a proclamation under the section does not apply to other persons. Second, the hosting agreement is one between South Africa as the host nation and the AU. It is intended to deal with the representatives and officials of the AU and organisations with which it has relationships, not with the position of heads of state and state delegations. If there is to be a special agreement for immunity in respect of such persons it must be made under section 7. Otherwise their right to immunity, if any, will arise by virtue of customary international law and, in South Africa, DIPA. Although section 4(1)(c) of DIPA contemplates the possibility of a section 7 agreement applying to a head of state a careful reading suggests that this relates only to the conferral of additional privileges that the head of state would not otherwise enjoy by virtue of section 4(1)(a).

[43] Counsel for the Government endeavoured to circumvent these difficulties in the following way. Prior to President Al Bashir coming to South Africa



Sudan had requested that he be afforded the privileges and immunities of a delegate attending the AU Summit. The provisions of article VIII of the hosting agreement were promulgated for this purpose. Even if the Minister exceeded her powers in doing so the proclamation remained in force until set aside in terms of the *Oudekraal* principle.[24] As it had not been set aside it remained effective to confer immunity on President Al Bashir notwithstanding any underlying legal defects in its proclamation.

[44] The difficulty with this contention is that it demands in the first instance that article VIII of the hosting agreement covered President Al Bashir. If it did not it was irrelevant that the Minister thought, or had been advised, that it did. And that in turn depended in the first instance upon President Al Bashir being a delegate to the AU Assembly. But a head of state attending an AU Assembly does not do so as a delegate but as the embodiment of the member state itself. That is apparent from the AU's description of the Assembly on its website as:

> "The Assembly is the African Union's (AU's) supreme organ and comprises Heads of State and Government from all Member States."

[45] The Constitutive Act of the AU makes this perfectly clear. In article 1 it defines "Member State" as being "a Member State of the Union" and the "Assembly" as "the Assembly of Heads of State and Government of the Union". The "Union" is the AU. In terms of article 6.1 it is composed of Heads of State and Government "or their duly accredited representatives". Under article 7.1 decisions of the Assembly are taken by consensus, or failing that by a two-thirds majority of Member States. The AU is composed of member states and the Assembly is its governing body composed of the heads of state or heads of government of the member states. They are the embodiment of the member states not delegates from them. Without the heads of state and heads of government or their representatives there can be no Assembly.

[46] Over and above that difficulty there is no basis for saying that heads of state attending the Assembly were encompassed by the reference to "delegates" in article VIII.1 of the hosting agreement. The agreement was concluded between the AU and the South African government. There is nothing to indicate that the AU was representing the heads of state of member states or their delegations in concluding the agreement or was concerned with their entitlement to immunity when visiting South Africa. That was a matter for the diplomatic relationship between South Africa and other member states, not the AU. It is an agreement relating to the "material and technical organisation" of various meetings including the Assembly. It makes no reference to heads of state in any of its provisions. The key words in article VIII.1 are "the delegates and other representatives of Inter-Governmental Organizations attending the Meetings". That relates only to persons who are there because of their entitlement to be

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there on behalf of one or other inter-governmental organisation, not to those who are there on behalf of a member state.25

[47] The necessary conclusion is that President Al Bashir was not a person included in the reference to "delegates" in article VIII.1 of the hosting agreement. As such the hosting agreement did not confer any immunity on President Al Bashir and its proclamation by the Minister of International Relations and Co-operation did not serve to confer any immunity on him. The fact that the Cabinet may have thought that it would is neither here nor there. An erroneous belief cannot transform an absence of immunity into immunity. And, that being so, it was unnecessary for SALC to seek to set the proclamation aside before bringing its application.

[48] The High Court was accordingly correct in the conclusion it reached on the arguments placed before it. It cannot be criticised for not dealing with an argument that was never raised or suggested before it. It was proper therefore for it to make an order in favour of SALC on the issues before it. Whether its order was correct in the light of the new arguments now raised is the matter to which I now turn.

**Was there immunity under customary international law and section 4(1) of DIPA?**

[49] The argument on behalf of Government ran as follows. It is a well established principle of customary international law that heads of state enjoy immunity *ratione personae,* that is, by virtue of the office they hold, and are not subject to the criminal or civil jurisdiction of the Courts of other countries or any other form of restraint. In the usual terminology they are regarded as inviolable. This immunity is embodied in section 4(1)(a) of DIPA, which provides:

"A head of state is immune from the criminal and civil jurisdiction of the Courts of the Republic, and enjoys such privileges as -

(a) heads of state enjoy in accordance with the rules of customary international law . . . "

It follows that before the enactment of the Implementation Act President Al Bashir would have enjoyed immunity from arrest and surrender to the ICC notwithstanding South Africa's accession to the Rome Statute.

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[50] The Government submitted that the Implementation Act does not remove this immunity. On a proper construction of section 4(2) of the Implementation Act it has nothing to do with immunity from arrest in terms of the ICC warrants, but precludes immunity being advanced as a defence or in mitigation of sentence in a prosecution for international crimes before a South African Court. It does not therefore remove the immunity that a head of state enjoys from arrest in South Africa even for international crimes to be prosecuted before the ICC. As to section 10(9) of the Implementation Act it is concerned only with the surrender of a person properly arrested pursuant to an ICC warrant. It precludes such a person from raising immunity to preclude surrender. But it is silent on the question whether such person may be arrested in the first place. If they were immune from arrest then they should not be arrested and there is no room for an inquiry in terms of section 10(5) of the Implementation Act and therefore no room for applying the exclusion of immunity in section 10(9).

[51] SALC countered this argument in the following way. The Implementation Act was intended to give effect to South Africa's accession to the Rome Statute and South Africa's obligations thereunder. These included the obligation to co-operate with the ICC in causing persons in respect of whom the ICC has issued arrest warrants and requested assistance to be arrested and surrendered. Properly construed, in the light of these obligations, the provisions of sections 4(2) and 10(9) of the Implementation Act preclude anyone, whether in a prosecution before a South African Court, or when arrested pursuant to an ICC warrant, from raising as defence to their prosecution or ground for resisting their arrest and surrender, any form of immunity.

[52] In the alternative, SALC joined issue with the Government on the contents of customary international law. It contended that whatever the position may be in relation to a national court, in the case of an international tribunal, such as the ICC, set up to deal with international crimes, there is no immunity from arrest or prosecution. In regard to the specific situation in Sudan SALC contended that the effect of Security Council Resolution 1593 (2005) was to subject Sudan to the provisions of the Rome Statute, notwithstanding the fact that it has not acceded to it and thereby to compel it to cooperate with the ICC. A consequence of that, and the fact that Sudan was obliged to co-operate fully with the ICC, was that it could not invoke immunity to prevent President Al Bashir from being arrested and surrendered to face trial before the ICC. In regard to the second arrest warrant, which dealt with the crime of genocide, SALC pointed out that Sudan was a party to the Genocide Convention (1948) and as such it contended that it had waived any immunity that its citizens would otherwise have enjoyed for prosecution of crimes falling within the scope of the Convention.

[53] The Foundation's argument took the Constitution as its starting point. It said that under the Constitution the

Government is required to take steps to ensure that persons accused of international crimes are detained, arrested and prosecuted before an appropriate tribunal. This duty is reinforced by the fact that under section 232, customary international law is law in South Africa unless it is inconsistent with the Constitution



or an Act of Parliament.[26] Section 231 deals with the legal effect of international agreements, such as the Rome Statute, to which South Africa is a party. Under section 231(4) an international agreement becomes law in South Africa when it is enacted into law by national legislation. So customary international law is to be read in the light of legislation under which South Africa has enacted international agreements into law. When construing section 4(1)(a) of DIPA and its reference to customary international law, it must be read in the light of these constitutional obligations and provisions. The immunity confirmed in section 4(1)(a) of DIPA must therefore be construed in a way that is consistent with the absence of immunity from prosecution for international crimes provided in the Rome Statute.

***The Rome Statute***

[54] The Rome Statute is an international agreement between the State Parties thereto, directed at the prosecution and sentencing of those responsible for the international crimes of war crimes, genocide and crimes against humanity. The importance of the international struggle to rid the world of these crimes is resoundingly stated in the Preamble in the following terms:

"*The States Parties to this Statute*,

*Conscious* that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

*Mindful* that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

*Recognizing* that such grave crimes threaten the peace, security and well-being of the world,

*Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation,

*Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

*Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

. . .

*Determined* to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

*Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

*Resolved* to guarantee lasting respect for and the enforcement of international justice,

*Have agreed as follows*".



[55] Article 1 creates the ICC and gives it the power "to exercise its jurisdiction over persons for the most serious crimes of international concern". Although the Rome Statute was concluded outside the United Nations ("UN") the aim under article 2 is to bring it into relationship with the UN by agreement between the UN and the ICC. The international crimes that are the subject of the ICC's jurisdiction are defined, as is the Court's jurisdiction. In the ordinary course the ICC has jurisdiction over state parties and their nationals and where a non-party state accepts the jurisdiction of the Court.

[56] This jurisdiction is not universal because parties may for various reasons not accede to the Rome Statute.[27] Article 13(b) of the Rome Statute endeavours to address this problem by providing that the ICC may exercise jurisdiction if:

"a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations."

The Security Council referred the situation in Darfur to the Prosecutor in terms of this provision. While there is debate among commentators as to the full effect of such a referral, it is accepted by all that it confers jurisdiction upon the ICC in respect of the actions of a non-party state and its citizens.[28] UN member states are obliged to accept the authority of the decision by the Security Council to refer the situation in Darfur to the Prosecutor.[29]

[57] Part 9 of the Rome Statute deals comprehensively with the obligations of international co-operation and judicial assistance to the ICC in the performance of its tasks. Article 86 imposes a general obligation to co-operate fully with the Court in the investigation and prosecution of crimes within its jurisdiction. Under article 87.1(a) the ICC may address requests for co-operation to States Parties and under article 88 all States Parties are obliged to have procedures available under national law to enable them to co-operate with the Court.

[58] Article 89 deals with the arrest and surrender of persons to the ICC and its entitlement to request a State to co-operate in securing such arrest and surrender. It is common cause that the ICC has made such a request to South Africa in relation to the arrest warrants issued in respect of President Al Bashir. In urgent cases the ICC may, in terms of article 92, seek the provisional arrest of a person, but that was not the case here, although there appears to have been some confusion over the issue in the



application papers and the order made by the High Court. I will revert to that later.

[59] Article 27 of the Rome Statute deals with the possibility that the crime being prosecuted is likely in many instances to have been perpetrated by a state actor, ranging from a head of state to a humble official or soldier, and therefore the possibility would exist of the accused person raising a claim to immunity in accordance with long-established principles of customary international law, to be considered later in this judgment. It reads:

> "1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

The undisputed effect of this provision is that it is not open to a person being prosecuted before the ICC to claim immunity from prosecution or advance a defence of superior orders. It is agreed by all commentators that, because Party States have bound themselves to the Statute including this provision, all Party States have waived any immunity that their nationals would otherwise have enjoyed under customary international law.

[60] One further provision requires discussion. It is article 98 providing that:

> "1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the co-operation of that third State for the waiver of the immunity.
>
> 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the co-operation of the sending State for the giving of consent for the surrender."

This provision has occasioned much debate. There is a measure of consensus that it deals with requests for surrender or assistance in relation to the nationals, including heads of state, of non-Party States such as Sudan. Beyond that there appear to be two views. The one, espoused by the AU,[30] is that it operates to protect Party States from the obligation to cooperate with requests from the ICC for arrest and surrender or assistance where that would involve their breaching their obligations to respect personal inviolability under customary international law towards non-Party



States.[31] In other words, it provides the justification for African states to refuse to arrest and surrender President Al Bashir, because he is entitled as the head of state of Sudan to immunity *ratione personae*.[32] The other view is that, as non-Party States and their nationals are ordinarily brought within the jurisdiction of the ICC by way of a Security Council reference under article 13(b), article 27 is thereby made applicable to the non-Party State and therefore it is not open to it to rely on article 98.[33] It is well-recognised that there is a tension between articles 27 and 98 that has not as yet been authoritatively resolved.

[61] South Africa is bound by its obligations under the Rome Statute. It is obliged to co-operate with the ICC and to arrest and surrender to the Court persons in respect of whom the ICC has issued an arrest warrant and a request for assistance. To this end, it passed the Implementation Act. The relationship between that Act and the head of state immunity conferred by customary international law and DIPA lies at the heart of this case. But the starting point is not immediately with these, but with the Constitution.

***The constitutional background***

[62] The Constitution makes international customary law part of the law of South Africa, but it may be amended by legislation.[34] It provides a specific mechanism whereby obligations assumed under international agreements become a part of the law of South Africa.[35] And it decrees that, when interpreting any legislation, the Courts must prefer a reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[36] As Ngcobo CJ said in *Glenister* (*II*):[37]

> "Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law . . . These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution."

[63] The Constitution incorporated these provisions pursuant to the goal stated in the Preamble that its purpose is to "[b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations". From being an international pariah South Africa has

sought in our democratic state to play a full role as an accepted member of the international community. As part of this aim it enacted the Implementation Act, the preamble to which records that South Africa has become "an integral and accepted member of the community of nations".

[64] The Constitutional Court explained the inter-relationship between South Africa's obligations under international law and its domestic law in *National Commissioner of Police v Southern African Human Rights Litigation Centre*.[38] The Court was dealing with claims of torture, but its statements also referred to international crimes and are apposite in the context of the present case. Giving the judgment of the Court Majiedt AJ said:

> "[37] Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require states, even in the absence of binding international-treaty law, to suppress such conduct because 'all states have an interest as they violate values that constitute the foundation of the world public order'. Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of s 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm.
>
> [38] Furthermore, along with genocide and war crimes there is an international treaty law obligation to prosecute torture. The Convention against Torture, an international convention drafted specifically to deal with the crime of torture, obliges states parties to 'ensure that all acts of torture are offences under its criminal law', together with an 'attempt to commit torture' and 'complicity and participation in torture'.
>
> [39] South Africa has fulfilled this international-law obligation through the recent enactment of the Torture Act [Prevention and Combating of Torture of Persons Act 13 of 2013]. In effect, torture is criminalised in South Africa under s 232 of the Constitution and the Torture Act whilst torture on the scale of crimes against humanity is criminalised under s 232 of the Constitution, the Torture Act and the ICC Act . . .
>
> [40] Because of the international nature of the crime of torture, South Africa, in terms of ss 231(4), 232 and 233 of the Constitution and various international, regional and subregional instruments, is required, where appropriate, to exercise universal jurisdiction in relation to these crimes as they offend against the human conscience and our international-and domestic-law obligations. The exercise of universal jurisdiction is, however, subject to certain limitations."

[65] That passage strongly supports SALC's case that the Government was under an obligation to co-operate with the ICC in arresting President Al Bashir. I did not understand Mr *Gauntlett* SC to challenge it as a general proposition. His contention was that, as foreshadowed in the final sentence, the principles governing the immunity *ratione personae* of heads of state constituted a limitation on this exercise of universal jurisdiction that precluded the performance of these obligations in relation to current



heads of state.[39] This necessitates a consideration of the nature of immunity in customary international law and, more specifically, the nature of head of state immunity.

***Immunity in customary international law***

[66] Professor Crawford[40] describes the basic principles of the international law of immunity in the following terms:

> "State immunity is a rule of international law that facilitates the performance of public functions of the state and its representatives by preventing them from being sued or prosecuted in foreign Courts. Essentially, it precludes the Courts of the forum state from exercising adjudicative and enforcement jurisdiction in certain classes of case in which a foreign state is a party. It is a procedural bar (not a substantive defence) based on the status and functions of the state or official in question. Previously described as a privilege conferred at the behest of the executive, the grant of immunity is now understood as an obligation under customary international law . . . [T]he existence of this obligation is supported by ample authority . . . Immunity exists as a rule of international law, but its application depends substantially on the law and procedural rules of the forum."

This immunity is available when it is sought to implead a foreign state, whether directly or indirectly,[41] before domestic Courts, and also when action is taken against state officials acting in their capacity as such. They enjoy the same immunity as the state they represent.[42] This is known as immunity *ratione materiae* (immunity attaching to official acts). In addition, heads of state and certain other high officials of state[43] enjoy immunity *ratione personae* (immunity by virtue of status or an office held at any particular time). This form of immunity terminates when the individual demits, or is removed from, office. The country concerned may waive either form of immunity.

[67] The Government called these principles in aid in support of its position that President Al Bashir was immune from arrest and surrender in terms



of the Implementation Act. It cited the authoritative statements by the International Court of Justice ("ICJ") in the *Arrest Warrant* case[44] that:

> ". . . [I]n international law it is firmly established that . . . certain holders of High-ranking office in a State, such as the Head of State . . . enjoy immunities from jurisdiction in other States, both civil and criminal.

. . . [T]hroughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties."

In regard to a suggestion that, because the case concerned allegations of the commission of international crimes, there was an exception to the principle, the ICJ said (paragraph 58) that it had examined State practice, including national legislation and decisions of higher national courts, but was unable to deduce that there existed under customary international law any exception to this rule where the individual concerned was suspected of having committed war crimes or crimes against humanity. This appears to be accepted by leading commentators such as Professor Akande.[45] It has also been widely accepted by national courts which have rejected attempts to implead sitting heads of state including Prime Minister Sharon of Israel, President Gaddafi of Libya, President Mugabe of Zimbabwe, Prime Minister Thatcher of the United Kingdom, President Castro of Cuba, President Zemin of China, President Kagame of Rwanda and President Aristide of Haiti, while the latter was living in exile in the United States of America.[46]

[68] Dating back to the instrument that established the Nuremberg Trials, it has been a feature of international instruments dealing with the prosecution of international crimes before specially constituted international tribunals, that those tribunals are constituted on the basis of specific provisions excluding claims of immunity as a defence or mitigating circumstance before those tribunals.[47] The ICJ considered these as well (paragraph 58) and found that they likewise did not enable it to conclude that any such exception existed in customary international law in regard to national Courts. But it was urged upon us that customary international law has moved on and at least when it was concerned with international

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crimes and international tribunals such as the ICC these principles were subject to an exception.

[69] I mean no disrespect to the efforts of Counsel to provide us with a comprehensive body of authority dealing with the issue of immunity in relation to persons charged with international crimes, in not engaging in a comprehensive consideration of the material placed before us. The narrow issue is whether there is now an international crimes exception to the principle of head of state immunity, enabling a state or national court to disregard such immunity when called upon by the ICC to assist in implementing an arrest warrant. The argument proceeded, as does this judgment, on the basis that once a head of state has been brought before the ICC no plea of head of state immunity can be invoked.[48] But, as a number of commentators have pointed out, that does not necessarily mean that a state is entitled to ignore head of state immunity when requested to co-operate with the ICC to bring such a person before it. It is in this context that the question of an international crimes exception to head of state immunity arises.

[70] In the absence of a binding treaty or other international instrument creating such an exception, or an established universal practice in the affairs of nations, one looks to the decisions of international courts for guidance as to the existence of such an exception. But we were referred to no decision by the ICJ itself, qualifying or limiting the scope of its decision in the *Arrest Warrant* case. Instead, the ICJ appears to have affirmed the decision in its subsequent judgment in *Djibouti v France*,[49] where it cited the judgment and explained that "the determining feature in assessing whether there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority". Then in the *Jurisdictional Immunities* case,[50] after a comprehensive review of both national and international jurisprudence on the point, the ICJ rejected a contention that international law does not recognise immunity, or at least restricts it, in cases involving serious violations of the law of armed conflict. No more recent case from the ICJ was drawn to our attention.

[71] The *Jurisdictional Immunities* case involved a civil claim by one state against another state, but I can discern nothing in the underlying treatment of customary international law that would justify admitting an exception to head of state immunity for international crimes in the context of criminal proceedings, but denying it in relation to civil proceedings. I am mindful that in some of the reasoning in both *Pinochet* (*3*)[51] and *Jones*[52]

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there are passages in which a careful distinction is drawn between civil liability, and the case of criminal liability.[53] But *Pinochet* (*3*) was dealing with the criminal liability of a former head of state, not civil liability, and in *Jones* the House of Lords was concerned with the possible circumvention of state immunity, by permitting personal actions against the officials of the state. Permitting such an action would indirectly infringe the absolute immunity of the foreign state, but indirect infringement does not arise in a criminal case. Of greater relevance in regard to the contention that there is an international crimes exception to head of state immunity is that there are clear statements in *Pinochet* (*3*) that if Senator Pinochet had still been the Chilean head of state he would have enjoyed immunity *ratione personae*.[54] Apart from the point of circumvention of state immunity, it was not suggested that the principles of immunity are different in respect of criminal prosecution of international crimes as opposed to the adjudication of civil claims arising from the perpetration of international crimes. As pointed out by Professor Crawford the immunity afforded to state officials has always been the same as that of the state they represent.[55] And Dame Hazel Fox QC and Philippa Webb say that "Civil immunity can in the last resort . . . be regarded as based on criminal immunity."[56]

[72] In two cases, both relied on by the ICJ in the *Jurisdictional Immunities* decision, the European Court of Human Rights ("ECHR") has likewise accepted that customary international law is as stated in the *Arrest Warrant* case insofar as it concerns civil claims. The ICJ cited the following passage from the ECHR decision in *Al Adsani*:[57]

"Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the Courts of another State where acts of torture are alleged."

Then in *Kalogeropoulou*[58] the EHCR said:

"The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity."

[73] I can see the force of an argument that the prosecution of perpetrators of international crimes is of greater importance than permitting civil claims arising from their conduct. On the other hand, however, and having regard to the fact that customary international law is derived from the actions of states in their relations with one another, it may be that states would be more willing to accept immunity being withdrawn or attenuated

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in relation to claims that sound in monetary terms, than they would to agree to permit their high-ranking office holders and officials to be prosecuted in other national courts. But as I have said no authority to which we were referred drew any distinction between the two situations or suggested that an international crimes exception was accepted in either situation. Professor O'Keefe argues persuasively that there is little likelihood of the acceptance of such an exception in the foreseeable future.[59]

[74] It may be that these considerations will inform future debate and contribute to the development of customary international law, but our task is to assess the state of customary international law as it stands at the present time and apply it. That is what the Constitution requires us to do. While in other areas of the law the Court's function includes the development of the law, in the area of customary international law its task is one of discerning the existing state of the law, not developing it. As Lord Hoffmann said in *Jones*:[60]

"It is not for a national Court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states."

Development of customary international law occurs in international courts and tribunals, in the contents of international agreements and treaties and by its general acceptance by the international community of nations in their relations with one another as to the laws that govern that community. However tempting it may be to a domestic court to seek to expand the boundaries of customary international law by domestic judicial decision, it is not in my view permissible for it to do so.

[75] The ICC itself has affirmed that the *Arrest Warrant* case correctly reflects customary international law in respect of the immunity *ratione personae* of heads of state. In the *DRC* case concerning President Al Bashir[61] it said:

"At the outset, the Chamber wishes to make it clear that it is not disputed that under international law a sitting Head of State enjoys personal immunities from criminal jurisdiction and inviolability before national Courts of foreign States even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court."

In support of this statement the ICC cited the *Arrest Warrant* case.

[76] The *Arrest Warrant* case specifically recognised that there are exceptions to this immunity. The decision mentioned four.[62] The first three were that there is no immunity before a domestic Court; no immunity if it is waived by the State they represent; and no immunity after they demit, or are

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removed from, office. The fourth bears upon the present case. The ICJ recognised that an incumbent of an office entitled to immunity *ratione personae* "may be subject to criminal proceedings before certain international criminal Courts, where they have jurisdiction". It mentioned various possible examples of which the ICC was one. The tribunals in question were those the founding statutes of which excluded such immunity as a defence or ground for moderating sentence. Does this provide the exception for which SALC contends? It has the support of at least one of the commentators cited by SALC.[63] But another equally eminent commentator cited by the Government disagrees.[64] No one so far as I can see claims that the matter has been clearly resolved as a matter of customary international law.

[77] There is a difference between saying that an international tribunal, having jurisdiction and constituted on terms that specifically exclude reliance on any principles of immunity, provides an exception to the customary international law rule that heads of state enjoy immunity *ratione personae*, and saying that a national court asked to provide assistance to that international tribunal is likewise not bound by the customary international law rule. It is the latter proposition with which we are concerned. And it is of great importance that in two instances in dealing with the arrest and surrender of President Al Bashir, the ICC did not found its decisions on that proposition. Instead it held that President Al Bashir does not enjoy any such immunity, because the Security Council removed it by way of Resolution 1593 (2005).

[78] Sudan is not a party to the Rome Statute. It has not therefore undertaken any obligations in relation to the ICC. By contrast a state that is a party to the Rome Statute is bound by its terms. As those include, in article 27, an express provision precluding reliance on immunity it is accepted that party states waive any rights to immunity that their own citizens might otherwise have enjoyed. But the position is different in respect of non-parties. Here the starting point must be that in terms of article 34 of the Vienna Convention on the Law of Treaties[65] a treaty such as the Rome Statute cannot impose obligations on states that are not parties to the

treaty and have not consented to the imposition of such obligations.

[79] The ICC recognised this difficulty in the *DRC* case. It also accepted that in the ordinary course the only means of avoiding the difficulty was by invoking article 98 of the Rome Statute, which provides for the ICC to secure the co-operation of the third party state (in this case, Sudan) in waiving immunity and giving consent for the surrender of the person

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concerned. The papers do not reveal whether the ICC has made approaches to Sudan to secure a waiver or consent, but given that President Al Bashir is the head of state in that country it is obvious at a practical level that it would not be forthcoming.

[80] In *DRC*, the ICC held that requiring the DRC to arrest and surrender President Al Bashir did not create an inconsistency between its obligations under the Rome Statute and its international obligation to respect the immunities of President Al Bashir as a head of state. But its reasoning was not based on the existence of an international crimes exception to head of state immunity. It was based entirely on Security Council Resolution 1593 (2005). The ICC reasoned as follows:[66]

"The Chamber does not consider that such inconsistency arises in this case. *This is so because by issuing Resolution 1593(2005) the SC[Security Council] decided that the 'Government of Sudan [. . . ] shall cooperate fully with and provide necessary assistance to the Court and the Prosecutor pursuant to this resolution'.* Since Immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the co-operation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan 'co-operate fully' and 'provide any necessary assistance to the Court' senseless. Accordingly, the '*cooperation* of that third party State [Sudan] for the waiver of the immunity' as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of the SC Resolution 1593(2005). By virtue of said paragraph, the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State." (My emphasis added in italics. Underlined words emphasised in the original.)

[81] In its decision in relation to President Al Bashir's visit to South Africa referred to earlier[67] the ICC repeated this justification for its view that South Africa was not barred by President Al Bashir's status as a head of state from arresting him and causing him to be surrendered to the ICC. It said:[68]

"In conclusion, the Republic of South Africa is already aware of its obligation under the Rome Statute to immediately arrest Omar Al Bashir and surrender him to the Court, *as it is aware of the Court's explicit position . . . that the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State have been implicitly waived by the Security Council of the United Nations by resolution 1593(2005)* . . . "(My emphasis.)

[82] These decisions involved a departure by the ICC from its earlier decision holding that there is an international crimes exception to head of state

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immunity when a person is charged with international crimes under the Rome Statute.[69] In *Malawi*[70] the ICC concluded that:

". . . [T]he Chamber finds that customary international law creates an exception to Head of State immunity when international Courts seek a Head of State's arrest for the commission of international crimes."

By contrast on the same question Professor Crawford[71] (since 2015 a judge of the ICJ) wrote, in respect of the ICC, that state parties had consented to the waiver of immunity in respect of their nationals by virtue of their agreement to article 27, but:

"The entitlement of nationals of non-parties to personal immunity is not obviously eroded, particularly in the light of Article 98(1) of the ICC statute."

He noted that the Pre-Trial Chamber held a firm opinion to the contrary, but that was written before the Chamber gave a different justification for its views in regard to President Al Bashir and immunity. Its current position appears to accept that President Al Bashir would enjoy head of state immunity, were it not, so it believes, for the fact that it has been waived by the Security Council.

[83] It would serve little purpose to trawl through the academic literature on the question as the commentators are divided, although one senses a desire on the part of many of them that the problem should be resolved by recognising an exception to the rule of head of state immunity. Were it simply a matter for me to determine I would be inclined to share the view expressed by Dr Weatherall[72] that:

". . . [T]he State is not an abstract entity but a community of human beings. Protection of international criminals . . . from international scrutiny under the guise of State dignity is an affront to the citizens against whom grave violations of human rights are perpetrated. As State sovereignty is increasingly viewed to be contingent upon respect for certain values common to the international community, it is perhaps unsurprising that bare sovereignty is no longer sufficient to absolutely shield High officials from prosecution for *jus cogens* violations,"

as well as that of the US District Court[73] he quotes:

"These precedents instruct that resort to head-of-state and diplomatic immunity as a shield for private abuses of the sovereign's office is wearing thinner in the eyes of the world and waning in the cover of the law. The prevailing trend teaches that the day does come to pass when those who violate their public trust are called upon, in this world, to render account for the wrongs they inflict on innocents."

[84] But the content of customary international law is not for me to determine and, like Dr Weatherall, I must conclude with regret that it would go too far to say that there is no longer any sovereign immunity for *jus cogens* (immutable norm) violations. Consideration of the cases and the literature goes no further than showing that Professor Dugard is correct when he says that "customary international law is in a state of flux in respect of immunity, both criminal and civil, for acts of violation of norms of *jus cogens*".[74] In those circumstances, I am unable to hold that at this stage of the development of customary international law there is an international crimes exception to the immunity and inviolability that heads of state enjoy when visiting foreign countries and before foreign national Courts.

[85] Ordinarily that would mean that President Al Bashir was entitled to inviolability while in South Africa last June. But SALC argued that the position was different as a result of the enactment of the Implementation Act. I turn to consider that contention.

**The Implementation Act**

[86] Whether the Implementation Act has the effect of removing the immunity that President Al Bashir would otherwise enjoy is a matter of the proper construction of the Implementation Act. The principles to be followed in that regard are settled.[75] In the present case they are strongly influenced by the fact that we are dealing with a statute that incorporated an international agreement into South African law and are required by section 233 of the Constitution to construe it in a manner consistent with international law. As international law requires state parties to international agreements to comply with the obligations they have assumed under those agreements, an interpretation of the Implementation Act that results in South Africa not complying with its obligations under the Rome Statute is to be avoided if possible.

[87] We are also obliged by section 39(2) of the Constitution to interpret the Implementation Act in a way that promotes the spirit, purport and objects of the Bill of Rights. There are a number of provisions of the Bill of Rights that inform its spirit, purport and objects in this context. If international crimes were committed in South Africa they would infringe a number of rights guaranteed under the Bill of Rights. Section 11 guarantees the right to life and we are here concerned with an arrest warrant that charges the crime of genocide. The charges of war crimes and crimes against humanity not only infringe that right but they also infringe the right to dignity in section 10 and the right to freedom and security of the person in section 12. Section 12(1) explains that this includes the right not to be deprived of freedom arbitrarily or without just cause; the right not to



be detained without trial; the right to be free from all forms of violence from either public or private sources; the right not to be tortured and the right not to be treated in a cruel, inhuman or degrading way. Section 13 guarantees that no one may be subjected to slavery, servitude or forced labour and section 14 protects the right to privacy. Then there are the rights to freedom of religion, belief and opinion; freedom of expression and the right to assembly, demonstration and petition.

[88] Reference to the two arrest warrants show that the conduct of which President Al Bashir stands accused, and for which he is said to be responsible, involves acts that would infringe all of these rights. It is of course not for us to form or express a view on whether the conduct charged occurred or, if it did, his responsibility for it. But I mention it because it illustrates the importance in the context of the interpretation of the Implementation Act of construing it in a way that accords with and gives effect to the spirit, purport and objects of the Bill of Rights.

[89] The starting point in the interpretational exercise is the long title of the Implementation Act, which describes its purposes. It reads that it is an Act:

> "To provide for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa; to ensure that South Africa conforms with its obligations set out in the Statute; to provide for the crime of genocide, crimes against humanity and war crimes; to provide for the prosecution in South African Courts of persons accused of having committed the said crimes in South Africa and beyond the borders of South Africa in certain circumstances; to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstances; to provide for co-operation by South Africa with the said Court; and to provide for matters connected therewith."

[90] Some of these features warrant stressing in the light of the fact that there is no dispute that President Al Bashir is subject to the jurisdiction of the ICC and can be prosecuted by it for his alleged crimes. He has been stripped of any immunity when before the ICC. It is therefore important that the purpose of the Implementation Act is to provide a framework to ensure the effective implementation of the Rome Statute. It is to *ensure* that South Africa conforms to its obligations under the Rome Statute. In that regard there is no doubting its obligation to endeavour to bring President Al Bashir before the ICC for trial. The head of state immunity claimed for him is only a procedural bar to the enforcement of that obligation in this country.[76] It is not an immunity that confers impunity for any wrongdoing on his part.

[91] Lastly, the Implementation Act provides for the arrest of persons accused of international crimes and their surrender to the ICC and for co-operation between this country and the ICC. Those are powerful objectives. The reason for them appears from the preamble where the point is made that

"millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law". As a result of this and South Africa's own painful past the Republic of South Africa is committed to:

"* bringing persons who commit such atrocities to justice, either in a Court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute; and

* carrying out its other obligations in terms of the said Statute".

[92] The relevant provisions of the Implementation Act must be read and construed in the light of this commitment, which as the Constitutional Court has pointed out, is constitutionally mandated. The first is section 4(2) which provides:

"(2) Despite any other law to the contrary, including customary and conventional international law, the fact that a person -

(a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official; or

(b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither -

(i) a defence to a crime; nor

(ii) a ground for any possible reduction of sentence once a person has been convicted of a crime."

[93] In Dugard,[77] it is suggested that this section is an endeavour by the Legislature to "cut past" the controversial issue of immunity *ratione personae*. I confess to being unpersuaded. The section is in a part of the Implementation Act conferring jurisdiction on South African Courts to try international crimes in certain circumstances. It would have been absurd and non-compliant with its international obligations for South Africa in such a case to permit the accused to raise immunity either *ratione personae* or *ratione materiae*, or obedience to orders, to avoid conviction or reduce any sentence. In the circumstances, the section paraphrased the provisions of article 27(1) of the Rome Statute and made them applicable in trials for international crimes in South Africa or, as Professor Du Plessis expressed matters, it "trumps" the immunities that would otherwise attach to individuals.[78] The difficulty lies in taking it further to create in South Africa an international crimes exception to head of state immunity. Nevertheless, that does not mean that it is irrelevant to the interpretational exercise. It is

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a clear indication that South Africa does not support immunities when people are charged with international crimes.

[94] Recognition of head of state immunity alongside the provisions of sec-tion 4(2) to preclude someone from being brought to trial in South Africa would create an anomaly. Under section 4(3)(c) a South African Court has jurisdiction to try someone for an international crime if they are present in the territory of the Republic. In such a trial it would be no answer for the accused to raise immunity either *ratione personae* or *ratione materiae*. But on the argument for the Government this would not matter because it would be impossible for the accused to be brought before the Court in terms of the Criminal Procedure Act 51 of 1977 ("CPA"). Under the CPA an accused is brought to Court either by arrest or indictment,[79] but either procedure would compel the accused to submit to the criminal jurisdiction of a South African Court, which is inconsistent with immunity.

[95] A construction of section 4(2) that would exclude claims of immunity if a person was being tried before a South African Court, but would not exclude immunity in seeking to bring that person to trial before that Court would in my view be a serious anomaly. The ordinary principle of interpretation is that the conferral of a power conveys with it all ancillary powers necessary to achieve the purpose of that power.[80] The purpose of the power to prosecute international crimes in South Africa is to ensure that the perpetrators of such crimes do not go unpunished. In order to achieve that purpose it is necessary for the National Director of Public Prosecutions to have the power not only to prosecute perpetrators before our Courts, but, to that end, to bring them before our Courts. This is also consistent with the constitutional requirement that the Implementation Act be construed in a way that gives effect to South Africa's international law obligations and the spirit, purport and objects of the Bill of Rights. The construction proffered on behalf of the Government emasculates the section in relation to international crimes that were perpetrated outside the borders of this country by nationals of other states. That is a construction that would defeat the purposes of the Implementation Act. It is not in my view correct.

[96] I turn then to the provisions of the Implementation Act dealing with requests for assistance from the ICC and, more particularly, requests for assistance in terms of arrest warrants issued by the ICC for the purpose of securing the presence before the Court of alleged perpetrators of international crimes. These are in sections 8 to 10 of the Act. Section 8(1) provides that when a request is received from the ICC for the arrest and surrender of a person for whom it has issued a warrant of arrest it must be referred to the Central Authority. This is defined as the Director-General: Justice and Constitutional Development, the present incumbent of which office is Ms Sindane. The Central Authority must immediately on receipt of the request forward the documents to a magistrate who must endorse the

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warrant for execution in any part of the Republic.[81] That was what occurred in relation to the request in relation to the first arrest warrant. It was forwarded to the Chief Magistrate, Pretoria, who endorsed it for execution.[82] So far as the record goes that warrant is still extant and operative.

[97] Section 9(3) provides that any warrant endorsed under section 8 must be in the form and executed in a manner as near as possible to that which is prescribed under the laws relating to criminal procedure in South Africa. This is the only part of section 9 that bears upon the two warrants in this case. The balance of the section deals with provisional warrants to be sought pursuant to a request by the ICC in terms of article 92 of the Rome Statute. That is irrelevant for the purposes of this case, save that in formulating its claim in the founding affidavit SALC sought to rely on section 9(1) and (2). This misconception appears to some degree to have coloured the relief sought by SALC. It will be dealt with below.

[98] Section 10 deals with the procedures to be followed before a competent court after arrest for the purposes of surrender. Within 48 hours of the person's arrest they must be brought before the magistrate in whose area of jurisdiction the arrest took place. The magistrate then conducts an inquiry in order to establish whether the warrant applies to the person in question; whether the person has been arrested in accordance with the procedures laid down in domestic law; and whether the person's rights as contemplated in the Bill of Rights have been respected, if, and to the extent which, they are or may be applicable.[83] The inquiry is conducted in the same manner as a preparatory examination under the CPA.[84] If, at the end of the inquiry, the magistrate is satisfied of the three matters specified in subsection (1) and that the person may be surrendered to the ICC,[85] then they "*must* order that such person be surrendered to the Court and that he or she be committed to prison pending such surrender.'[86] There is no scope for the exercise of any discretion in that regard. Provided the requirements for surrender are satisfied then the magistrate must order surrender.

[99] These provisions do not mention the issue of immunity. Nor is it apparent where a claim to immunity could find its place in the inquiry contemplated by section 10(1). The inquiry is expressly confined to the three matters specified and none of those appear to involve issues of immunity. Certainly the question whether the person arrested is the person referred to in the warrant does not raise that as an issue. Similarly, whether the person's arrest complied procedurally with the requirements for a valid arrest in South African domestic law would not raise that issue. When this difficulty was raised with Counsel he suggested that the inquiry became



relevant when considering whether the arrested person's rights in terms of the Bill of Rights had been respected and referred to section 12 of the Constitution guaranteeing the right to freedom and security of the person and section 21 governing freedom of movement. But, if the Implementation Act provides for a person's arrest in those circumstances neither of those rights is infringed, or, if they are, the limitation is justified under section 36 of the Constitution. The argument is dependent on the premise that such an arrest would be unlawful because of the existence of immunity. But that begs the very question in issue in this case, namely, whether in relation to an ICC arrest warrant and request for assistance, such immunity exists.

[100] It is here that section 10(9) assumes crucial importance because it deals with the very question of the relevance of claims to immunity to the order of surrender. It provides that:

"The fact that the person to be surrendered is a person contemplated in section 4(2)(a) or (b) does not constitute a ground for refusing to issue an order contemplated in subsection (5)."

The persons referred to in section 4(2) include a person who "is or was a head of State". In other words, it includes any person in the situation of President Al Bashir. So the fact that President Al Bashir was such a person would not have provided a ground for a magistrate not to make an order for his surrender in terms of section 10(5).

[101] In an endeavour to circumvent what appears to be a plain provision the Government argued that section 10 deals only with the surrender of persons who had already been arrested under section 9 and that the latter section was silent on the question of immunity. But that creates an absurdity. If it were correct, then any person entitled on any basis to claim immunity would challenge their arrest by way of an interdict *de libero homine exhibendo* (the equivalent of a *habeas corpus* application in other jurisdictions) and demand their release. So the only people who could be brought before a magistrate under section 10 would be those who had no grounds for claiming immunity. But then section 10(9) would serve no purpose at all. It would be entirely redundant, because there would be no possible situation in which a person brought before the magistrate under section 10(1) would be a person referred to in section 4(2)(a) or (b). Needless to say such an interpretation is to be avoided.

[102] Counsel contended that to construe the Implementation Act in the manner suggested by SALC involved a tacit repeal or amendment of section 4(2) of DIPA, because that was the prior statute and until the Implementation Act was passed would have served to afford President Al Bashir immunity. He submitted that this is not lightly to be inferred.[87] That is no doubt



correct, but there is another principle that emerges from the cases on this point. It was referred to by Marshall J in *Gorham v Luckett*:[88]

". . . if this last Act professes, or manifestly intends, to regulate the whole subject to which it relates, it necessarily supersedes and repeals all former acts, so far as it differs from them in its prescriptions."

This aptly describes the situation with which we are concerned. DIPA is a general statute dealing with the

subject of immunities and privileges enjoyed by various people, including heads of state. The Implementation Act is a specific Act dealing with South Africa's implementation of the Rome Statute. In that special area the Implementation Act must enjoy priority. I would not, however, use the language of repeal or amendment. It is rather more an example of the application of the related principle in the converse situation embodied in the maxim *generalia specialibus non derogant* (general words and rules do not derogate from special ones).[89] Where there is legislation dealing generally with a topic and, either before or after the enactment of that legislation, the Legislature enacts other legislation dealing with a specific area otherwise covered by the general legislation, the two statutes co-exist alongside one another, each dealing with its own subject matter and without conflict. In both instances, the general statute's reach is limited by the existence of the specific legislation. So DIPA continues to govern the question of head of state immunity, but the Implementation Act excludes such immunity in relation to international crimes and the obligations of South Africa to the ICC.

[103] I conclude therefore that when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa co-operating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for co-operation made.[90] I accept, in the light of the earlier discussion of head



of state immunity, that in doing so South Africa was taking a step that many other nations have not yet taken. If that puts this country in the vanguard of attempts to prevent international crimes and, when they occur, cause the perpetrators to be prosecuted, that seems to me a matter for national pride rather than concern. It is wholly consistent with our commitment to human rights both at a national and an international level. And it does not undermine customary international law, which as a country we are entitled to depart from by statute as stated in section 232 of the Constitution. What is commendable is that it is a departure in a progressive direction.

[104] It is also important to note that this conclusion accords with the understanding of Government as to its obligations under and in terms of the Rome Statute and the Implementation Act. As noted above when South Africa received the first arrest warrant and request for assistance from the ICC, the Central Authority acted in terms of section 8(1) of the Implementation Act and forwarded it to the Chief Magistrate, Pretoria, who endorsed it for execution in any part of the Republic. When President Zuma was inaugurated and an invitation was extended to President Al Bashir to attend the inauguration, Sudan enquired whether he would be liable to arrest if he attended, and the answer was in the affirmative. The then Director-General of the Department of International Relations and Co-operation issued a public statement quoted in the papers, that:

"If today, President al Bashir landed in terms of the provision [of the Rome Statute], he would have to be arrested."

There are several statements in the papers and the literature with which we have been furnished that indicate that there have been other occasions, such as the funeral of the late President Mandela, that President Al Bashir did not attend, because he would have been liable to arrest and surrender to the ICC had he done so. It is plain from this that, save for the circumstances of the present case, South Africa has hitherto complied meticulously with its obligations under the Rome Statute in respect of President Al Bashir.

[105] That brings me back to the point made in paragraphs 11 to 16 and 24 of this judgment that the arguments with which we have been confronted were not those on which the case was conducted in the Court below. Nor, and this is the important point, did they reflect the approach of the Government to the issues. That emerges from the affidavits of Ms Sindane and, in particular, of Dr Lubisi. Ms Sindane explained that the Government's reasons for not seeking to arrest President Al Bashir were based on the terms of the hosting agreement and the ministerial proclamation. And Dr Lubisi explained that "Cabinet collectively appreciated and acknowledged that the aforesaid decision can only apply for the duration of the AU Summit". These statements demonstrated that as far as South Africa was concerned this involved a departure from its commitment to its obligations under the Rome Statute. We have not been apprised of the reasons for South Africa departing from those obligations on this occasion. But, be that as it may, whilst the departure from this country's



obligations was unfortunate, according to the affidavits it was only temporary. It is perhaps a pity in those circumstances that the Government chose to pursue the new arguments, thereby possibly giving the impression that our commitment as a nation to the Rome Statute was in question.

**Waiver**

[106] We received extensive argument on two propositions to the effect that, even if the Implementation Act did not oust President Al Bashir's head of state immunity, it had been waived, either by the Security Council Resolution 1593 (2005) or, in relation to the second arrest warrant, by the Genocide Convention (1948). In view of my conclusion on the effect of the Implementation Act it is unnecessary to address these submissions. The position under the Security Council Resolution is hotly contested by the commentators and the limited argument we received on the Genocide Convention does not give me confidence that we should express a view on it. I pass therefore to a consideration of the relief granted by the High Court and the question of costs.

**The relief**

[107] The relief granted by the High Court is set out in paragraph 6 above. The matter having been brought and dealt with as an urgent application the orders were not as well-tailored to the contentions being advanced by SALC as mature consideration would indicate. A broad statement that conduct was inconsistent with the Constitution did little to define where the shortcoming lay. Mr *Trengove* SC accepted that even if the appeal failed it was desirable that the declaratory order be formulated with greater precision. In my view, an appropriate order would have been the following:

"The conduct of the Respondents in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful."

[108] The second paragraph of the order directed the applicants to take reasonable steps to arrest President Al Bashir without a warrant in terms of section 40(1)(k) of the CPA. I do not think that section has anything to do with a person charged with international crimes under the Rome Statute. It is true that it deals with people who have committed crimes outside South Africa that would have been an offence if committed inside South Africa, which would include international crimes. But it is qualified by the requirement that the person arrested is "under any law relating to extradition or fugitive offenders" liable to arrest and detention in South Africa. That is not the position with an arrest under section 10 of the Implementation Act. That Act is not concerned with extradition, but with



surrender to the ICC. Persons arrested thereunder are not necessarily fugitive offenders. After all President Al Bashir continues to tread the world stage and has made appearances at the UN and visited China, as well as a number of other states, in his official capacity as head of state of Sudan, so he is not a fugitive offender.

[109] I am not sure why it was thought necessary to look to the CPA in regard to the possible arrest of President Al Bashir. After all the power to arrest him existed under the Implementation Act. Furthermore he was not to be arrested without a warrant, but in terms of warrants endorsed by a magistrate, one of which was in existence at the time, although SALC did not know that. As paragraph 2 of the order sought by SALC and granted by the High Court was inappropriate, and there is at present no reason to think that the existing arrest warrants will not be dealt with in terms of the Implementation Act and be available to be enforced if President Al Bashir returns to this country, it should simply be deleted. Subject to those amendments to the order the appeal should be dismissed.

**Costs**

[110] The amendments to the order do not represent substantial success for the applicants. While their arguments in regard to the content of customary international law as it applies under DIPA were accepted, the key statute is the Implementation Act and their arguments in regard to that were unsuccessful. SALC have succeeded in establishing important points of public importance in regard to the Government's obligations under the Rome Statute and the Implementation Act. They should accordingly have their costs, including the costs of two Counsel.

[111] The Foundation's arguments were of great value in dealing with this case and the emphasis they rightly placed on the importance of the Constitution in construing the statutes under consideration was a valuable insight. In my view, they should also have their costs including the costs of the application for admission as *amicus curiae* and the costs of two Counsel.

[112] As regards the costs incurred by the *amici* other than the Foundation and the costs of the Government in opposing their applications for admission as *amici* I have already expressed the view that the *amici* should not be penalised for their lack of success in securing their admission as *amici*. The Government must bear its own costs in relation to these applications, as must the *amici*.

**Result**

[113] I make the following order:

1. The application for leave to appeal is granted.
2. The applicants are to pay the costs of that application such costs to include those consequent upon the employment of two Counsel.
3. The applications by the African Centre for Justice and Peace Studies, the International Immigration Rights Initiative, the Peace and Justice Initiative and the Centre for Human Rights for admission as *amici curiae* are dismissed with no order for costs.



4. The order of the High Court is varied to read as follows:

   "1 The conduct of the Respondents in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful.

   2 The applicant is entitled to the costs of the application on a *pro bono* basis."

5. The appeal is otherwise dismissed.

6. The applicants are to pay the respondent's costs of appeal and the costs of the Helen Suzman Foundation, including the costs of its application for admission as an *amicus*, such costs to include in both instances the costs consequent upon the employment of two Counsel.

(Majiedt and Shongwe JJA concurred in the judgment of Wallis JA. Lewis and Ponnan JJA concurred for separate reasons in the judgment of Wallis JA.)

**Ponnan JA:**

[114] I have had the privilege of reading the judgment of Wallis JA, which comprehensively sets out the facts and issues that call for adjudication in the appeal. I feel persuaded to write separately in this matter. Both my approach and the line that I take in endeavouring to resolve it are far narrower than and, in their emphasis, different from that preferred by my learned Colleague.

[115] I agree with Wallis JA that the content of customary international law is not for us to determine.91 Nor can I fault his conclusion that:

> "when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of State immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for co-operation made".92

With due deference to my learned Colleague, that conclusion, I daresay, renders his discussion on customary international law unnecessary. I am accordingly hesitant to endorse Wallis JA's discussion on customary international law as also his conclusion on the subject, the high water mark of which is:

> "In those circumstances I am unable to hold that at this stage of the development of customary international law there is an international crimes exception to the immunity and inviolability that heads of State enjoy when visiting foreign countries and before foreign national courts."93



[116] More narrowly then, at the heart of the appeal lies the supposed clash between section 4(1)(a) of the DIPA and section 4(2) of the Implementation Act. The clash is said to arise because the former provision recognises an immunity that the latter purportedly negates. Harmonising that clash - a clash that seems to me to be more apparent than real - necessarily disposes of the primary issue in the appeal.

[117] Section 4(1)(a) of the DIPA provides:

> "A head of State is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as -
>
> (a) heads of State enjoy in accordance with the rules of customary international law . . . "

Supposing there was no further legislation, President Al Bashir would have enjoyed immunity from arrest and surrender to the ICC. But there is further and later legislation in the form of the Implementation Act, sec-tion 4(2) of which provides:

> "Despite any other law to the contrary, including customary and conventional international law, the fact that a person -
>
> (a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official; or
>
> (b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither -
>
> (i) a defence to a crime; nor
>
> (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime."

[118] In my view, the apparent conflict can reasonably be reconciled when one applies the appropriate rules of statutory construction. Generally speaking, when the repeal of former legislation is intended, specific words to that effect are employed, but this, however desirable, is not always done, nor is it absolutely necessary. For, as Kotze AJA observed in a separate concurring judgment in *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 397:

> "There are many illustrations in the books of the repeal by implication of earlier statutes by later ones, for subsequent legislation repeals previous inconsistent legislation, whether it expressly declares such repeal or not. Such an implied repeal will arise wherever the contents and operation of a later Act are repugnant to or cannot be harmonized with those of an earlier one . . ."

But repeal by implication is not favoured. An interpretation of apparently conflicting statutory provisions which involve the implied repeal of the earlier by the later ought not to be adopted unless it is inevitable (*R v Durban Corporation* 1946 NPD 109 at 115). Any reasonable construction which offers an escape from that is more likely to be in consonance with the real intention of the Legislature (*R v Tucker* 1953 (3) SA 150 (A) at 162 [also reported at [1953] 3 All SA 258 (A) - Ed]). As it was put in *Wendywood Developments (Pty) Ltd v Rieger and another* 1971 (3) SA 28 (A) at 38 [also reported at [1971] 3 All SA 103 (A) - Ed]:

> "It is necessary to bear in mind a well-known principle of statutory construction, namely, that statutes must be read together and the later one must not be so construed as to repeal the provisions of the earlier one, unless the later



> statute expressly alters the provisions of the earlier one or such alteration is a necessary inference from the terms of the

later statute."

[119] I can draw no such inference in this case particularly when regard is had to the nature, purpose and background of the Implementation Act. The preamble to the Implementation Act records that "throughout the history of human-kind, millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law." It commits South Africa to "bringing persons who commit such atrocities to justice" either in our own courts, or, in accordance with the principle of complementarity, in the ICC. Section 3 lists the objects of the Implementation Act as being, amongst others to: ensure that the Rome Statute is effectively implemented in South Africa; ensure that South Africa conforms with its obligations under the Rome Statute; and, enable the Republic to co-operate with the ICC by, *inter alia*, the surrender of suspects for prosecution before the ICC. Section 4(1) provides that any person who commits any of the international crimes is guilty of an offence and liable to conviction and punishment. Section 4(3) vests our courts with universal jurisdiction over the prosecution of all international crimes, wherever they may be committed, provided only that the accused is present in the Republic.

[120] Sections 8, 9 and 10 of the Implementation Act govern the manner in which an ICC request for the arrest of a suspect must be implemented. They do so in mandatory terms. Section 8 caters for an ICC request for the arrest and the surrender of a suspect. Section 8(1) says that the request "must" be referred to the central authority, namely, the Director-General of Justice. Section 8(2) requires the central authority immediately on receipt of that request to forward it to a magistrate who "must" endorse the warrant of arrest for execution. That has happened here in relation to one of the two warrants. Section 9(3) says that a warrant endorsed in terms of section 8 "must" be in a form and be executed in a manner as near as possible to that prescribed for domestic warrants of arrest in South Africa.

[121] Section 10 then comes into play - subsection (1) provides that the suspect "must" be brought before a magistrate within 48 hours, who "must" hold an inquiry to determine: first, whether the warrant applies to the suspect; second, whether the suspect has been arrested in accordance with our domestic law, and third, whether the suspect's constitutional rights have been respected. According to section 10(5), if the magistrate is satisfied that the three requirements have been met and that the suspect may be surrendered to the ICC, he or she "must" order that the suspect be surrendered to the ICC. Tellingly, these provisions leave no room for the suspect to raise any immunity claim or for the magistrate to inquire into and determine such a claim.

[122] Finally, there is section 10(9) of the Implementation Act, which provides:

"The fact that the person to be surrendered is a person contemplated in section 4(2)(a) or (b) does not constitute a ground for refusing to issue an order contemplated in subsection (5)."

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There is no imperfection in the language of this provision. Its meaning is clear and unambiguous. It applies to any person contemplated in section 4(2)(a) or (b), which includes a sitting or former head of State. Accordingly, the fact that the suspect is a sitting or former head of State does not constitute a ground for refusing an order contemplated in section 10(5) - that is an order that the suspect be surrendered to the ICC. Recognition of head of State immunity alongside the provisions of section 4(2) to preclude someone from being brought to trial in South Africa would create an intolerable anomaly. In terms of section 4(2) of the Implementation Act, a head of State may be arrested and prosecuted before South African domestic courts. The same head of State may be prosecuted before the ICC in terms of article 27 of the Rome Statute. But, when the ICC requests South Africa to arrest and surrender that head of State to the ICC for prosecution, it would be precluded from doing so by virtue of the suspect's immunity. The immunity would not protect him against arrest and prosecution in South Africa but inexplicably protects him from an arrest in South Africa for surrender to the ICC.

[123] The Legislature has thus made a clear choice in section 10(9) to negate the head of State immunity that might otherwise have stood in the way of the arrest and surrender of President Al Bashir. This is not to suggest that section 4(1)(a) of the DIPA has in any way become obsolete or redundant by virtue of the enactment of the Implementation Act. Both enactments address the matter in a slightly different manner. In my view, section 4(1)(a) of the DIPA falls to be read subject to the provisions of the Implementation Act. Or to put it another way, section 4(1)(a) of the DIPA only finds application insofar as the Implementation Act does not. Thus the immunity contemplated by section 4(1)(a) the DIPA can only be validly invoked if it is not in conflict with the Implementation Act. The Legislature has shown, through the Implementation Act, in what respects the more general immunity conferred by section 4(1)(a) of the DIPA is to be excluded. Any other construction would mean that the provisions of the Implementation Act to which I have referred must simply be ignored. Accordingly, section 4(1)(a) of the DIPA continues to govern head of State immunity unless such immunity is excluded by the operation of the Implementation Act. So construed, section 4(1)(a) of the DIPA and section 4(2) of the Implementation Act can stand side by side.

[124] The issues raised are of considerable constitutional and public importance. On any reckoning, even the rather more discrete point of statutory interpretation adopted in this judgment, the matter is appealable.94 For the rest, I agree with the reasoning and orders proposed by Wallis JA.

(Lewis JA concurred in the judgment of Ponnan JA.)

For the applicants:

*JJ Gauntlett* SC, *FB Pelser* and *L Dzai* instructed by the *State Attorney*, Pretoria and Bloemfontein

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For the respondent:

*WH Trengove* SC, *M du Plessis*, *I Goodman* and *H Rajah* instructed by *Webber Wentzel*, Johannesburg and *Webbers Attorneys*, Bloemfontein

For the first *amicus curiae*:

*D Unterhalter* SC, *C Steinberg*, *A Coutsoudis* and *N Muwangua* instructed by *Webber Wentzel*, Johannesburg and *Symington & De Kok*, Bloemfontein
For the applicants for admission as second and third *amici curiae*:

*GM Malindi* SC and *N Lewis* instructed by *Lawyers for Human Rights Law Clinic*, Johannesburg and *Webbers Attorneys*, Bloemfontein
For the applicants for admission as fourth and fifth *amici curiae*:

*J Brickhill* instructed by the *Legal Resources Centre*, Johannesburg and *Honey Attorneys*, Bloemfontein

**The following cases were referred to in the above judgment:**

**South Africa**

| | |
|---|---|
| Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk [2014] 1 All SA 517 ([2013] ZASCA 176; 2014 (2) SA 494) (SCA) - **Referred to** | 522 |
| Certain Amicus Curiae Applications, In re: Minister of Health and others v Treatment Action Campaign and others 2002 (10) BCLR 1023 (2002 (5) SA 713) (CC) - ***Dictum* at para [5] approved and applied** | 501 |
| Children's Institute v Presiding Officer of the Children's Court, Krugersdorp and others 2013 (1) BCLR 1 ([2012] ZACC 25; 2013 (2) SA 620) (CC) - **Referred to** | 501 |
| City of Tshwane Metropolitan Municipality and others v Nambiti Technologies (Pty) Ltd [2016] 1 All SA 332 ([2015] ZASCA 167) (SCA) - **Referred to** | 498 |
| CUSA v Tao Ying Metal Industries and others 2009 (1) BCLR 1 ([2008] ZACC 15; 2009 (2) SA 204) (CC) - **Referred to** | 498 |
| Fischer and another v Ramahlele and others [2014] 3 All SA 395 ([2014] ZASCA 88; 2014 (4) SA 614) (SCA) - **Referred to** | 498 |
| Glenister v President of the Republic of South Africa and others 2011 (7) BCLR 651 ([2011] ZACC 6; 2011 (3) SA 347) (CC) - ***Dictum* at para [97] approved and applied** | 512 |
| Government of the Republic of South Africa and another v Government of KwaZulu and another [1983] 3 All SA 332 (1983 (1) SA 164) (A) - **Referred to** | 527 |
| Institute for Security Studies, *Ex parte*: *In re*: S v Basson (CCT 30/2003) [2005] ZACC 4; 2006 (6) SA 195 (SCA) - **Referred to** | 500 |
| Janse van Rensburg NO and another v Minister of Trade and Industry and another NNO 2000 (11) BCLR 1235 ([2000] ZACC 18; 2001 (1) SA 29) (CC) - **Distinguished** | 496 |
| JT Publishing (Pty) Ltd and another v Minister of Safety and Security and others 1996 (12) BCLR 1599 ([1996] ZACC 23; 1997 (3) SA 514) (CC) - **Distinguished** | 497 |



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|---|---|
| Kent NO v South African Railways and another 1946 AD 398 - **Referred to** | 527 |
| Koyabe and others v Minister for Home Affairs and others (Lawyers for Human Rights as *amicus curiae*) 2009 (12) BCLR 1192 ([2009] ZACC 23; 2010 (4) SA 327) (CC) - **Referred to** | 502 |
| Member of the Executive Council for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute 2014 (5) BCLR 547 ([2014] ZACC 6); 2014 (3) SA 481) (CC) - **Referred to** | 495 |
| Middelburg Municipality v Gertzen 1914 AD 544 - **Referred to** | 525 |
| Minister of Defence and Military Veterans v Motau and others 2014 (8) BCLR 930 ([2014] ZACC 18; 2014 (5) SA 69) (CC) - **Referred to** | 528 |
| Mthembu v Letsela and another [2000] 3 All SA 219 ([2000] ZASCA 181; 2000 (3) SA 867) (SCA) - **Referred to** | 528 |
| Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 ([2012] ZASCA 13; 2012 (4) SA 593) (SCA) - **Referred to** | 522 |
| National Commissioner of the South African Police v Southern African Human Rights Litigation Centre and another (Dugard and others as *amici curiae*) 2014 (12) BCLR 1428 ([2014] ZACC 30; 2015 (1) SA 315) (CC) - ***Dicta* at paras [37]-[38] approved** | 491 |

New Modderfontein Gold Mining Co v Transvaal Provincial Administration 1919 AD 367 - **Referred to** 527

Oudekraal Estates (Pty) Ltd v City of Cape Town and others [2004] 3 All SA 1 ([2004] ZASCA 48; 2004 (6) SA 222) (SCA) - **Referred to** 495

President, Ordinary Court Martial and others v Freedom of Expression Institute and others 1999 (11) BCLR 1219 ([1999] ZACC 10; 1999 (4) SA 682) (CC) - **Distinguished** 497

Qoboshiyane NO and others v Avusa Publishing Eastern Cape (Pty) Ltd and others [2013] JOL 30408 ([2012] ZASCA 166; 2013 (3) SA 315) (SCA) - **Referred to** 498

R v Durban Corporation 1946 NPD 109 - **Referred to** 533

R v Tucker [1953] 3 All SA 258 (1953 (3) SA 150) (A) - **Referred to** 533

Sasol Synthetic Fuels (Pty) Ltd and others v Lambert and others [2002] JOL 9264 ([2001] ZASCA 133; 2002 (2) SA 21) (SCA) - **Referred to** 528

South Atlantic Islands Development Corporation Ltd v Buchan [1971] 1 All SA 203 (1971 (1) SA 234) (C) - **Referred to** 509

Springs Town Council v Soonah [1963] 2 All SA 1 (1963 (1) SA 659) (A) - **Referred to** 528

Van Rensburg v Van Rensburg en andere [1963] 1 All SA 572 (1963 (1) SA 505) (A) - **Referred to** 498

Wendywood Developments (Pty) Ltd v Rieger and another [1971] 3 All SA 103 (1971 (3) SA 28) (A) - **Referred to** 533



**European Court of Human Rights**

Al Adsani v The United Kingdom (2002) 34 EHRR 11 - **Referred to** 517

Kalogeropoulou and others v Greece and Germany (2002) 129 ILR 537 - **Referred to** 517

**International Court of Justice**

Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France), Judgment, ICJ Reports 2008, p. 177; [2008] ICJ 4 - **Referred to** 516

Democratic Republic of the Congo v Belgium) ICJ Reports 2002, p. 3; [2002] ICJ 1 - **Referred to** 515

Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Judgment, ICJ Reports 2012, p 99; [2012] ICJ 10 - **Referred to** 516

**United Kingdom**

Compania Naviera Vascongado v SS Cristina [1938] AC 485; [1938] 1 All ER 719 (HL) - **Referred to** 514

Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening); Mitchell v Al-Dali [2006] UKHL 26; [2007] 1 AC 270; [2007] 1 All ER 113 (HL) - **Referred to** 514

R v Bow Street Metropolitan Stipendiary Magistrate, *Ex parte* Pinochet Ugarte (No 3) (Amnesty International intervening) [2000] 1 AC 147, [1999] 2 All ER 97 (HL) - **Referred to** 516

R v Bow Street Stipendiary Magistrate and others, *Ex parte* Pinochet Ugarte (Amnesty International and others intervening) [1998] 4 All ER 897 (HL) - **Referred to** 517

**United States of America**

Gorham v Luckett 6 B Monroe (Ky) 146 at 154 (1845) - **Referred to** 528

Tachiona v Mugabe 169 F Supp 2d 259, 316-7 (SDNY 2001) - **Referred to** 521

**Footnotes**

1 Preamble to the Rome Statute. The Statute operates in terms of the principle of complementarity under which international crimes should in the first instance be prosecuted in national Courts and before the ICC if national Courts are unable or unwilling to do so. *National Commissioner of Police v South African Human Rights Litigation Centre and another* (CCT 02/14) [2014] ZACC 30*;* 2015 (1) SA 315 (CC) para [30] [also reported as *National Commissioner of the South African Police v Southern African Human Rights Litigation Centre and another* (*Dugard and others as amici curiae*) at 2014 (12) BCLR 1428 (CC) - Ed]. Dapo Akande "The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC" (2012) 10 *Journal of International Criminal Justice* 299 at 302.

2 Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir ICC-02/05-01/09 Date 13 June 2015. In argument, Counsel for the Government suggested that this judgment was given summarily and late at night, likening it to an unopposed application in a motion Court. That characterisation was unjustified. A reading of the judgment shows that it was only delivered after a consultation between the ICC and the Government of South Africa under art 97 of the Rome Statute.

3 GN 470, *GG* 38860, 5 June 2015.

4 Emphasis added.

5 *Oudekraal Estates* (*Pty*) *Ltd v City of Cape Town and others* (41/2003) [2004] ZASCA 48; 2004 (6) SA 222 (SCA) para [26] [also reported at [2004] 3 All SA 1 (SCA) - Ed]; *MEC for Health*, *Eastern Cape and another v Kirland Investments* (*Pty*) *Ltd t/a Eye & Lazer Institute* [2014] ZACC 6); 2014 (3) SA 481 (CC) paras [65]-[66] and [88]-[90] [also reported at 2014 (5) BCLR 547 (CC) - Ed].

6 The African Centre for Justice and Peace Studies and The International Refugee Rights Initiative applied jointly to be admitted as second and third *amici* respectively. The Peace and Justice Initiative and the Centre for Human Rights applied jointly to be admitted as fourth and fifth *amici* respectively.

7 R 16(8) provides that an *amicus* is limited to the record on appeal and may not add thereto.

8 *Janse van Rensburg NO and another v Minister of Trade and Industry and another NNO* (CCT13/99) [2000] ZACC 18; 2001 (1) SA 29 (CC) para [9] [also reported at 2000 (11) BCLR 1235 (CC) - Ed].

9 *President*, *Ordinary Court Martial and others v Freedom of Expression Institute and others* (CCT5/99) [1999] ZACC 10; 1999 (4) SA 682 (CC) para [8] [also reported at 1999 (11) BCLR 1219 (CC) - Ed] and *JT Publishing* (*Pty*) *Ltd and another v Minister of Safety and Security and others* (CCT49/95) [1996] ZACC 23; 1997 (3) SA 514 (CC) para [15] [also reported at 1996 (12) BCLR 1599 (CC) - Ed].

10 *Qoboshiyane NO and others v Avusa Publishing Eastern Cape* (*Pty*) *Ltd and others* (864/2011) [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para [5] [also reported at [2013] JOL 30408 (SCA) - Ed]; *City of Tshwane Metropolitan Municipality and others v Nambiti Technologies* (*Pty*) *Ltd* (20580/2014) 2015 ZASCA 167: [2016] 1 All SA 332 (SCA) para [6].

11 *Van Rensburg v Van Rensburg en andere* 1963 (1) SA 505 (A) at 510A-C [also reported at [1963] 1 All SA 572 (A) - Ed]. The approach has been endorsed by the Constitutional Court. *CUSA v Tao Ying Metal Industries and others* (CCT 40/07) [2008] ZACC 15; 2009 (2) SA 204 (CC) para [68] [also reported at 2009 (1) BCLR 1 (CC) - Ed].

12 *Fischer and another v Ramahlele and others* (203/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA) paras [13] and [14] [also reported at [2014] 3 All SA 395 (SCA) - Ed].

13 The rule reads as follows:

"Admission as *amicus*

(1) Subject to this rule, any person interested in any matter before the Court may, with the written consent of all the parties in the matter before the Court given not later than the time specified in subrule (5), be admitted therein as an *amicus curiae* upon such terms and conditions and with such rights and privileges as may be agreed upon in writing with all the parties before the Court or as may be directed by the President in terms of subrule (3).

Admission by consent

(2) The written consent referred to in subrule (1) shall, within 10 days of it having been obtained, be lodged with the registrar and the *amicus curiae* shall, in addition to any other provision, comply with the times agreed upon for the lodging of written argument.

Amendment of consent

(3) The President may amend the terms, conditions, rights and privileges agreed upon in terms of subrule (1).

Application to be admitted

(4) If the written consent referred to in subrule (1) has not been secured, any person who has an interest in any matter before the Court may apply to the President to be admitted therein as an *amicus curiae*, and the President may grant such application upon such terms and conditions and with such rights and privileges as he or she may determine.

Time for application

(5) An application pursuant to the provisions of subrule (4) shall be made within one month after the record has been lodged with the registrar.

Format

(6) An application to be admitted as an *amicus curiae* shall -

(a) briefly describe the interest of the *amicus curiae* in the proceedings;

(b) briefly identify the position to be adopted by the *amicus curiae* in the proceedings;

(c) set out the submissions to be advanced by the *amicus curiae*, their relevance to the proceedings and his or her reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

Argument

(7) (a) An *amicus curiae* shall have the right to lodge written argument, provided that such written argument does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court.

(b) The heads of argument of an *amicus curiae* shall not exceed 20 pages unless a judge, on request, otherwise orders.

Limitations

(8) An *amicus curiae* shall be limited to the record on appeal and may not add thereto and, unless otherwise ordered by the Court, shall not present oral argument.

Filing of heads

(9) An order granting leave to be admitted as an *amicus curiae* shall specify the date of lodging the written argument of the *amicus curiae* or any other relevant matter.

Costs

(10) An order of the Court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of the *amicus curiae*."

14 The Constitutional Court has held in respect of its similarly worded rules governing admission as an *amicus* (r 10) that consent alone is not sufficient and an application must also be made to the Chief Justice. *Ex parte Institute for Security Studies*: *In re S v Basson* (CCT30/2003) [2005] ZACC 4; 2006 (6) SA 195 (SCA) paras [6]-[8]. Although Harms *Civil Procedure in the Supreme Court* (loose-leaf) C16-1 (issue 51) says that this is equally applicable in the SCA that does not accord with the practice in this Court.

15 This is a material difference from the Constitutional Court rule, which does not limit the length of the written submissions

of an *amicus*. Also in that Court it is the Chief Justice who determines whether an *amicus* is permitted to make oral submissions, although in practice it is understood that the entire Court has input in that decision. Historically the Constitutional Court has been generous in permitting oral representations by *amici*. Van Loggerenberg and others *Erasmus Superior Court Practice* (2ed, loose-leaf) Vol 1, B1-30 (Original Service, 2015). In this Court it is plain that the Court constituted to hear the appeal decides whether the *amicus* may make oral submissions.

16 Compare *Children's Institute v Presiding Officer of the Children's Court, Krugersdorp and others* (CCT 69/12) [2012] ZACC 25; 2013 (2) SA 620 (CC) [also reported at 2013 (1) BCLR 1 (CC) - Ed]. That dealt with r 16A in the Uniform Rules of Court, which does not contain a provision that an *amicus* is confined to the record on appeal. In the Constitutional Court an *amicus* is confined to the record on appeal (r 10(8)) subject to the right in terms of r 31 to submit additional facts that are common cause or otherwise incontrovertible or are of an official, scientific technical or statistical nature and capable of easy verification. The SCA has a limited power to permit the leading of additional evidence on appeal, but the Court has not had to consider whether that power can be exercised on the application of an *amicus*.

17 *In re*: *Certain Amicus Curiae Applications*: *Minister of Health and others v Treatment Action Campaign and others* 2002 (5) SA 713 (CC) para [5] [also reported at 2002 (10) BCLR 1023 (CC) - Ed] which reads:

> "The role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The *amicus* must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court. Ordinarily it is inappropriate for an *amicus* to try to introduce new contentions based on fresh evidence."

18 See generally *Koyabe and others v Minister for Home Affairs and others* (CCT 53/08) [2009] ZACC 23; 2010 (4) SA 327 (CC) para [80] [also reported as *Koyabe and others v Minister for Home Affairs and others* (*Lawyers for Human Rights as amicus curiae*) at 2009 (12) BCLR 1192 (CC) - Ed] where it is stated that:

> "*Amici curiae* have made and continue to make an invaluable contribution to this Court's jurisprudence. Most, if not all, constitutional matters present issues, the resolution of which will invariably have an impact beyond the parties directly litigating before the Court. Constitutional litigation by its very nature requires the determination of issues squarely in the public interest, and insofar as *amici* introduce additional, new and relevant perspectives, leading to more nuanced judicial decisions, their participation in litigation is to be welcomed and encouraged."

The qualification to their usefulness must be observed.

19 I have already drawn attention to the fact that r 16 makes no provision for such opposition so that there was nothing untoward in the Deputy President making an order on the application as it stood.

20 The Preamble to the Rome Statute contains the following: "Emphasising that the International Criminal Court established under this statute shall be complementary to national criminal jurisdictions".

21 Art 68 provides for victims and witnesses to be protected and to participate in proceedings before the ICC.

22 Art 75 provides for the creation of a trust fund for the purpose of making reparations to victims and their families.

23 Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by the General Assembly of the United Nations on 9 December 1948.

24 Fn 5, *supra*.

25 Dire Tladi "The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law; Attempting to make a Collage from an Incoherent Framework" (2015) 13 *Journal of International Criminal Justice* 1027 at 1046 suggests that the reference in art VIII.1 to arts V and VII of the OAU General Convention on the Privileges and Immunities of the AU incorporates the immunities of heads of state and other representatives of states in the hosting agreement and the proclamation. Counsel for the Government did not pursue such an argument, which ignores that these articles are only mentioned in the context of saying that the members of the Commission and Staff Members and delegates and other representatives of Inter-Governmental Organisations are to enjoy those privileges. It clearly goes no further than that.

26 This constitutionalised what was in any event the legal position. *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C) at 238C-F [also reported at [1971] 1 All SA 203 (C) - Ed].

27 These include three permanent members of the UN Security Council, namely, the United States of America, Russia and China, and the world's largest democracy, India. Sudan is not a member, although 34 African countries are members. South Africa was the first African country to sign the Rome Statute and to accede to it.

28 Akande, fn 1, *supra*, 301; Aleksandra Dubak "Problems Surrounding Arrest Warrants issued by the International Criminal Court: A Decade of Judicial Practice" (2012) 32 *Polish Yearbook of International Law* 209 at 220.

29 Art 25 of the UN Charter provides that "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

30 Akande, fn 1, *supra*, 301. ICC Decision Pursuant to art 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Co-operation Requests issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 of 12 December 2011 (*Malawi*) para [15].

31 Paola Gaeta "Does President Al Bashir Enjoy Immunity from Arrest?" (2009) 7 *Journal of International Criminal Justice* 315 at 327-329.

32 Michiel Blommestijn and Cedric Ryngaert "Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity" (2010) 6 Zeitschrift für Internationale Strafrechtsdogmatik 428 at 438-440.

33 Dabo Akande "The Legal Nature of Security Council Referrals to the ICC and its impact on Al Bashir's Immunities" (2009) 7 *Journal of International Criminal Justice* 333 at 342.

34 S 232 of the Constitution.

35 S 231 of the Constitution.

36 S 233 of the Constitution.

37 *Glenister v President of the Republic of South Africa and others* [2011] ZACC 6; 2011 (3) SA 347 (CC) para [97] [also reported at 2011 (7) BCLR 651 (CC) - Ed].

38 *National Commissioner of Police v Southern African Human Rights Litigation Centre and another* [2014] ZACC 30; 2015 (1) SA 315 (CC) paras [37]-[40].

39 In advancing this contention he echoed the view consistently taken by the states of the AU that a sitting head of state enjoys immunity in the absence of waiver and that President Al Bashir is accordingly for the present immune from proceedings in other countries and before national Courts directed at securing his arrest and surrender under the two ICC arrest warrants. See the various resolutions of the AU referred to in fn 12 of *Malawi* fn 30 *supra*. See also Asad G Kiyani "Al-Bashir & the ICC: The Problem of Head of State Immunity" (2013) 12 *Chinese Journal of International Law* 467 para [41] which deals with the AU's approach and says that it is shared by the Arab League and China.

40 James Crawford *Brownlie's Principles of Public International Law* (8ed) (2012) (*Brownlie*) at 487-488.

41 An action *in rem* against a ship owned by a foreign sovereign is an example of an indirect impleading of a foreign

sovereign. See *Compania Naviera Vascongado v SS Cristina* [1938] AC 485; [1938] 1 All ER 719 (HL). So is a civil action against an individual in respect of actions on behalf of a foreign state, where permitting an action against the individual would circumvent the state's immunity. *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* (*Secretary of State for Constitutional Affairs intervening*); *Mitchell v Al-Dali* [2006] UKHL 26; [2007] 1 AC 270; [2007] 1 All ER 113 (HL).

42 *Brownlie*, *supra*, 493-4.

43 For example the Head of Government or the Minister of Foreign Affairs.

44 Case concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) ICJ Reports 2002, p 3; [2002] ICJ 1 paras [51] and [54] (*Arrest Warrant*).

45 Akande, fn 33 *supra* at 334.

46 See the cases cited in Michael A Tunks, "Diplomats or Defendants? Defining the Future of Head-of-State Immunity" (2002) 52 *Duke Law Journal* 651 at 662-663 and 665-666; Thomas Weatherall "Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence" (2015) 46 *Georgetown Journal of International Law* 1151 at 1171-1173.

47 Charter of the International Military Tribunal of Nuremberg, art 7; Charter of the International Military Tribunal for the Far East, art 6; Statute of the International Criminal Tribunal for the former Yugoslavia, art 7, para [2]; Statute of the International Criminal Tribunal for Rwanda, art 6, para [2]; and Rome Statute of the International Criminal Court, art 27. Most of these provisions are quoted in *Prosecutor v Taylor*, Decision on Immunity from Jurisdiction (Charles Taylor) of the Special Court for Sierra Leone, case number SCSL/2003-01-I, Appeals Chamber, 31 May 2004.

48 As was held in *Prosecutor v Taylor ibid*.

49 *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v France*), *Judgment*, ICJ Reports 2008, p 177; [2008] ICJ 4 para [170].

50 *Jurisdictional Immunities of the State* (*Germany v Italy*: *Greece intervening*), *Judgment*, ICJ Reports 2012, p 99; [2012] ICJ 10 paras [81]-[97].

51 *R v Bow Street Metropolitan Stipendiary Magistrate*, *Ex parte Pinochet Ugarte* (*No 3*) (*Amnesty International intervening*) [2000] 1 AC 147, [1999] 2 All ER 97 (HL).

52 *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* (*Secretary of State for Constitutional Affairs intervening*); *Mitchell v Al-Dali* [2006] UKHL 26; [2007] 1 AC 270; [2007] 1 All ER 113 (HL).

53 Lord Bingham of Cornhill para [32] and Lord Hoffmann para [71].

54 Lord Goff of Chieveley citing at 116 the opinion of Lord Slynn of Hadley in *Pinochet* (*1*) [1998] 4 All ER 897 (HL) at 913 [reported as *R v Bow Street Stipendiary Magistrate and others*, *Ex parte Pinochet Ugarte* (*Amnesty International and others intervening*) - Ed]; Lord Millett at 171; and Lord Phillips of Worth Matravers at 181.

55 *Brownlie* fn 35 *ante*.

56 Hazel Fox QC and Philippa Webb *The Law of State Immunity* (3ed) (2014) 85.

57 *Al Adsani v The United Kingdom* (2002) 34 EHRR 11 para [61].

58 *Kalogeropoulou and others v Greece and Germany* (2002) 129 ILR 537.

59 Roger O'Keefe the Professor of Public International Law at University College London "Symposium on the Immunity of State Officials. An "International Crime" Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely" (2015) 109 AJIL 167.

60 Para [63].

61 Decision on the Co-operation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court ICC-02/05-01/09 dated 9 April 2014 (*DRC*) para [25].

62 Para [61].

63 Dr Göran Sluiter "The Surrender of War Criminals to the International Criminal Court" (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 605 at 632. The proposition is contained in a single bald sentence reading:

> "Also, the recent judgment by the ICJ in the *Congo-Belgium* case acknowledges, in my view, that current international law for state and diplomatic immunities are not applicable to arrests and surrenders at the request of the ICC."

64 Gaeta, fn 31, 315 especially at 319.

65 Vienna Convention on the Law of Treaties, 1969.

66 Para [29].

67 Fn 2, *supra*.

68 Para [9] of the Decision.

69 Tladi, fn 25 *supra* at 1042. The author regards the earlier decisions as incorrect because they dealt with the issue as if art 98 formed no part of the Rome Statute. So does Erika De Wet "The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law" (2015) 13 *Journal of International Criminal Justice* 1049 at 1057. Professor De Wet regards the reasoning in the later decisions as preferable. In other words, she supports the approach of the removal of immunity by the Security Council. We were provided with other material in which the reasoning in the decision was subjected to substantial criticism.

70 *Malawi* paras [37]-[43] fn 30, *supra*.

71 *Brownlie*, *supra* 501.

72 Weatherall, fn 41 *supra*, at 1175.

73 *Tachiona v Mugabe* 169 F Supp 2d 259, 316-317 (SDNY 2001).

74 John Dugard *International Law*: *A South African Perspective* (4ed) (2011) (Dugard) at 258.

75 *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para [18] [also reported at [2012] 2 All SA 262 (SCA) - Ed]; and *Bothma-Batho Transport* (*Edms*) *Bpk v S Bothma & Seun Transport* (*Edms*) *Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para [12] [also reported at [2014] 1 All SA 517 (SCA) - Ed].

76 *Jurisdictional Immunities* para [93]; Hazel Fox QC and Philippa Webb, fn 56 *supra* at 5, 21 and 38-39.

77 Dugard fn 68 *ante*, at 211. This appears in a chapter written by Professor du Plessis. See also J Dugard and G Abraham "Public International Law" 2002 *Annual Survey of South African Law* 140 at 165-166; and M du Plessis "South Africa's Implementation of the ICC Statute: An African Example" (2007) 5 *Journal of International Criminal Justice* 460 at 474.

78 Du Plessis *ibid*.

79 In the Magistrates' Courts arrest and summons are used but it is inconceivable that international crimes would be prosecuted anywhere but in the High Court.

80 *Middelburg Municipality v Gertzen* 1914 AD 544 at 552.

81 S 8(2) of the Implementation Act.

82 Tladi, fn 25 *supra*, 1037.

83 S 10(1) of the Implementation Act.

84 S 10(3) of the Implementation Act.

85 This is not an additional matter on which the magistrate must be satisfied. If the three requirements are present then the person may be surrendered to the ICC and the magistrate must so order.

86 S 10(5) of the Implementation Act.

87 *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 400 (*New Modderfontein*); *Kent NO v South African Railways and another* 1946 AD 398 at 405; *Government of the Republic of South Africa and another v Government of KwaZulu and another* 1983 (1) SA 164 (A) at 200E-F [also reported at [1983] 3 All SA 332 (A) - Ed].

88 *Gorham v Luckett* 6 B Monroe (Ky) 146 at 154 (1845) cited in *New Modderfontein* at 397 and again in *Springs Town Council v Soonah* 1963 (1) SA 659 (A) at 669A-D [also reported at [1963] 2 All SA 1 (A) - Ed] and quoted in *Mthembu v Letsela and another* [2000] ZASCA 181; 2000 (3) SA 867 (SCA) para [28] [also reported at [2000] 3 All SA 219 (SCA) - Ed].

89 *Minister of Defence and Military Veterans v Motau and others* [2014] ZACC 18; 2014 (5) SA 69 (CC) para [78] [also reported at 2014 (8) BCLR 930 (CC) - Ed]; *Sasol Synthetic Fuels* (*Pty*) *Ltd and others v Lambert and others* [2001] ZASCA 133; 2002 (2) SA 21 (SCA) [also reported at [2002] JOL 9264 (SCA) - Ed].

90 My colleague Ponnan JA in his separate judgment says that this conclusion, which he shares, may render the discussion on customary international law unnecessary. With respect I do not agree. Until one reaches the conclusion that under customary international law President Al Bashir would ordinarily enjoy immunity a discussion of the relevant provisions of the Implementation Act is irrelevant. One cannot construe the provisions of the Implementation Act as removing an immunity that does not exist. If there was no such immunity, because there is an international crimes exception as contended by SALC, then the relevant sections of the Implementation Act merely reflect the provisions of customary international law and do not depart from them. That is an entirely different interpretation from the one in the body of this judgment and would involve a different analysis of the Implementation Act on the footing that it reflected, not overrode, customary international law.

91 Para [84].

92 Para [103].

93 Para [84].

94 *Qoboshiyane NO and others v Avusa Publishing Eastern Cape* (*Pty*) *Ltd and others* fn 10, *supra*.

# Chapter VII
# Immunity of State officials from foreign criminal jurisdiction

## A. Introduction

68. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[749] At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session (2008).[750]

69. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).[751] The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.[752]

70. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[753] The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014), her fourth report during the sixty-seventh session (2015) and her fifth report, in a partial debate, during the sixty-eighth session (2016).[754] On the basis of the draft articles proposed by the Special Rapporteur in the second, third and fourth reports, the Commission has thus far provisionally adopted six draft articles and commentaries thereto. Draft article 2 on the use of terms is still being developed.[755]

## B. Consideration of the topic at the present session

71. The Commission had before it the fifth report of the Special Rapporteur analysing the question of limitations and exceptions to the immunity of State officials from foreign

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[749] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[750] *Official Records of the General Assembly*, *Sixty-second Session*, *Supplement No. 10* (A/62/10), para. 386. For the memorandum prepared by the Secretariat, see A/CN.4/596 and Corr.1.

[751] A/CN.4/601, A/CN.4/631 and A/CN.4/646, respectively.

[752] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 207; and *ibid*., *Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

[753] *Ibid*., *Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 266.

[754] A/CN.4/654, A/CN.4/661, A/CN.4/673 and Corr.1, A/CN.4/687 and A/CN.4/701, respectively.

[755] See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 48-49. At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 1, 3 and 4 and, at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto (*ibid*., *Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 48-49). At its 3231st meeting, on 25 July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 and, at its 3240th to 3242nd meetings, on 6 and 7 August 2014, it adopted the commentaries thereto. At its 3329th meeting, on 27 July 2016, the Commission provisionally adopted draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session, and at its 3345th and 3346th meetings, on 11 August 2016, the Commission adopted the commentaries thereto (*ibid*., *Seventy-first Session, Supplement No. 10* (A/71/10), paras. 194-195 and 250 and, *ibid*., *Seventieth Session, Supplement No. 10* (A/70/10), para. 176).

criminal jurisdiction (A/CN.4/701), which it had begun to debate at its sixty-eighth session. The report addressed, in particular, the prior consideration by the Commission of the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, offered an analysis of relevant practice, addressed some methodological and conceptual questions related to limitations and exceptions, and considered instances in which the immunity of State officials from foreign criminal jurisdiction would not apply. The Special Rapporteur drew the conclusion that it had not been possible to determine, on the basis of practice, the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule. On the other hand, she came to the conclusion that limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction did apply to State officials in the context of immunity *ratione materiae*. As a consequence of the analysis, the report contained a proposal for draft article 7 on crimes in respect of which immunity did not apply.[756]

72. At its sixty-eighth session, given that the report had not been available in all languages, the Commission underlined that the debate on the report would continue in order to be finalized at the present session. Accordingly, the Commission continued its debate on the fifth report at its 3360th to 3365th meetings, on 18, 19, 23, 24, 26 and 30 May 2017, respectively.

73. Following its debate on the report, the Commission, at its 3365th meeting, on 30 May 2017, decided to refer draft article 7, as contained in the Special Rapporteur's fifth report, to the Drafting Committee, taking into account the debate in the Commission.

74. At its 3378th meeting, on 20 July 2017, the Commission considered the report of the Drafting Committee and provisionally adopted draft article 7 (see section C.1 below). Provisional adoption was by recorded vote, with 21 votes in favour, 8 votes against and 1 abstention. The members present voted as follows:

| | |
|---|---|
| Mr. Carlos J. Argüello Gomez | Yes |
| Mr. Yacouba Cissé | Yes |
| Ms. Concepción Escobar Hernández | Yes |
| Ms. Patrícia Galvão Teles | Yes |
| Mr. Juan Manuel Gómez-Robledo | Yes |
| Mr. Hussein A. Hassouna | Yes |
| Mr. Mahmoud D. Hmoud | Yes |
| Mr. Huikang Huang | No |

[756] The text of draft article 7, as proposed by the Special Rapporteur in her fifth report, reads as follows:

**Draft article 7**
**Crimes in respect of which immunity does not apply**

1. Immunity shall not apply in relation to the following crimes:

   (a) Genocide, crimes against humanity, war crimes, torture and enforced disappearances;

   (b) Crimes of corruption;

   (c) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.

2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.

3. Paragraphs 1 and 2 are without prejudice to:

   (a) Any provision of a treaty that is binding on the forum State and the State of the official, under which immunity would not be applicable;

   (b) The obligation to cooperate with an international tribunal which, in each case, requires compliance by the forum State.

| | |
|---|---|
| Mr. Charles Chernor Jalloh | Yes |
| Mr. Roman A. Kolodkin | No |
| Mr. Ahmed Laraba | No |
| Ms. Marja Lehto | Yes |
| Mr. Shinya Murase | Yes |
| Mr. Sean D. Murphy | No |
| Mr. Hong Thao Nguyen | Yes |
| Mr. Georg Nolte | No |
| Ms. Nilüfer Oral | Yes |
| Mr. Hassan Ouazzani Chahdi | Yes |
| Mr. Ki Gab Park | Yes |
| Mr. Chris Maina Peter | Yes |
| Mr. Ernest Petrič | No |
| Mr. Aniruddha Rajput | No |
| Mr. August Reinisch | Yes |
| Mr. Juan José Ruda Santolaria | Yes |
| Mr. Gilberto Vergne Saboia | Yes |
| Mr. Pavel Šturma | Abstain |
| Mr. Dire D. Tladi | Yes |
| Mr. Eduardo Valencia-Ospina | Yes |
| Mr. Marcelo Vázquez-Bermúdez | Yes |
| Sir Michael Wood | No |

75. Explanations of vote before the vote were made by Mr. Roman A. Kolodkin, Mr. Sean D. Murphy, Sir Michael Wood, Mr. Huikang Huang, Mr. Aniruddha Rajput, Mr. Ernest Petrič, Mr. Juan Manuel Gómez-Robledo, Mr. Juan José Ruda Santolaria and Mr. Georg Nolte. Explanations of vote after the vote were made by Mr. Dire D. Tladi, Mr. Pavel Šturma, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Mr. Shinya Murase, Mr. Yacouba Cissé, Mr. Hussein A. Hassouna, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Ms. Concepción Escobar Hernández and Mr. Hong Thao Nguyen. Those explanations of vote were recorded in the summary record of the 3378th meeting (A/CN.4/SR.3378).

76. At its 3387th to 3389th meetings, on 3 and 4 August 2017, the Commission adopted the commentaries to the draft article provisionally adopted at the present session (see section C.2 below).

77. Informal consultations on immunity of State officials from foreign criminal jurisdiction, conducted by the Special Rapporteur, were held on 18 July 2017. The informal consultations were open-ended and their aim was to exchange views and share ideas on the procedural aspects of immunity of State officials from foreign criminal jurisdiction, which will be the subject under consideration in the sixth report of the Special Rapporteur, to be submitted in 2018. The consultations were based on an informal concept paper on procedural provisions and safeguards prepared by the Special Rapporteur. At the 3378th meeting, on 20 July 2017, the Special Rapporteur informed the Commission on the development of the informal consultations.

### 1. Introduction by the Special Rapporteur of the fifth report

78. The Special Rapporteur recalled that the fifth report, on limitations and exceptions to immunities of State officials from foreign criminal jurisdiction, dealt with a subject that had been the subject of recurrent debate over the years in the Commission and in the Sixth

Committee, eliciting diverse, and often opposing, views. There was a general desire to proceed cautiously and prudently given the sensitivity of the subject and its importance for States. The report itself had been introduced at the sixty-eighth session of the Commission[757] and had been the subject of a partial debate.[758] The Special Rapporteur noted that, due to the change in composition of the Commission, and in the light of the comments and observations on the report at the sixty-eighth session of the Commission and in the Sixth Committee at the seventy-first session of the General Assembly, she considered it appropriate at the current session to make additional introductory remarks on the report. Accordingly, the Special Rapporteur gave a brief overview of the previous debates on the fifth report in the Commission and the Sixth Committee.

79. Commenting on the fifth report itself, she noted that it followed a similar methodology to previous reports, examining State practice, international jurisprudence, the prior work of the Commission and an analysis of domestic legislation for the present report. The report had also taken into account the information received from Governments in response to questions posed by the Commission and oral statements by States in the Sixth Committee. The Special Rapporteur underlined that the fifth report, like the previous reports, had to be read and understood together with the prior reports on the topic.

80. Building on her presentation at the previous session, which she considered to be an integral part of the prior reports considered by the Commission, the Special Rapporteur highlighted a number of ideas central to the report. First, she noted that the phrase "limitations and exceptions" echoed the different arguments put forward in practice for the non-application of immunity. The Special Rapporteur stressed that the distinction between limitations and exceptions, despite its theoretical and normative value for the systemic interpretation of the immunity regime, had no practical significance, as "limitations" or "exceptions" led to the same consequence, namely the non-application of the legal regime of the immunity of State officials from foreign criminal jurisdiction in a particular case.

81. Second, the report addressed limitations and exceptions within the specific framework of immunity and within the context of the international legal system as a whole. In that regard, the Special Rapporteur underscored: (a) the interrelationship between immunity and jurisdiction, even though the two were different concepts; (b) the procedural nature of immunity; (c) the distinction between immunity of State officials and State immunity; and (d) the distinction between immunity from foreign criminal jurisdiction and immunity before international criminal courts and tribunals. The report further examined immunity from the point of view of international law as a normative system, in which immunity sought to guarantee respect for sovereign equality of States but had to be balanced against other important values of the international legal system.

82. Third, the report focused on the practice of States, which constituted the cornerstone of the Commission's work. The report examined to what extent practice revealed the existence of customary norms that could be codified, following the basic methodology in the Commission's work on the identification of customary international law. It also analysed whether there existed a trend towards progressive development of norms relating to immunity. Going beyond international jurisprudence and treaties, the report studied domestic legislation and decisions of domestic courts. The report also analysed the issues from a systemic perspective, thereby considering the regime of immunity in relation to other aspects of the contemporary international legal system, understood as a whole.

83. On those bases, the report concluded that it had not been possible to determine the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule. On the other hand, the report concluded that limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction were extant in the context of immunity *ratione materiae*. Although varied, the practice showed a clear trend towards considering the commission of international crimes as a bar to the application of immunity *ratione materiae*

[757] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), paras. 196-208.

[758] *Ibid*., paras. 209-246.

of State officials from foreign criminal jurisdiction, for the reason that such crimes did not constitute official acts, that the crimes concerned were grave or that they undermined the values and principles recognized by the international community as a whole.

84. Finally, the Special Rapporteur noted that the Commission should approach the topic of immunity from foreign criminal jurisdiction, and in particular the question of limitations and exceptions, from the perspectives of both codification and the progressive development of international law. The challenge for the Commission was to decide whether to support a developing trend in the field of immunity, or whether to halt such development.

85. The Special Rapporteur also made specific comments on the proposed draft article 7. The three paragraphs of the draft article sought to address, in an integral fashion, all the elements that defined the regime of limitations and exceptions to immunity.

86. Paragraph 1 identified crimes to which immunity would not apply. Following the model of the United Nations Convention on Jurisdictional Immunities of States and Their Property, the expression "does not apply" was used to capture both limitations and exceptions. The paragraph identified situations in which immunity did not apply by reference to the crimes over which jurisdiction was sought, namely in case of (a) international crimes; (b) crimes of corruption; and (c) the so-called "territorial tort" exception.

87. Paragraph 2 defined the scope of limitations and exceptions. It specified that the limitations and exceptions in paragraph 1 did not apply to the persons who enjoyed immunity *ratione personae*, namely Heads of State, Heads of Government and Ministers for Foreign Affairs. It emphasized, however, that the enjoyment of immunity *ratione personae* was time-bound, which meant that the limitations and exceptions to immunity would apply to the troika once they had left office.

88. Paragraph 3 contained a without-prejudice provision in respect of situations covered by special regimes. The first subparagraph related to instances in which immunity of officials was not applicable due to the existence of treaty relations between the States concerned. The second subparagraph covered cases in which immunity might be affected by a general obligation to cooperate with an international criminal court. Both of those situations stemmed from examples in practice.

89. With regard to the future work of the Commission on the topic, the Special Rapporteur indicated her intention to conduct informal consultations on various procedural matters relating to the topic, during the present session of the Commission. It was hoped that such consultations would further inform the content of her sixth report, to be submitted during the seventieth session of the Commission.

### 2. Summary of the debate

90. The debate at the present session was a continuation of the discussion on the fifth report, which had commenced at the sixty-eighth session of the Commission. The summary below should be read in combination with the summary of the topic in the report of the Commission on the work of its sixty-eighth session.

#### (a) General comments

91. Members commended the Special Rapporteur for her rich and well-documented fifth report, which offered a thoughtful analysis of State practice as reflected in treaties and domestic legislation, as well as in international and domestic case law. Members also recalled, with appreciation, the work by the former Special Rapporteur, as well as the study by the Secretariat. Members acknowledged the complex and contentious nature of the topic, in particular the question of limitations and exceptions. The comments made focused generally on methodological and conceptual issues raised in the fifth report, including on the methodology and treatment of State practice, the mandate of the Commission in the progressive development of international law and its codification, the regime of immunity in the international legal system as a whole, as well as the interrelationship between the question of limitations and exceptions and procedural aspects.

*Methodology and treatment of State practice*

92. Several members expressed their appreciation for the detailed and comprehensive analysis of State practice contained in the fifth report. Some members noted their support for the methodology of the Special Rapporteur and maintained that the report provided a firm foundation for the proposed draft article.

93. Other members stated that, while the discussion of practice was extensive, it remained unclear how it related to the specific limitations and exceptions contained in draft article 7. Some members also questioned whether the report, while not finding coherent practice against the non-applicability of immunity, contained sufficient evidence to support the limitations and exceptions to immunity that it proposed. It was noted that many of the examples cited in the report related to State immunity or immunity in civil proceedings, rather than criminal prosecutions. In the view of some members, the report selectively discussed cases that supported the establishment of limitations and exceptions to immunities, while ignoring evidence indicating the opposite. It was noted that the examples in the report were taken from different contexts and time periods and did not demonstrate a linear development towards restrictions on immunity.

94. Members disagreed on the extent and the relevance of treaty practice with regard to limitations and exceptions to immunity. Some members asserted that treaty practice did not establish a trend towards restricting the immunity of foreign State officials. In their view, few treaties provided for limitations and exceptions, and any practice in regard to those treaties could not be counted towards the existence of a customary rule. It was pointed out that many treaties, including treaties relating to diplomatic and consular relations, as well as those relating to international crimes, did not provide for limitations or exceptions. Moreover, a number of members noted that treaties providing for individual responsibility in the case of international crimes, even where they denied immunity before international courts, did not affect the immunity of foreign officials before domestic courts.

95. Other members asserted that treaty practice had marked a deliberate move towards limitations and exceptions of immunity of State officials. Some members placed that development within the context of the work of the Commission on individual criminal responsibility, noting that relevant instruments, such as the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, as well as the work on the draft Code of Crimes against the Peace and Security of Mankind and international criminal jurisdiction rejected immunity for international crimes. Such members maintained that the present draft article should follow the example of the Rome Statute of the International Criminal Court, which in article 27 declares the irrelevance of official capacity. Reference was also made to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), as adopted by the African Union. Furthermore, some members noted that the proliferation of treaties containing a "prosecute or extradite" provision had a bearing on the scope of immunity of State officials. They suggested that the obligation to prosecute international crimes implied a limitation on the scope of immunity of State officials.

96. With regard to domestic legislation, some members noted that there were few examples of domestic laws recognizing limitations and exceptions to immunity of foreign officials, even in cases of international crimes. A few members noted that domestic legislation implementing the Rome Statute typically only dealt with institutional issues or with questions of extradition, rather than immunity. It was highlighted that the few countries whose legislation had contained broader exception clauses had recently revised their laws on immunity of State officials to restrict the scope of the limitations and exceptions.

97. Other members maintained that domestic laws reflected the trend indicated by the Special Rapporteur. The view was expressed that even if domestic legislation often focused on State immunity, at least it demonstrated a trend towards the restriction of immunity. Some members noted that the domestic implementation of the Rome Statute had a direct effect on the regime of immunity in domestic courts.

98. Several members criticized the small number of domestic cases examined in the fifth report. It was noted that many of the cases had been overturned or did not relate to

immunity of State officials from foreign criminal jurisdiction, but to State immunity or immunity in civil proceedings. Some members asserted that the report should have examined the reasons why immunity had been declined or upheld in particular cases; should have analysed cases in which prosecutors had decided not to prosecute due to the immunity of the official involved; and should have considered cases in which States had unsuccessfully invoked immunity.

99. A number of members maintained that the small sample of domestic cases analysed in the report did not affect its substantive analysis. The Special Rapporteur was encouraged to further consider regional practice, including, for example, case law from Asia and the jurisprudence of the Inter-American Court of Human Rights.

100. Several members stressed that the trend in international jurisprudence ran counter to the conclusions drawn in the fifth report. It was emphasized that international and regional courts had repeatedly upheld immunity, even in cases involving international crimes or violations of peremptory norms of international law (*jus cogens*). International jurisprudence had underlined that immunity, which was procedural in nature, was not affected by the gravity of an act. A number of members also emphasized the difference between international and domestic courts. They maintained that the lack of immunity before international criminal tribunals did not entail the non-application of immunity in domestic courts. It was pointed out that international tribunals had only recognized the denial of immunity by domestic courts in cases that related to cooperation with such tribunals.

101. Other members asserted that the analysis of international jurisprudence by the Special Rapporteur supported her approach to limitations and exceptions of immunity. Several members noted that many of the international decisions upholding immunity did not relate to individual criminal responsibility, but dealt with immunity in civil proceedings, State immunity, officials enjoying immunity *ratione personae*, or questions of State responsibility. Some members also pointed out that international courts and tribunals had made the application of immunity conditional on the availability of alternative redress; if no such redress was available, immunity could not be upheld. Reference was made to individual and dissenting opinions that emphasized that the requirements of sovereignty should not override the need for accountability, but that a balance should be struck.

*Progressive development of international law and its codification*

102. In the view of some members, the report could have indicated more clearly whether it sought to determine the scope of existing international law (*lex lata*), whether it followed an emerging trend towards desirable norms (*lex ferenda*) or whether it aimed to set out "new law". It was noted that the Commission's dual mandate of codification and progressive development required it to closely follow established practice or to openly assert the progressive nature of its work, respectively. Several members urged the Commission to focus on existing law, rather than to engage in progressive development. It was noted that the Commission was not drafting a new treaty, the rules of which would ultimately be subject to the approval of States, but that it aimed to produce a set of guidelines on current practice, for use by non-specialists involved in domestic prosecutions.

103. In that regard, a number of members criticized the fifth report for the nature in which it asserted the existence of customary international law with regard to limitations and exception, without establishing a solid foundation for that in practice. In the view of several members, the report did not sufficiently highlight the serious disagreements within the Commission and within the Sixth Committee over the substantive and procedural aspects of that issue. It was suggested that, due to such differences, the Commission ought to proceed cautiously.

104. Other members stated that the Commission's work on the question of limitations and exceptions should reflect both codification and progressive development. It was asserted that the fifth report accurately captured the current state of international law on immunity of foreign officials. Such members noted that the lingering uncertainty over the scope of immunity ought to encourage the Commission to provide guidelines on the issue, irrespective of the views of States. The Commission was urged not to forget its

commitment to the progressive development of international law, as it had displayed in various earlier instruments. For some of those members, the possibility of developing draft articles to form the basis of a treaty on the subject could not be discounted at this stage.

105. Some members questioned whether State practice supported an alleged trend towards limitations and exceptions to immunity of State officials as proposed. Those members maintained that no such trend existed or, if a trend could be discerned, that it pointed in the opposite direction. It was recalled that several States had recently restricted the scope of limitations and exceptions to immunity in their domestic legislation, and international and regional courts had typically upheld the immunity of State officials from foreign criminal jurisdiction in recent cases.

106. Other members asserted that, even if not all aspects of the report found a firm basis in customary international law, a trend towards limitations and exceptions of immunity *ratione materiae* did exist. A number of members claimed that developments in the field of State immunity, international criminal law and international human rights law supported such a trend. Moreover, it was asserted that courts and tribunals increasingly refused to apply immunity, either because the alleged acts violated peremptory norms of international law (*jus cogens*) or because they considered that such acts could not be performed in an official capacity. Further, certain States had expressed their support for restricting the scope of immunity of foreign officials. Some members maintained that the Commission ought to bolster such a trend, in order to fight impunity and lift impediments to the prosecution of international crimes.

*International law as a system*

107. It was emphasized by some members that the draft articles ought to strike a balance between, on the one hand, the sovereign equality of States and the need for stability in international relations and, on the other hand, the interest of the international community as a whole in preventing and punishing the most serious crimes under international law.

108. Other members expressed concern that the limitations and exceptions to immunity proposed by the Special Rapporteur could foster abuse, for example by enabling politically motivated trials of State officials in foreign jurisdictions. This could weaken stability in international relations and run counter to the cause of fighting impunity and promoting human rights. It was emphasized that, as a fundamental principle of international law, the courts of one State should not sit in judgment over the acts of another State.

109. Several members noted that the system of immunity could and should not stand in the way of the protection of the fundamental interests of the international community. It was emphasized that the protection of human rights and the fight against impunity were not peripheral to the sovereignty of States, but had to be reconciled with it. In the view of such members, perpetrators of international crimes ought not to be allowed to hide behind the cloak of sovereignty to shield themselves from prosecution, as their acts caused severe instability in the countries and regions in which they were perpetrated, eventually affecting the international community as a whole. The point was made that the rules on immunity should not be considered in isolation, but in the light of other norms of the international legal system.

*Procedural aspects of immunity*

110. Some members noted that the question of limitations and exceptions was closely related to that of procedural aspects of immunity, including procedural safeguards and guarantees. Several members expressed regret that the Special Rapporteur had not submitted a sixth report on that issue at the present session. A number of members suggested that the Commission ought to postpone its work on limitations and exceptions until after the Special Rapporteur had expounded her views on procedural aspects in her sixth report, so that the two issues could be considered in conjunction.

111. It was noted that procedural safeguards could help to strike the necessary balance between the respect for the sovereign equality of States and the need to fight impunity. Several members referred to the work of the previous Special Rapporteur on the topic, who had dealt with various procedural issues relating to timing, invocation, burden of proof and

the waiver of immunity. With regard to waiver, some members proposed the establishment of a procedure whereby immunity had to be explicitly invoked by the State of the official; or the establishment of a treaty-based duty to "waive or prosecute", according to which States would have to choose whether to waive immunity in a foreign court or to prosecute the case themselves.

112. Emphasizing the procedural nature of immunity, a number of members noted that, when successfully invoked through diplomatic channels or in courts, immunity suspended the jurisdiction of foreign courts, but did not affect the criminal responsibility of the alleged offenders. Given its preliminary nature, courts had to consider the question of immunity before proceeding to the merits. It was stated that, for this reason, the gravity of an alleged act could have no bearing on the application of immunity, or on its sovereign or official nature. Such members maintained that this did not leave an accountability gap, since, for example, a State, by invoking the immunity of its official and recognizing its acts as its own, would trigger its own responsibility and could be sued itself at the national or international level.

113. Other members maintained that, while a discussion of procedural aspects was very important for the topic as a whole, the Commission first had to identify the substantive features of limitations and exceptions to immunity. It was pointed out that procedural aspects were relevant to the draft articles as a whole and could only be considered after all substantive elements had been discussed. Several members wished not to pre-empt the Commission's debate on the topic of the sixth report and urged the Commission not to delay its consideration of the limitations and exceptions to immunity.

114. A number of members asserted that there was a strong link between immunity and impunity for international crimes. It was pointed out that, if no alternative forum or jurisdiction for prosecution of international crimes was available, the procedural barrier of immunity in domestic courts would entail substantive effects. Some members emphasized that substantive justice should not be the victim of procedural justice, particularly in the case of violations of peremptory norms of international law (*jus cogens*). Such members cautioned that an exclusively procedural approach to immunity would have a negative impact on the development of individual responsibility in international law.

115. It was noted that the International Criminal Court, the most obvious forum for the prosecution of State officials, did not have the capacity or the resources to prosecute all alleged perpetrators of international crimes. As the Court operated on the basis of complementarity, those members maintained that domestic courts should remain the principal forums for combating impunity. It was also noted that the responsibility of a State for an act did not negate the individual responsibility of an official and should not stand in the way of individual prosecutions.

### (b) Specific comments on draft article 7

116. Some members questioned why the proposed title of draft article 7 referred to situations "in respect of which immunity does not apply", when the report discussed "limitations and exceptions" to immunity. It was suggested that the uncertainty over the meaning and scope of the phrase "limitations and exceptions" demonstrated that draft article 7 did not reflect settled international law.

117. A number of members considered that the distinction between limitations and exceptions was useful and should be maintained. It helped to distinguish situations in which immunity was not at issue, because the relevant conduct could not be considered as an official act or as performed in official capacity, from cases in which immunity was excluded on the basis of exceptional circumstances.

118. Other members supported the wording proposed by the Special Rapporteur. It was pointed out that the work on the topic so far had proceeded on the assumption that immunity applied and that draft article 7 should thus deal with its "non-application". Some members noted that a distinction might provide theoretical clarity, but that it had no basis in the practice of States.

119. Some members reiterated their general reservations regarding draft article 7, as proposed. It was suggested that one way forward would be to reformulate the draft article on the basis of an obligation to waive or prosecute core international crimes, which would entail a duty of a State either to waive the immunity of its officials before the courts of a foreign State, or to undertake to fulfil its obligation to prosecute its own officials.

120. A number of members questioned whether the list of crimes included in paragraph 1 was exhaustive or merely illustrative. A suggestion was made to include a general reference to the most serious crimes under international law, rather than including a list of crimes. Some members noted that the paragraph should leave open the possibility of the emergence of new crimes to which immunity would not apply. Other members questioned the basis in customary international law for the crimes listed by the Special Rapporteur, as well as the grounds for including some crimes and not others conceivably within the same genre. It was also suggested that the draft article, or the commentaries thereto, should provide appropriate definitions of the crimes listed.

121. With regard to subparagraph (a), several members expressed their support for the inclusion of the core crimes of genocide, crimes against humanity and war crimes. Some members noted that torture and enforced disappearance, both listed by the Special Rapporteur, fell within the scope of crimes against humanity. Suggestions were made to add the crimes of slavery, apartheid, terrorism and crimes against global cultural heritage.

122. Members further debated whether the crime of aggression should be included in the draft article. Those arguing in favour of inclusion pointed to the prominence of the crime of aggression under the Nürnberg Principles and its pending activation in the Rome Statute. It was also noted that the implementing legislation of some States provided for domestic prosecution of the crime. Other members agreed with the Special Rapporteur that the crime of aggression should be excluded, for the reasons outlined in the fifth report. It was maintained that prosecution of State officials for the crime of aggression by other States would affect the sovereign equality of States, an issue that would not arise in the case of prosecution before an international court.

123. Commenting on subparagraph (b), a number of members questioned whether State practice supported the inclusion of corruption as a limitation or exception to immunity. It was also noted that the text proposed by the Special Rapporteur left the definition and scope of corruption rather vague. Some members maintained that corruption could not be performed in an official capacity, as it was always done with an eye to private gain. In that regard, it was noted that immunity for corruption had already been excluded on the basis of draft article 6. It was suggested that the subparagraph could be removed and that a reference to corruption could be included in the commentaries.

124. Other members supported the inclusion of the crime of corruption in the text of the draft article, noting that the international community had to cooperate to prevent and punish the crime. It was pointed out that domestic courts had often rejected claims for immunity in corruption cases, that many States legislated to prevent and punish corruption, and that corruption had been the subject of various international and regional conventions.

125. Some members emphasized that corruption seriously affected the functioning of public institutions and the rule of law and could significantly impact the socioeconomic situation of domestic populations. It was suggested that the draft article should focus on “grand” or large-scale corruption. A suggestion was made that the subparagraph could indicate what should happen to the proceeds of the crime of corruption when officials were prosecuted in foreign jurisdictions. It was pointed out that that was a matter of the political will of the States involved, but that ordinarily the funds would have to be returned to the country from which they had been taken.

126. Some members noted that the territorial tort exception, on which subparagraph (c) was modelled, was well established in civil proceedings but not in the criminal sphere. It was pointed out that the authorities cited by the Special Rapporteur mostly referred to civil cases and that the report insufficiently examined its applicability in criminal law. Several members mentioned that the concept remained controversial in international law and that the report left a number of issues open, for example its application to military activities and other public acts. In that regard, it was suggested that the subparagraph be formulated more

narrowly. Several members referred to the definition proposed by the previous Special Rapporteur on the topic. It was also suggested that the scope of the subparagraph be restricted to specific acts contrary to State sovereignty, such as espionage, political assassination and sabotage.

127. Members generally agreed with the substance of paragraph 2, noting that it reflected existing practice. Members recommended that the commentaries should specify that only the troika of Heads of State, Heads of Government and Ministers for Foreign Affairs could enjoy immunity *ratione personae*. It was emphasized that, in line with international jurisprudence, immunity *ratione personae* was without prejudice to the criminal responsibility of those enjoying it. A suggestion was made to indicate that immunity *ratione personae* did not apply before international courts.

128. Some members suggested that paragraph 2 was superfluous and could be deleted. They proposed to specify in paragraph 1 that the limitations and exceptions listed in the draft article only applied to immunity *ratione materiae*. Other members preferred to retain the paragraph to highlight the difference between immunity *ratione personae* and immunity *ratione materiae*. A suggestion was made to align the temporal scope of the application of immunity *ratione personae* and immunity *ratione materiae* with draft articles 4 and 6. Moreover, the view was expressed that immunity *ratione personae* should be restricted, as it could lead to impunity in cases of lifetime rulers.

129. Several members accepted the inclusion of the without-prejudice clause in paragraph 3. It was noted that, contrary to subparagraph (a), the clause should also apply to treaties under which immunity was applicable. With regard to subparagraph (b), some members considered the reference to an "international tribunal" too vague and suggested that the draft article specify whether that referred to international criminal courts and tribunals, or to any international tribunal. The view was expressed that the paragraph remained prejudicial and should be deleted, as it could potentially affect matters subject to ongoing judicial proceedings.

#### (c) Future work

130. Many members expressed their anticipation of the sixth report, which would deal with procedural aspects of immunity. It was suggested that the Special Rapporteur should discuss the relationship between immunity and statutes of limitation for crimes to which no limitations or exceptions applied. Some members noted that the Commission should revisit some of the texts provisionally adopted, for example the definition of "immunity from jurisdiction", in order to determine whether it included questions of inviolability.

### 3. Concluding remarks of the Special Rapporteur

131. In her summary of the debate, the Special Rapporteur expressed her satisfaction with the wide-ranging and interesting discussion that the fifth report had evoked. Responding to some of the criticism on the structure and content of the report, the Special Rapporteur emphasized that all sections of the report were equally relevant to its conclusions. She also noted that it was the substance of the arguments advanced that mattered, not whether she had followed the approach of the previous Special Rapporteur.

132. With regard to the analysis of practice in the fifth report, the Special Rapporteur recalled the various views expressed. She emphasized that the jurisprudence of international courts did not unequivocally exclude the application of limitations and exceptions to immunity *ratione materiae*, as those decisions primarily dealt with State immunity or immunity *ratione personae*. She also stressed the importance of national jurisprudence, which, although it might have been limited and not sufficiently homogeneous, was at the heart of the project. She thanked members for suggesting the addition of international, regional and domestic case law.

133. The Special Rapporteur stated the report's analysis of domestic legislation helped differentiate immunity of State officials from State immunity; highlighted the relative nature of State immunity; and illustrated the use of the "territorial tort exception". She also noted that domestic legislation implementing the Rome Statute could shine a light on the question of immunity of State officials, particularly when it went beyond the requirements

of the Rome Statute. The Special Rapporteur noted that other forms of State practice, such as decisions by prosecutors or diplomatic demarches, were typically not available in the public domain and could thus not be considered as relevant practice.

134. The Special Rapporteur acknowledged the disagreement between members over a possible customary rule or emerging trend towards limitations and exceptions to immunity of State officials. She maintained that the Commission ought to focus on identifying the relevant rules *lex lata* and *lex ferenda* relating to immunity. She did not support the view that the Commission was engaged in crafting "new law" on the issue, as suggested by some members. In that regard, the Special Rapporteur noted that the draft articles, similar to other projects of the Commission, contained elements of both codification and progressive development and that they should be assessed in that light.

135. The Special Rapporteur reiterated her position that the distinction between limitations and exceptions, as set out in the report, helped to illuminate the concept of immunity of State officials and its role within the international legal system. In her view, that approach was not incompatible with the pragmatic formulation of draft article 7, which focused on the situation in which immunity "does not apply"; rather, that formulation avoided a number of controversies relating to the distinction between limitations and exceptions and found its basis in practice.

136. The Special Rapporteur agreed with members that a discussion of the procedural aspects of immunity was of vital importance to the project. She noted, however, that procedural issues went beyond questions of limitations and exceptions, affected the draft articles as a whole and should be dealt with after the Commission had considered the issue of limitations and exceptions to immunity. She pointed out that the previous Special Rapporteur had taken a similar approach and reiterated her offer to hold informal consultations on that matter, in preparation of submission of the sixth report.

137. Turning to specific comments on the draft article proposed in the fifth report, the Special Rapporteur noted that many members were in favour of retaining paragraph 1, although various suggestions for revision of its content had been made. With regard to subparagraph (a), the Special Rapporteur expressed her readiness to include the crime of apartheid, but continued to have reservations regarding the inclusion of other transnational crimes, as the latter were treaty based and did not derive from custom. Moreover, the Special Rapporteur maintained her hesitancy regarding the inclusion of the crime of aggression, as it risked increased politicization of the entire project. For a similar reason, she preferred to maintain a list of specific crimes, rather than including an open, general reference to international crimes. Definitions of the specific crimes could be provided in the commentaries, possibly by reference to existing treaties.

138. The Special Rapporteur noted that the inclusion of corruption in subparagraph (b) remained controversial. She acknowledged that the provision should principally apply to matters of "grand corruption", a term that was to be further specified in the commentaries. She emphasized that, since corruption was always committed for private gain, it could not be considered as an act performed in an official capacity, to which immunity *ratione materiae* would apply. With regard to the "territorial tort exception", as contained in subparagraph (c), the Special Rapporteur maintained that its application was not restricted to the sphere of civil jurisdiction. In its current form, it aimed at addressing major offences, such as sabotage and espionage.

139. The Special Rapporteur also noted the general agreement on paragraph 2, which highlighted that limitations and exceptions did not apply in case of immunity *ratione personae*, a well-established position in practice and doctrine. In her view, the explicit reference to immunity *ratione personae* provided a balance between the principle of sovereign equality and the need to fight impunity, which might be undone were the paragraph deleted. She also expressed her preference for retaining the non-prejudice clauses in paragraph 3, which would facilitate the resolution of any normative conflict between the draft articles and existing international instruments, in particular those relating to international criminal courts and tribunals.

## C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission

### 1. Text of the draft articles

140. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

**Immunity of State officials from foreign criminal jurisdiction**

**Part One**
**Introduction**

**Article 1**
**Scope of the present draft articles**

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

**Article 2**
**Definitions**

For the purposes of the present draft articles:

...

(e) "State official" means any individual who represents the State or who exercises State functions;

(f) an "act performed in an official capacity" means any act performed by a State official in the exercise of State authority;

**Part Two**
**Immunity *ratione personae****

**Article 3**
**Persons enjoying immunity *ratione personae***

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

**Article 4**
**Scope of immunity *ratione personae***

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.

3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

* The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.

## Part Three
## Immunity *ratione materiae**

### Article 5
### Persons enjoying immunity *ratione materiae*

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

### Article 6
### Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

### Article 7
### Crimes under international law in respect of which immunity *ratione materiae* shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

(a) crime of genocide;

(b) crimes against humanity;

(c) war crimes;

(d) crime of *apartheid*;

(e) torture;

(f) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

### Annex

### List of treaties referred to in draft article 7, paragraph 2

Crime of genocide

- Rome Statute of the International Criminal Court, 17 July 1998, article 6;
- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

Crimes against humanity

- Rome Statute of the International Criminal Court, 17 July 1998, article 7.

War crimes

- Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.

Crime of *apartheid*

* The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.

- International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 30 November 1973, article II.

Torture

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984: article 1, paragraph 1.

Enforced disappearance

- International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.

## 2. Text of the draft article, with commentary thereto, provisionally adopted by the Commission at its sixty-ninth session

141. The text of the draft article, and the commentary thereto, provisionally adopted by the Commission at its sixty-ninth session, is reproduced below.

**Part Two**
**Immunity *ratione personae****

…

**Part Three**

**Immunity *ratione materiae****

…

**Article 7**
**Crimes under international law in respect of which immunity *ratione materiae* shall not apply**

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

(a) crime of genocide;

(b) crimes against humanity;

(c) war crimes;

(d) crime of *apartheid*;

(e) torture;

(f) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

**Annex**
**List of treaties referred to in article 7, paragraph 2**

Crime of genocide

- Rome Statute of the International Criminal Court, 17 July 1998, article 6;
- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

Crimes against humanity

- Rome Statute of the International Criminal Court, 17 July 1998, article 7.

* The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.

War crimes

- Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.

Crime of *apartheid*

- International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 30 November 1973, article II.

Torture

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984: article 1, paragraph 1.

Enforced disappearance

- International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.

**Commentary**

(1) Draft article 7 lists crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* shall not apply under the present draft articles. The draft article contains two paragraphs, one that lists the crimes (para. 1) and one that identifies the definition of those crimes (para. 2).

(2) As draft article 7 refers solely to immunity from jurisdiction *ratione materiae*, it is included in Part Three of the draft articles and does not apply in respect of immunity from jurisdiction *ratione personae*, which is regulated in Part Two of the draft articles.

(3) This does not mean, however, that the State officials listed in draft article 3 (Heads of State, Heads of Government and Ministers for Foreign Affairs) will always be exempt from the application of draft article 7. On the contrary, it should be borne in mind that, as the Commission has indicated, Heads of State, Heads of Government and Ministers for Foreign Affairs "enjoy immunity *ratione personae* only during their term of office"[759] and the cessation of such immunity "is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*".[760] In addition, draft article 6, on immunity *ratione materiae*, provides that "[i]ndividuals who enjoyed immunity *ratione personae* ..., whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office".[761] Accordingly, as this residual immunity is immunity *ratione materiae*, draft article 7 will be applicable to the immunity from jurisdiction enjoyed by a former Head of State, a former Head of Government or a former Minister for Foreign Affairs for acts performed in an official capacity during their term of office. Therefore, such immunity will not apply to these former officials in connection with the crimes under international law listed in paragraph 1 of draft article 7.

(4) Paragraph 1 of draft article 7 lists the crimes which, if committed, would prevent the application of such immunity from criminal jurisdiction to a foreign official, even if those crimes had been committed by the official acting in an official capacity during his or her term of office. Thus, draft article 7 complements the normative elements of immunity from foreign criminal jurisdiction *ratione materiae* as defined in draft articles 5 and 6.

(5) The Commission, by a recorded vote, decided to include this draft article for the following reasons. First, it considered that there has been a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of

[759] Draft article 4, paragraph 1. See paragraph (2) of the commentary to draft article 4, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), p. 66.

[760] Draft article 4, paragraph 3. See paragraph (7) of the commentary to draft article 4, *ibid*., p. 70.

[761] Draft article 6, paragraph 3. See paragraphs (9) to (15) of the commentary to draft article 6, *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), pp. 361-363. See also paragraph (4) of the commentary to draft article 5, *ibid*., *Sixty-ninth Session, Supplement No. 10* (A/69/10), p. 237.

certain types of behaviour that constitute crimes under international law. This trend is reflected in judicial decisions taken by national courts which, even though they do not all follow the same line of reasoning, have not recognized immunity from jurisdiction *ratione materiae* in relation to certain international crimes.[762] In rare cases, this trend has also been reflected in the adoption of national legislation that provides for exceptions to immunity *ratione materiae* in relation to the commission of international crimes.[763] This trend has also

[762] See the following cases, which are presented in support of such trend: *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, United Kingdom, 24 March 1999, [1999] UKHL 17, [2000] 1 AC 147; *Re Pinochet*, Belgium, Court of First Instance of Brussels, judgment of 6 November 1998, *International Law Reports* (ILR), vol. 119, p. 349; *In re Hussein*, Germany, Higher Regional Court of Cologne, judgment of 16 May 2000, 2 Zs 1330/99, para. 11 (makes this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office); *Bouterse*, Netherlands, Amsterdam Court of Appeal, judgment of 20 November 2000, *Netherlands Yearbook of International Law*, vol. 32 (2001), pp. 266 *ff*. (although the Supreme Court subsequently quashed the verdict, it did not do so in relation to immunity but because of the violation of the principle of non-retroactivity and the limited scope of universal jurisdiction; see judgment of 18 September 2001, *International Law in Domestic Courts* [ILDC 80 (NL 2001)]); *Re Sharon and Yaron*, Belgium, Court of Cassation, judgment of 12 February 2003, ILR, vol. 127, p. 123 (although the Court granted immunity *ratione personae* to Ariel Sharon, it tried Amos Yaron, who, at the time the acts were committed, was head of the Israeli armed forces that took part in the Sabra and Shatila massacres); *H. v. Public Prosecutor*, Netherlands, Supreme Court, judgment of 8 July 2008, ILDC 1071 (NL 2008), para. 7.2; *Lozano v. Italy*, Italy, Court of Cassation, judgment of 24 July 2008, ILDC 1085 (IT 2008), para. 6; *A. v. Office of the Public Prosecutor of the Confederation*, Switzerland, Federal Criminal Court, judgment of 25 July 2012, BB.2011.140; *FF v. Director of Public Prosecutions* (Prince Nasser case), High Court of Justice, Queen's Bench Division, Divisional Court, judgment of 7 October 2014 [2014] EWHC 3419 (Admin.) (the significance of this ruling lies in the fact that it was issued as a "consent order", that is to say, based on an agreement reached between the plaintiffs and the Director of Public Prosecutions, in which the latter agrees that the charges of torture against Prince Nasser are not covered by immunity *ratione materiae*). In a civil proceeding, the Italian Supreme Court has also asserted that State officials who have committed international crimes do not enjoy immunity *ratione materiae* from criminal jurisdiction (*Ferrini v. Federal Republic of Germany*, Court of Cassation, judgment of 11 March 2004, ILR, vol. 128, p. 674). In *Jones*, although the House of Lords recognized immunity from civil jurisdiction, it reiterated that immunity from criminal jurisdiction is not applicable in the case of torture (*Jones v. Kingdom of Saudi Arabia*, House of Lords, judgment of 14 June 2006 [2006] UKHL 26, [2007] 1 A.C.). Lastly, it should be noted that the Federal High Court of Ethiopia, albeit in the context of a case pursued against an Ethiopian national, affirmed the existence of a rule of international law preventing the application of immunity to a former Head of State accused of international crimes (*Special Prosecutor v. Hailemariam*, Federal High Court, judgment of 9 October 1995, ILDC 555 (ET 1995)). National courts have in some cases tried officials of another State for international crimes without expressly ruling on immunity. This occurred, for example, in the *Barbie* case before the French courts: *Fédération Nationale des Déportés et Internés Résistants et Patriotes and others v. Barbie*, France, Court of Cassation, judgments of 6 October 1983, 26 January 1984 and 20 December 1985, ILR, vol. 78, p. 125; *Fédération Nationale des Déportés et Internés Résistants et Patriotes and others v. Barbie*, Rhone Court of Assizes, judgment of 4 July 1987, ILR, vol. 78, p. 148; and Court of Cassation, judgment of 3 June 1988, ILR, vol. 100, p. 330. Meanwhile, the National High Court of Spain has tried various foreign officials for international crimes without deeming it necessary to rule on immunity, in the *Pinochet*, *Scilingo*, *Cavallo*, *Guatemala*, *Rwanda* and *Tibet* cases. In the *Rwanda* case, however, the National High Court ruled against the prosecution of President Kagame on the grounds that he enjoyed immunity. Similarly, in the *Tibet* case, the National High Court ruled against the prosecution of the then President Hu Jintao; however, following the end of the latter's term as President of China, the Central Court of Investigation No. 2 of the National High Court allowed his prosecution by order of 9 October 2013, claiming that he no longer enjoyed "diplomatic immunity".

[763] In support of this position, attention has been drawn to Organic Act No. 16/2015 of 27 October, on the privileges and immunities of foreign States, the international organizations based in Spain and international conferences and meetings held in Spain, which establishes a separate regime of immunity for Heads of State, Heads of Government and Ministers for Foreign Affairs, according to which, in respect of "acts performed in the exercise of official functions [by the officials in question] during a term in office, genocide, forced disappearance, war crimes and crimes against humanity shall be excluded from immunity" (art. 23, para. 1, *in fine*). Also of interest is Act No. 24488 of Argentina, on foreign State immunity, article 3 of which was excluded by Decree No. 849/95 promulgating the Act, with the result that the Argentine courts may not decline to hear a claim against a State for

been highlighted in the literature, and has been reflected to some extent in proceedings before international tribunals.[764]

violation of international human rights law. Meanwhile, from a far more limited perspective, the United States Foreign Sovereign Immunities Act, as amended by the Torture Victim Protection Act, establishes a "terrorism exception to the jurisdictional immunity of a foreign State" (section 1605A), which makes it possible to exclude the application of immunity for certain types of acts such as torture or extrajudicial executions, provided that they were carried out by officials of a State previously designated by the competent authorities of the United States as a "State sponsor of terrorism". A similar exception is contained in the State Immunity Act of Canada. Lastly, it should be borne in mind that some limitations or exceptions to immunity in relation to international crimes are contained in national legislation concerning such crimes, either in separate laws (see the Belgian Repression of Serious Violations of International Humanitarian Law Act, as amended in 2003; the 2003 International Crimes Act of the Netherlands; or the Criminal Code of the Republic of the Niger, as amended in 2003) or in legislation implementing the Rome Statute of the International Criminal Court. For implementing legislation that establishes a general exception to immunity, see: Burkina Faso, Act No. 50 of 2009 on the determination of competence and procedures for application of the Rome Statute of the International Criminal Court by the jurisdictions of Burkina Faso, arts. 7 and 15.1 (according to which the Burkina Faso courts may exercise jurisdiction with respect to persons who have committed a crime that falls within the competence of the Court, even in cases where it was committed abroad, provided that the suspect is in their territory. Moreover, official status shall not be grounds for exception or reduction of responsibility); Comoros, Act No. 11-022 of 13 December 2011 concerning the application of the Rome Statute, art. 7.2 ("the immunities or special rules of procedure accompanying the official status of a person by virtue of the law or of international law shall not prevent national courts from exercising their competence with regard to that person in relation to the offences specified in this Act"); Ireland, International Criminal Court Act 2006, art. 61.1 ("In accordance with article 27, any diplomatic immunity or state immunity attaching to a person by reason of a connection with a state party to the Statute is not a bar to proceedings under this Act in relation to the person"); Mauritius, International Criminal Court Act 2001, art. 4; South Africa, Act No. 27 of 18 July 2002 implementing the Rome Statute of the International Criminal Court, arts. 4 (2) (a) (i) and 4 (3) (c) (stating that South African courts are competent to prosecute crimes of genocide, crimes against humanity and war crimes when the alleged perpetrator is in South Africa and that any official status claimed by the accused is irrelevant). For implementing legislation that establishes procedures for consultation or limitations only in relation to the duty to cooperate with the International Criminal Court, see: Argentina, Act No. 26200 implementing the Rome Statute of the International Criminal Court, adopted by Act No. 25390 and ratified on 16 January 2001, arts. 40 and 41; Australia, International Criminal Court Act No. 41 of 2002, art. 12.4; Austria, Federal Act No. 135 of 13 August 2002 on cooperation with the International Criminal Court, arts. 9.1 and 9.3; Canada, 1999 Extradition Act, art. 18; France, Code of Criminal Procedure (under Act No. 2002-268 of 26 February 2002), art. 627.8; Germany, Courts Constitution Act, arts. 20.1 and 21; Iceland, 2003 Act on the International Criminal Court, art. 20.1; Ireland, 2006 International Criminal Court Act No. 30, art. 6.1; Kenya, Act No. 16 of 2008 on International Crimes, art. 27; Liechtenstein, Act of 20 October 2004 on cooperation with the International Criminal Court and other international tribunals, art. 10.1 (b) and (c); Malta, Extradition Act, art. 26S.1; Norway, Act No. 65 of 15 June 2001 concerning implementation of the Rome Statute of the International Criminal Court of 17 July 1998 in Norwegian law, art. 2; New Zealand, International Crimes and International Criminal Court Act 2000, art. 31.1; United Kingdom, International Criminal Court Act 2001, art. 23.1; Samoa, Act No. 26 of 2007 on the International Criminal Court, arts. 32.1 and 41; Switzerland, Act on Cooperation with the International Criminal Court, art. 6; and Uganda, Act No. 18 of 2006 on the International Criminal Court, art. 25.1 (a) and (b). Denmark is a special case: its Act of 16 May 2001 on the International Criminal Court (art. 2) attributes the settlement of questions on immunity to the executive branch without defining a specific system for consultations.

[764] The existence of a trend towards limiting immunity for international crimes was noted by Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 88, para. 85. For its part, the European Court of Human Rights, in *Jones and Others v. the United Kingdom*, expressly recognized that there appeared to be "some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture", and that, "in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States" (*Jones and Others v. the United Kingdom*, Applications Nos. 34356/06 and 40528/06, judgment of 2 June 2014, ECHR 2014, paras. 213 and 215).

(6) Second, the Commission also took into account the fact that the draft articles on immunity of State officials from foreign criminal jurisdiction are intended to apply within an international legal order whose unity and systemic nature cannot be ignored. Therefore, the Commission should not overlook other existing standards or clash with the legal principles enshrined in such important sectors of contemporary international law as international humanitarian law, international human rights law and international criminal law. In this context, the consideration of crimes to which immunity from foreign criminal jurisdiction does not apply must be careful and balanced, taking into account the need to preserve respect for the principle of the sovereign equality of States, to ensure the implementation of the principles of accountability and individual criminal responsibility and to end impunity for the most serious international crimes, which is one of the primary objectives of the international community. Striking this balance will ensure that immunity fulfils the purpose for which it was established (to protect the sovereign equality and legitimate interests of States) and that it is not turned into a procedural mechanism to block all attempts to establish the criminal responsibility of certain individuals (State officials) arising from the commission of the most serious crimes under international law.

(7) In the light of the above two reasons, the Commission considers that it must pursue its mandate of promoting the progressive development and codification of international law by applying both the deductive method and the inductive method. It is on this premise that the Commission has included in draft article 7 a list of crimes to which immunity *ratione materiae* shall not apply for the following reasons: (a) they are crimes which in practice tend to be considered as crimes not covered by immunity *ratione materiae* from foreign criminal jurisdiction; and (b) they are crimes under international law that have been identified as the most serious crimes of concern to the international community, and there are international, treaty-based and customary norms relating to their prohibition, including an obligation to take steps to prevent and punish them.

(8) However, some members disagreed with this analysis. First, they opposed draft article 7, which had been adopted by vote, stating that: (a) the Commission should not portray its work as possibly codifying customary international law when, for reasons indicated in the footnotes below, it is clear that national case law,[765] national statutes,[766] and

[765] Those members noted that only nine cases are cited (see footnote 762 above) that purportedly expressly address the issue of immunity *ratione materiae* of a State official from foreign criminal jurisdiction under customary international law, and that most of those cases actually provide no support for the proposition that such immunity is to be denied. For example, in the United Kingdom case of *Regina v. Bow Street Metropolitan Stipendiary Magistrate*, immunity was denied only with respect to acts falling within the scope of a treaty in force that was interpreted as waiving immunity (the Convention against Torture). The German case of *In re Hussein* did not concern any of the crimes listed in draft article 7, and the judgment did not assert, in relation to the hypothesis that the then President Hussein had ceased to hold office, that immunity *ratione materiae* from jurisdiction was not or should not be recognized in that instance. The *Bouterse* case was not upheld by the Netherlands Supreme Court and the reasoning of the lower court on immunity remained an untested *obiter dictum*. The Belgian decision in *Re Sharon and Yaron* was controversial and led the Parliament thereafter to alter Belgian law, resulting in the Court of Cassation affirming a lack of jurisdiction over the case. The same law was at issue in *Re Pinochet* before the Court of First Instance of Brussels. In the case of *Lozano v. Italy*, the foreign State official was accorded, not denied, immunity *ratione materiae*. The case *Special Prosecutor v. Hailemariam* concerned prosecution by Ethiopia of one of its own nationals, not of a foreign State official. Other cases cited concern situations where immunity has not been invoked, or has been waived; they provide no support for the proposition that a State official does not enjoy immunity *ratione materiae* from foreign criminal jurisdiction under customary international law if such immunity is invoked. Further, those members noted that the relevance for the topic of *civil* cases in national courts must be carefully considered; to the extent they are relevant, they tend not to support the exceptions asserted in draft article 7. For example, the case *Ferrini v. Federal Republic of Germany* (see footnote 762 above) was found by the International Court of Justice as to be inconsistent with the obligations of Italy under international law. See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99. In the case of *Jones v. Kingdom of Saudi Arabia* (see footnote 762 above), the House of Lords recognized the immunity of the State official. By contrast, in addition to those cases indicated above, those members pointed to several cases where immunity *ratione materiae* has been invoked and

treaty law[767] do not support the exceptions asserted in draft article 7; (b) the relevant practice showed no "trend", temporal or otherwise, in favour of exceptions to immunity *ratione materiae* from foreign criminal jurisdiction; (c) immunity is a procedural matter and, consequently, (i) it is not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precludes immunity from foreign criminal jurisdiction; (ii) immunity does not depend on the gravity of the act in question or on the fact that such act is prohibited by the peremptory norm of international law; (iii) the issue of immunity must be considered at an early stage of the exercise of jurisdiction, before the case is considered on the merits;[768] (d) the lack of immunity before an international criminal court is not relevant to the issue of immunity from the jurisdiction of national courts; and (e) the establishment of a new system of exceptions to immunity, if not agreed upon by treaty, will likely harm inter-State relations and risks undermining the international community's objective of ending impunity for the most serious international crimes. Furthermore, these members took the view that the Commission, by proposing draft article 7, was conducting a "normative policy" exercise that bore no relation to either the codification or the progressive development of international law. For those members, draft article 7 is a proposal for "new law" that cannot be considered as either *lex lata* or desirable progressive development of international law. Second, those members of the Commission also stressed the difference between procedural immunity from foreign jurisdiction, on the one hand, and substantive criminal responsibility, on the other, and maintained that the recognition of exceptions to immunity was neither required nor necessarily appropriate for achieving the required balance. Rather, in the view of those members, impunity can be avoided in situations where a State official

accepted by national courts in criminal proceedings. See, for example, Senegal, *Prosecutor v. Hissène Habré*, Court of Appeal of Dakar, judgment of 4 July 2000, and Court of Cassation, judgment of 20 March 2001; ILR vol. 125, pp. 571-577 (immunity accorded to former head of State); Germany, *Jiang Zemin*, decision of the Federal Prosecutor General of 24 June 2005, 3 ARP 654/03-2 (same).

766 These members noted that very few national laws addressed the issue of immunity *ratione materiae* of a State official from foreign criminal jurisdiction under customary international law. As acknowledged in the Special Rapporteur's fifth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701), para. 42: "Immunity of the State or of its officials from jurisdiction is not explicitly regulated in most States. On the contrary, the response to immunity has been left to the courts". Of the few national laws that purportedly address such immunity (Burkina Faso, Comoros, Ireland, Mauritius Niger, Spain, South Africa), none support draft article 7 as it is written. For example, the Spanish Organic Act No. 16/2015 of 27 October, art. 23, para. 1, only addresses the immunity *ratione materiae* of former Heads of State, Heads of Government and Ministers for Foreign Affairs. Statutes such as the Repression of Serious Violations of International Humanitarian Law Act, as amended in 2003, of Belgium or the 2003 International Crimes Act of the Netherlands, only provide that immunity shall be denied as recognized under international law, without any further specification. Further, those members observed that national laws implementing an obligation to surrender a State official to the International Criminal Court, arising under the Rome Statute or a decision by the Security Council, are not relevant to the issue of immunity of a State official under customary international law from foreign criminal jurisdiction. Also irrelevant are national laws focused on the immunity of States, such as Act No. 24488 of Argentina, the Foreign Sovereign Immunities Act of the United States, and the State Immunity Act of Canada (further, it was noted that the Foreign Sovereign Immunities Act was not amended by the Torture Victim Protection Act, which has nothing to do with terrorism).

767 These members noted that none of the global treaties addressing specific types of crimes (e.g., genocide, war crimes, *apartheid*, torture, enforced disappearance) contain any provision precluding immunity *ratione materiae* of State officials from foreign criminal jurisdiction, nor do any of the global treaties addressing specific types of State officials (e.g., diplomats, consular officials, officials on special mission).

768 See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 765 above), p. 137, para. 84 ("customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated"); *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 25, para. 60 ("Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law").

is prosecuted in his or her own State; is prosecuted in an international court; or is prosecuted in a foreign court after waiver of the immunity. Asserting exceptions to immunity that States have not accepted by treaty or through their widespread practice risks creating severe tensions, if not outright conflict, among States whenever one State exercises criminal jurisdiction over the officials of another based solely on an allegation that a heinous crime has been committed.

(9) It should be borne in mind that these members also expressed the view that no decision can be taken on the issue of limitations and exceptions to immunity until the Commission has taken a position on the issue of procedural safeguards. This opinion was not, however, accepted by the majority of Commission members, who, while recognizing the importance of clearly defining procedural safeguards to prevent abuse in the exercise of foreign criminal jurisdiction over State officials, took the view that the issue of the crimes to which immunity from jurisdiction *ratione materiae* does not apply can be dealt with separately at the present stage of the Commission's work. Nevertheless, in order to reflect the great importance attached by the Commission to procedural issues in the context of the present topic, it was agreed that the current text of the draft articles should include the following footnote: "At its seventieth session, the Commission will consider the procedural provisions and safeguards applicable to the present draft articles." The footnote marker was inserted after the headings of Part Two (Immunity *ratione personae*) and Part Three (Immunity *ratione materiae*) of the draft articles, since procedural provisions and safeguards may refer to both categories of immunity, and should also be considered in relation to the draft articles as a whole.

*Paragraph 1*

(10) Paragraph 1 (a)-(f) of draft article 7 lists the crimes under international law which, if allegedly committed, would prevent the application of immunity from criminal jurisdiction to a foreign official, even if the official committed those crimes while acting in an official capacity during his or her term of office. The crimes are as follows: the crime of genocide, crimes against humanity, war crimes, the crime of *apartheid*, torture and enforced disappearance.

(11) The chapeau of the draft article uses the phrase "shall not apply" in order to reflect the fact that in both practice and doctrine two different interpretations have been followed with regard to whether or not such crimes are to be considered "acts performed in an official capacity". One view is that the commission of such crimes can never be considered a function of the State and they therefore cannot be regarded as "acts performed in an official capacity". The contrary view holds that crimes under international law either require the presence of a State element (torture, enforced disappearance) or else must have been committed with the backing, express or implied, of the State machinery, so that there is a connection with the State, and such crimes can therefore be considered in certain cases as "acts performed in an official capacity".[769] Although the Commission did not find it necessary to come down in favour of one or the other of these interpretations, it noted that some national courts have not applied immunity *ratione materiae* in the exercise of their criminal jurisdiction in respect of these crimes under international law, either because they do not regard them as an act performed in an official capacity or a characteristic function of the State,[770] or because they take the view that, although crimes under international law may constitute such an act or function, such crimes (by virtue of their gravity or because they

[769] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 765 above), p. 125, para. 60 (discussing *acta jure imperii* in the context of State immunity).

[770] See, for example, the following cases: *Re Pinochet*, Belgium, Court of First Instance of Brussels, judgment of 6 November 1998 (see footnote 762 above), p. 349; *In re Hussein*, Germany, Higher Regional Court of Cologne, judgment of 16 May 2000 (see footnote 762 above), para. 11 (makes this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office). A similar argument has also been used in some cases when the question of immunity has been raised before the civil courts. See, for example, *Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Livadeia (Greece), judgment of 30 October 1997.

contravene peremptory norms) may not give rise to recognition of the perpetrator's immunity from criminal jurisdiction.[771]

(12) Therefore, bearing in mind that, in practice, the same crime under international law has sometimes been interpreted as a limitation (absence of immunity) or as an exception (exclusion of existing immunity), the Commission considered it preferable to address the topic in terms of the effects resulting from each of these approaches, namely, the non-applicability to such crimes of immunity *ratione materiae* from foreign criminal jurisdiction that otherwise might be enjoyed by a State official. The Commission opted for this formulation for reasons of clarity and certainty, in order to provide a list of crimes which, even if committed by a State official, would preclude the possibility of immunity from foreign criminal jurisdiction.

(13) To that end, the Commission used the phrase "immunity ... shall not apply", following, *mutatis mutandis*, the technique once used by the Commission in relation to jurisdictional immunity of the State, when it used the phrase "proceedings in which State immunity cannot be invoked" in a similar context.[772] However, in draft article 7, the Commission decided not to use the phrase "cannot be invoked" in order to avoid the procedural component of that phrase, preferring instead to use the neutral phrase "shall not apply".

(14) The expression "from the exercise of foreign criminal jurisdiction" is included in the chapeau for consistency with the formulation used in draft articles 3 and 5, as provisionally adopted by the Commission.

(15) The expression "crimes under international law" refers to conduct that is criminal under international law whether or not such conduct has been criminalized under national law. The crimes listed in draft article 7 are the crimes of greatest concern to the international community as a whole; there is a broad international consensus on their definition as well as on the existence of an obligation to prevent and punish them. These crimes have been addressed in international treaties and are also prohibited by customary international law.

(16) The expression "crimes under international law" was used previously by the Commission in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[773] and in the 1954 draft Code of

[771] As happened, for example, in the case of *Eichmann*, Israel, Supreme Court, judgment of 29 May 1962, ILR, vol. 36, pp. 309-310. In the *Ferrini* case, the Italian courts based their ruling on both the gravity of the crimes committed and the fact that the conduct in question was contrary to *jus cogens* norms (*Ferrini v. Federal Republic of Germany*, Court of Cassation, judgment of 11 March 2004 (see footnote 762 above), p. 674). In the *Lozano* case, the Italian Court of Cassation based its denial of immunity on the violation of fundamental rights, which have the status of *jus cogens* norms and must therefore take precedence over the rules governing immunity (*Lozano v. Italy*, Italy, Court of Cassation, judgment of 24 July 2008 (see footnote 762 above), para. 6). In *A. v. Office of the Public Prosecutor of the Confederation*, the Federal Criminal Court of Switzerland based its decision on the existence of a customary prohibition of international crimes that the Swiss legislature considers to be *jus cogens*; it also pointed out the contradiction between prohibiting such conduct and continuing to recognize immunity *ratione materiae* that would prevent the launch of an investigation (*A. v. Office of the Public Prosecutor of the Confederation*, Switzerland, Federal Criminal Court, judgment of 25 July 2012 (see footnote 762 above)).

[772] Draft articles on jurisdictional immunities of States and their property, adopted by the Commission at its forty-third session, *Yearbook of the International Law Commission, 1991*, p. 33. The Commission used the phrase cited above as the title of part III of those draft articles and reiterated a variant (the "State cannot invoke") in articles 10 to 17 in the same part. For an explanation of the reasons that led the Commission to use this phrase, see, in particular, paragraph (1) of the general commentary to part III (p. 33) and paragraphs (1) to (5) of the commentary to article 10 (pp. 33-34). The United Nations Convention on Jurisdictional Immunities of States and Their Property, done at New York on 2 December 2004 (General Assembly resolution 59/38, annex), likewise uses the phrase "Proceedings in which State immunity cannot be invoked" in the title of part III and the variant "the State cannot invoke" in articles 10 to 17.

[773] See principle I of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal: "Any person who commits an act which constitutes a

Offences against the Peace and Security of Mankind.[774] In this context, the Commission took the view that the use of the expression "crimes under international law" means that "international law provides the basis for the criminal characterization" of such crimes and that "the prohibition of such types of behaviour and their punishability are a direct consequence of international law".[775] What follows from this is "the autonomy of international law in the criminal characterization" of such crimes[776] and the fact that "the characterization, or the absence of characterization, of a particular type of behaviour as criminal under national law has no effect on the characterization of that type of behaviour as criminal under international law".[777] Accordingly, the use of the expression "crimes under international law" directly links the list of crimes contained in paragraph 1 of draft article 7 to international law and ensures that the definition of such crimes is understood in accordance with international standards, and any definition established under domestic law to identify cases in which immunity does not apply is irrelevant.

(17) The category of crimes under international law includes (a) the crime of genocide, (b) crimes against humanity and (c) war crimes. The Commission included these crimes among the crimes in respect of which immunity does not apply for two basic reasons. First, these are crimes about which the international community has expressed particular concern, resulting in the adoption of treaties that are at the heart of international criminal law, international human rights law and international humanitarian law, and the international courts have emphasized not only the gravity of these crimes, but also the fact that their prohibition is customary in nature and that committing them may constitute a violation of peremptory norms of general international law (*jus cogens*). Second, these crimes arise, directly or indirectly, in the judicial practice of States in relation to cases in which the issue of immunity *ratione materiae* has been raised. Lastly, it should be noted that these three crimes are included in article 5 of the Rome Statute of the International Criminal Court, where they are described as "the most serious crimes of concern to the international community as a whole".[778] Some members noted, however, that the inclusion of those crimes in draft article 7 found little if any support in practice, in national and international jurisprudence or in national legislation.

(18) The Commission decided not to include the crime of aggression at this time, even though it too is included in article 5 of the Rome Statute and is characterized as a crime under the amendments adopted at the Review Conference of the Rome Statute held in Kampala in 2010.[779] The Commission took this decision in view of the nature of the crime of aggression, which would require national courts to determine the existence of a prior act of aggression by the foreign State, as well as the special political dimension of this type of

crime under international law is responsible therefor and liable to punishment" (*Yearbook ... 1950*, vol. II, document A/1316, p. 374).

[774] See article 1 of the draft Code of Offences against the Peace and Security of Mankind adopted in 1954: "Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished" (*Yearbook ... 1954*, vol. II, document A/2693, p. 150). For its part, article 1, paragraph 2, of the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission in 1996 states that: "Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law" (*Yearbook ... 1996*, vol. II (Part Two), p. 17).

[775] See paragraph (6) of the commentary to article 1 of the 1996 draft Code of Crimes against the Peace and Security of Mankind (*Yearbook... 1996*, vol. II (Part Two), p. 17).

[776] *Ibid*., para. (9), p. 18.

[777] *Ibid*., para. (10). It should be borne in mind that the Commission, in commenting on principle I of the Nürnberg principles, had stated that: "The general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law" (*Yearbook ... 1950*, vol. II, document A/1316, p. 374, para. 99).

[778] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, art. 5, para. 1, and preamble, fourth paragraph.

[779] See the definition of aggression in article 8 *bis*, *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010*, publication of the International Criminal Court, RC/9/11, resolution 6, "The crime of aggression" (RC/Res.6).

crime,[780] given that it constitutes a "crime of leaders"; and also in view of the fact that the Assembly of States Parties to the Rome Statute of the International Criminal Court has not taken a decision to activate the Court's jurisdiction over this crime. However, some members stated that the crime of aggression should have been included in paragraph 1 of draft article 7, as it is the most serious of the crimes under international law, it was previously included by the Commission itself in the 1996 draft Code of Crimes against the Peace and Security of Mankind[781] and it is one of the crimes covered by the Rome Statute. Furthermore, a substantial number of States have included the crime of aggression within their national criminal law.[782] Accordingly, they expressed their opposition to the majority decision of the Commission and reserved their position on the matter.

(19) On the other hand, the Commission considered it necessary to include in paragraph 1 of draft article 7 the crimes of (d) *apartheid*, (e) torture and (f) enforced disappearance as separate categories of crimes under international law in respect of which immunity does not apply. Although these crimes are included in article 7 of the Rome Statute under the category of crimes against humanity,[783] the Commission took into account the following elements to consider them as separate crimes. First, the crimes of *apartheid*, torture and enforced disappearance have been the subject of international treaties that establish a special legal regime for each crime for the purposes of prevention, suppression and

[780] In this regard, it should be borne in mind that in the commentaries to the 1996 draft Code of Crimes against the Peace and Security of Mankind, the Commission stated the following: "The aggression attributed to a State is a *sine qua non* for the responsibility of an individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security." (*Yearbook … 1996*, vol. II (Part Two), p. 30, para. (14) of commentary to article 8).

[781] *Ibid*., pp. 42-43 (art. 16).

[782] The following are examples of national legislation that include the crime of aggression: Austria, Criminal Code § 321k, No. 60/1974 of 23 January 1974, as amended by BGBl. I No. 112/2015 of 13 August 2015; Azerbaijan, Criminal Code of 2000, arts. 100-101; Bangladesh, International Crimes (Tribunals) Act, art. 3, International Crimes (Tribunals) Act No. XIX of 1973, as amended by the International Crimes (Tribunals) (Amendment) Act No. LV of 2009 and Act No. XXI of 2012; Belarus, Criminal Code, arts. 122-123, Law No. 275-Z of 9 July 1999 (as amended on 28 April 2015); Bulgaria, Criminal Code, arts. 408-409, *State Gazette*, No. 26 of 2 April 1968, as amended by *State Gazette*, No. 32 of 27 April 2010; Croatia, Criminal Code, arts. 89, 157, *Official Gazette of the Republic of Croatia "Narodne novine",* No. 125/11; Cuba, Criminal Code, arts. 114-115, Código Penal, Ley No. 62 de 29 de diciembre de 1987, modificada por la Ley N° 87 de 16 de febrero de 1999; Ecuador, Criminal Code, art. 88; Estonia, Criminal Code, §§ 91-92; Finland, Criminal Code of Finland, Act No. 39/1889 as amended by Act No. 1718/2015, §§ 4 (a), 4 (b), 14 (a); Germany, Criminal Code, Strafgesetzbuch vom 13. November 1998 (BGBl); Luxembourg, Criminal Code, art. 136; Macedonia, Criminal Code, art. 415; Malta, Criminal Code § 82(C), Criminal Code of the Republic of Malta (1854, as amended 2004); Republic of Moldova, Criminal Code of the Republic of Moldova, arts. 139-140, adopted by Law No. 985-XV on 18 April 2002 (as amended 2009); Mongolia, Criminal Code of Mongolia (2002), art. 297; Montenegro, Criminal Code, art. 442, *Official Gazette of the Republic of Montenegro*, No. 70/2003, Correction, No. 13/2004; Paraguay, Codigo Penal de la Republica del Paraguay, art. 271, Ley No. 1.160/97; Poland, Criminal Code, art. 17, Law of 6 June 1997; Russia, Criminal Code, The Criminal Code of the Russian Federation, arts. 353-354, Federal Law No. 64-FZ of 13 June 1996 (as amended); Samoa, International Criminal Court Act 2007, as amended by Act 2014, § &A, No. 23; Slovenia, Criminal Code of 2005, arts 103 and 105; Tajikistan, Criminal Code of the Republic of Tajikistan, art. 395-396; Timor-Leste Criminal Code of the Democratic Republic of Timor-Leste, Decree Law No. 19/2009, art. 134. See, for discussion, A. Reisinger Coracini, "National legislation on individual criminal responsibility for conduct amounting to aggression' in *International Criminal Justice: Law and Practice from the Rome Statute to Its Review National Legislation on Individual Responsibility for Conduct Amounting to Aggression*, R. Bellelli, ed. (Abingdon and New York, Routledge, 2016).

[783] Rome Statute, art. 7, para. 1, subparas. (j), (f) and (i), respectively.

punishment,[784] which imposes specific obligations on States to take certain measures in their domestic legislation, including the obligation to define such crimes in their national criminal legislation and to take the necessary measures to ensure that their courts are competent to try such crimes.[785] It should be added that the treaties in question establish systems of international cooperation and judicial assistance between States.[786] Second, the Commission also noted that the crimes of *apartheid*, torture and enforced disappearance are subject under the Rome Statute to a specific threshold that is defined as the commission of such crimes "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack",[787] which, however, does not exist in the instruments specifically related to these crimes. Third, the Commission observed that the conventions against torture and enforced disappearance expressly establish that such acts can only be committed by State officials or at their instigation or with their support or acquiescence.[788] In addition, the Commission took into account the fact that, in many cases, when national courts have dealt with these crimes in relation to immunity, they have done so by treating them as separate crimes. The treatment of torture is a good example of this.[789] Some members noted, however, that the inclusion of those crimes in draft article 7 found little if any support in practice, in national and international jurisprudence or in national legislation.

(20) While some members of the Commission suggested that the list should include other crimes such as slavery, terrorism, human trafficking, child prostitution and child pornography, and piracy, which are also the subject of international treaties that establish special legal regimes for each crime for the purposes of prevention, suppression and punishment, the Commission decided not to include them. In doing so, it took into account the fact that these crimes either are already covered by the category of crimes against humanity or do not fully correspond to the definition of crimes under international law *stricto sensu*, being more correctly described in most cases as transnational crimes. In addition, such crimes are usually committed by non-State actors and are not reflected in national judicial practice relating to immunity from jurisdiction. In any event, the non-inclusion of other international crimes in draft article 7 should not be taken to mean that the Commission underestimates the seriousness of such crimes.

(21) Lastly, it should be noted that the Commission did not include in draft article 7, paragraph 1, the crimes of corruption or crimes affected by the so-called "territorial tort

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[784] See the International Convention on the Suppression and Punishment of the Crime of *Apartheid* (New York, 30 November 1973), United Nations, *Treaty Series*, vol. 1015, No. 14861, p. 243; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), *ibid*., vol. 1465, No. 24841, p. 85 (hereinafter "Convention against Torture"); and the International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), *ibid*., vol. 2716, No. 48088, p. 3.

[785] International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. IV; Convention against Torture, arts. 4 to 6; International Convention for the Protection of All Persons from Enforced Disappearance, arts. 4, 6 and 9.

[786] International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. XI; Convention against Torture, arts. 6-9; International Convention for the Protection of All Persons from Enforced Disappearance, arts. 10, 11, 13 and 14.

[787] Rome Statute, art. 7, para. 1. The definition of the threshold is contained in article 7, paragraph 2 (a).

[788] Convention against Torture, art. 1, para. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 2.

[789] As in the case, for example, of the United Kingdom, where cases relating to immunity from jurisdiction *ratione materiae* which raised the question of the non-applicability of such immunity to acts of torture have been based on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, United Kingdom, 24 March 1999 (see footnote 762 above); *FF v. Director of Public Prosecutions* (Prince Nasser case), High Court of Justice, Queen's Bench Division, Divisional Court, judgment of 7 October 2014 (see footnote 762 above). The Convention against Torture also served as the basis of a matter related to immunity from civil jurisdiction: *Jones v. Saudi Arabia*, House of Lords, judgment of 14 June 2006 (see footnote 762 above).

exception" proposed by the Special Rapporteur.[790] This does not mean, however, that the Commission considers that immunity from foreign criminal jurisdiction *ratione materiae* should apply to these two categories of crimes.

(22) With regard to corruption (understood as "grand corruption"), several members of the Commission pointed out that crimes of corruption are especially serious as they directly affect the interests and stability of the State, the well-being of its population and even its international relations. Consequently, those members were in favour of including an exception to immunity *ratione materiae*. However, other members of the Commission argued that, while the seriousness of the crime of corruption cannot be called into question, its inclusion in draft article 7 posed a problem, related essentially to the general nature of the term "corruption" and the wide range of acts that can be included in this category, as well as the fact that, in their view, treaty practice and case law do not provide sufficient grounds for including such crimes among the limitations and exceptions to immunity. Other members questioned whether corruption met the test of gravity of the other crimes listed in draft article 7. Lastly, several members of the Commission pointed out that corruption cannot under any circumstances be regarded as an act performed in an official capacity and therefore need not be included among the crimes for which immunity does not apply.

(23) Especially in view of that last argument, the Commission decided not to include crimes of corruption in draft article 7, on the grounds that they do not constitute "acts performed in an official capacity", but are acts carried out by a State official solely for his or her own benefit.[791] Although some members of the Commission pointed out that the involvement of State officials in such acts cannot be ignored, because it is precisely their official status that facilitates and makes possible the crime of corruption, some members of the Commission took the view that the fact that the crime is committed by an official does not change the nature of the act, which remains an act performed for the official's own benefit even if the official uses State facilities that might give the act a semblance of official status. Accordingly, since the normative element contained in draft article 6, paragraph 1, does not apply to the crime of corruption, several members of the Commission took the view that immunity from jurisdiction *ratione materiae* does not exist in relation to the crime of corruption and therefore the latter does not need to be included in the list of crimes for which immunity does not apply.[792]

(24) The Commission also considered the case of other crimes committed by a foreign official in the territory of the forum State without that State's consent to both the official's presence in its territory and the activity carried out by the official that gave rise to the commission of the crime (territorial exception). This scenario differs in many respects from the crimes under international law included in paragraph 1 of draft article 7 or the crime of corruption. Although the view was expressed that immunity could exist in these circumstances and the exception should not be included in draft article 7 because there was insufficient practice to justify doing so, the Commission decided not to include it in the draft article for other reasons. The Commission considers that certain crimes,[793] such as murder, espionage, sabotage or kidnapping, committed in the territory of a State in the aforementioned circumstances are subject to the principle of territorial sovereignty and do not give rise to immunity from jurisdiction *ratione materiae*, and therefore there is no need to include them in the list of crimes for which this type of immunity does not apply. This is without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, as set forth in draft article 1, paragraph 2.

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[790] See the Special Rapporteur's fifth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701), paras. 225-234.

[791] In the same vein, see paragraphs (3) and (5) of the commentary to draft article 2 (f), dealing with the definition of an "act performed in an official capacity", *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), pp. 354-355.

[792] *Ibid*., para. (13), p. 358.

[793] Referring to an exception in the context of State immunity, see *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)* (see footnote 765 above).

*Paragraph 2 and annex*

(25) Paragraph 2 of draft article 7 establishes a link between paragraph 1 of the article and the annex to the draft articles, entitled "List of treaties referred to in draft article 7, paragraph 2". While the concept of "crimes under international law" and the concepts of "crime of genocide", "crimes against humanity", "war crimes", "crime of *apartheid*", "torture" and "enforced disappearance" belong to well established categories in contemporary international law, the Commission is mindful that the fact that draft article 7 refers to "crimes" means that the principle of legal certainty characteristic of criminal law must be preserved and tools must be provided to avoid subjectivity in identifying what is meant by each of the aforementioned crimes.

(26) However, the Commission did not consider it necessary to define the crime of genocide, crimes against humanity, war crimes, the crime of *apartheid*, torture and enforced disappearance, as this is not part of its mandate within the framework of the present draft articles. On the contrary, the Commission found it preferable to simply identify the treaty instruments that define the aforementioned categories, for inclusion in a list that will enable legal practitioners to act with greater certainty in applying draft article 7. The outcome of this exercise is the list contained in the annex to the draft articles.

(27) As indicated in paragraph 2 of draft article 7, the linkage of each crime with the treaties listed in the annex is only for the purposes of draft article 7 on the immunity of State officials from foreign criminal jurisdiction, in order to identify the definitions of the crimes listed in paragraph 1 of the article without assuming or requiring that States must be parties to those instruments.

(28) On the other hand, it should be borne in mind that the listing of certain treaties has no effect on the customary nature of these crimes, as recognized under international law, or on the specific obligations that may arise from those treaties for States parties. Similarly, the inclusion of only some of the treaties that define the crimes in question has no effect on other treaties that define or regulate the same crimes, whose definitions and legal regimes remain intact for States parties in their application of those treaties. In conclusion, the reference to a specific treaty for the definition of each of the crimes listed in paragraph 1 of draft article 7 is included for reasons of convenience and appropriateness and solely for the purposes of draft article 7 and in no way affects the other rules of customary or treaty-based international law that refer to such crimes and that contain legal regimes of general scope for each of them.

(29) The choice of treaties whose articles are included in the annex to provide a definition of the various crimes under international law was based on three fundamental criteria: (a) the desire to avoid possible confusion when several treaties use different language to define the same crime; (b) the selection of treaties that are universal in scope; and (c) the selection of treaties providing the most up-to-date definitions available.

(30) Genocide was defined for the first time in the Convention on the Prevention and Punishment of the Crime of Genocide[794] and its definition has remained constant in contemporary international criminal law, notably in the statute of the International Tribunal for the Former Yugoslavia (art. 4),[795] the statute of the International Criminal Tribunal for Rwanda (art. 2)[796] and, in particular, the Rome Statute of the International Criminal Court, article 6 of which reproduces the definition contained in the Convention on the Prevention and Punishment of the Crime of Genocide. For its part, the Commission defined genocide in article 17 of the 1996 draft Code of Crimes against the Peace and Security of Mankind.[797] For the purposes of the present draft articles, the Commission has included in the annex both the Rome Statute (art. 6) and the Convention on the Prevention and Punishment of the

[794] Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277, art. II.

[795] Security Council resolution 827 (1993), annex.

[796] Security Council resolution 955 (1994), annex.

[797] *Yearbook ... 1996*, vol. II (Part Two), p. 44.

Crime of Genocide (art. II), given that the wording used in the two instruments is practically identical and has the same meaning.

(31) With regard to crimes against humanity, it should be recalled that some international treaties have identified certain behaviours as "crimes against humanity"[798] and that international courts have ruled on the customary nature of this category of crimes. The statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Criminal Tribunal for Rwanda (art. 3) have also defined this crime. The Commission itself defined this category of crimes in the 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 18).[799] However, the Rome Statute was the first instrument to define this category of crimes separately and comprehensively. For this reason, the Commission considered that article 7 of the Rome Statute should be taken as the definition of crimes against humanity for the purposes of the present draft article. This is consistent with the decision taken earlier by the Commission on the draft articles on crimes against humanity, draft article 3 of which reproduces the definition of this category of crimes contained in article 7 of the Rome Statute.[800]

(32) The concept of war crimes has a long tradition that was originally associated with treaties on international humanitarian law. The Geneva Conventions of 12 August 1949 for the protection of war victims and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), define that category of crimes as "grave breaches".[801] War crimes were defined in the statute of the International Tribunal for the Former Yugoslavia (arts. 2 and 3) and the statute of the International Criminal Tribunal for Rwanda (art. 4), as well as by the Commission itself in the 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 20).[802] The latest definition of war crimes is contained in article 8, paragraph 2, of the Rome Statute, which draws on previous experience and refers comprehensively to war crimes committed in both international and internal armed conflicts, as well as to crimes recognized on the basis of treaties and customary law. For the purposes of the present draft article, the Commission decided to retain the definition contained in article 8, paragraph 2, of the Rome Statute, as the most up-to-date version of the definition of this category of crimes. This does not imply, however, that the importance of the Geneva Conventions of 1949 and the Additional Protocol thereto in relation to the definition of war crimes should be overlooked.

(33) The crime of *apartheid* was defined for the first time in the International Convention on the Suppression and Punishment of the Crime of *Apartheid* of 30 November 1973, which, although it describes *apartheid* as a crime against humanity and a crime under international law (art. I), contains a detailed and separate definition of the crime of *apartheid* (art. II). For this reason, the Commission decided to retain the definition in the 1973 Convention for the purposes of the present draft article.

(34) Torture is defined as a violation of human rights in all the relevant international instruments. Its characterization as prohibited conduct liable to criminal prosecution is

[798] International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. I; International Convention for the Protection of All Persons from Enforced Disappearance, preamble, fifth paragraph.

[799] *Yearbook… 1996*, vol. II (Part Two), p. 47.

[800] See *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), pp. 56-58, article 3 and paragraph (3) of the commentary thereto.

[801] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), art. 51; Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 130; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 147 (United Nations, *Treaty Series*, vol. 75, Nos. 970-973); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (Geneva, 8 June 1977), art. 85 (*ibid*., vol. 1125, No. 17512, p. 3).

[802] *Yearbook … 1996*, vol. II (Part Two), pp. 53-54.

found for the first time in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which defines it as a separate crime in article 1, paragraph 1. This definition includes, moreover, the significant requirement that an act cannot be characterized as torture unless it is carried out by or at the instigation of or with the consent of public officials, which places this crime squarely within the scope of the present draft articles. A similar definition is contained in the Inter-American Convention to Prevent and Punish Torture (arts. 2 and 3).[803] The Commission considers that, for the purposes of the present draft article, torture is to be understood in accordance with the definition in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(35) The enforced disappearance of persons was defined for the first time in the Inter-American Convention on Forced Disappearance of Persons, of 9 June 1994 (art. II).[804] The International Convention for the Protection of All Persons from Enforced Disappearance, of 20 December 2006, also defines this crime (art. 2). As in the case of torture, this definition requires that the act be carried out by or at the instigation of or with the consent of public officials, which places this crime squarely within the scope of the present draft articles. The Commission therefore considers that, for the purposes of the present draft article, the definition of enforced disappearance should be understood in accordance with article 2 of the 2006 Convention.

[803] Inter-American Convention to Prevent and Punish Torture (Cartagena, Colombia, 9 December 1985), Organization of American States, *Treaty Series*, No. 67.

[804] Inter-American Convention on Forced Disappearance of Persons (Belem, Brazil, 9 June 1994), Organization of American States, *Official Records*, OEA/Ser.A/55.

result was a text that broadly resembles the final version of article 17.[23] It was preceded by a strange text box which indicated that it did not represent any agreement, yet there were no competing proposals. Consensus gradually consolidated around the text, as it underwent minor adjustments in the Zutphen draft[24] and the final version adopted by the Preparatory Committee at the conclusion of its work in April 1998.[25]

At the Rome Conference, the Coordinator introduced the debate with a review of the work in the Preparatory Committee:

> Article 15, entitled 'Issues of admissibility', was the result of extensive discussions in the Preparatory Committee on the Establishment of an International Criminal Court concerning the principle of complementarity. In those discussions, virtually all States had indicated the importance which they attached to the inclusion of the principle of complementarity in the Statute—the principle that the primary obligation for the prosecution of crimes falling within the jurisdiction of the Court lay with States themselves. Also, most delegations had been of the view that, when States were unable or unwilling to fulfil that obligation, the Court should have jurisdiction to intervene. The idea was not that the Court should serve as an appellate body or a court of last resort for national legal systems. Where States assumed their obligations, the Court had no role; only where there was a failure due to inability or unwillingness was the Court engaged. Paragraph 1 of the article set out the basic approach, namely that the Court would determine that a case was inadmissible if it was being investigated or prosecuted by a State, or had been investigated and a decision not to proceed had been taken by the State, or the person concerned had already been tried, or the case was not of sufficient gravity. Subparagraphs *(a)* and *(b)* contained the exceptions where the Court could declare a case admissible, that is, if the State was unwilling or unable to carry out the investigation or its decision not to prosecute was based on its unwillingness or inability to prosecute. The terms 'unwillingness' and 'inability' were defined in paragraphs 2 and 3 respectively.[26]

The ensuing debate showed the provision to be broadly acceptable.[27] An 'alternative approach' that had been included in the Preparatory Committee draft, whereby the Court would be without jurisdiction 'where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it',[28] received very modest support[29] and was not retained. There were also complaints that the criteria for determining inability were too subjective.[30] Some slight changes by Mexico[31] received support,[32] and were accepted, but the text adopted by the Preparatory Committee

[23] UN Doc. A/AC.249/1997/WG.3/CRP.2; Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997, UN Doc. A/AC.249/1997/L.8/Rev.1, pp. 10–11.

[24] Zutphen Report, pp. 41–3.

[25] Preparatory Committee Draft Statute, pp. 40–2. For a detailed account of the drafting of article 17 by the diplomat who coordinated the negotiations in the Preparatory Committee and at the Rome Conference, see: John T. Holmes, 'The Principle of Complementarity', in Lee, *The Making of the Rome Statute*, pp. 41–78.

[26] UN Doc. A/CONF.183/C.1/SR.11, para. 19.

[27] Ibid., paras 25 (United States), 28 (Belgium), 30 (Portugal), 34 (United Kingdom), 35 (Senegal), 36 (Australia), 38 (Philippines), 39 (Germany), 40 (Finland), 42 (Israel), 43 (Venezuela), 46 (Poland); UN Doc. A/CONF.183/C.1/SR.12, paras 2 (Japan), 12 (Republic of Korea), 16 (Switzerland), 17 (Jordan), 18 (Singapore), 21 (Norway), 26 (Italy), 28 (Turkey), 31 (Slovenia), 33 (Botswana), 34 (Austria), 36 (New Zealand), 37 (Netherlands), 40 (Thailand), 42 (Vietnam), 46 (Costa Rica).

[28] Preparatory Committee Draft Statute, p. 42.

[29] UN Doc. A/CONF.183/C.1/SR.12, paras 1 (Iran), 5 (Indonesia), 6 (Syria), 48 (Oman), 49 (Iran).

[30] Ibid., paras 9 (China), 10 (India), 22 (Nigeria).

[31] Mexico: revised proposals regarding articles 12*bis*, 15, and 108, UN Doc. A/CONF.183/C.1/L.14/Rev.1.

[32] UN Doc. A/CONF.183/C.1/SR.12, paras 3 (Cuba), 6 (Syria), 9 (China), 11 (Angola), 19 (Brazil), 23 (Egypt).

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# INTERNATIONAL LAW IMMUNITIES AND THE INTERNATIONAL CRIMINAL COURT

*By Dapo Akande*[*]

The tension between the protection of human rights and the demands of state sovereignty is reflected in the debate on whether state officials should be held responsible in external fora for international crimes committed while in office. This debate involves the interplay between two branches of international law. Firstly, there is the well-established law according immunities to the state and its agents from the jurisdiction of other states (state and diplomatic immunities). This law proceeds from notions of sovereign equality and is aimed at ensuring that states do not unduly interfere with other states and their agents.[1] On the other hand, there are those newer principles of international law that are based on humanitarian values and define certain types of conduct as crimes under international law (international criminal law).[2] One of the challenges in this latter area has been to develop international and national mechanisms by which individuals who commit these crimes may be held responsible. Since states often fail to institute domestic prosecution of their own officials and agents alleged to have committed international crimes, renewed attention has been paid to the possibility of subjecting state agents to prosecution in foreign domestic courts or in international courts. For such prosecution in foreign domestic courts to take place, it will usually have to be shown (1) that those courts have jurisdiction over crimes committed abroad by foreigners against foreigners (i.e., universal or quasi-universal jurisdiction), and (2) that such jurisdiction extends to state agents (i.e., that international law immunities are unavailable). Recent years have seen a significant increase in attempts to institute prosecutions for alleged international crimes in the national courts of states other than that where the acts occurred.[3] However, it has not proved easy to establish the two propositions identified above. Indeed, it has become apparent that the views that states possess universal jurisdiction over international crimes committed abroad and that incumbent and former state officials are subject to foreign domestic prosecution for such crimes are by no means universally held.[4]

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[1] For surveys of this body of law, see EILEEN DENZA, DIPLOMATIC LAW (1998); HAZEL FOX, THE LAW OF STATE IMMUNITY (2002); James Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions*, 1983 BRIT. Y.B. INT'L L. 75.

[2] For surveys of this body of law, see ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2003); Antonio Cassese, *International Criminal Law*, *in* INTERNATIONAL LAW 720 (Malcolm D. Evans ed., 2003).

[3] For surveys of domestic prosecutions relying on universal jurisdiction, see LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (2003); Committee on International Human Rights Law and Practice, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, *in* 69 INTERNATIONAL LAW ASSOCIATION, CONFERENCE REPORT 403, 424–43 (2000), *available at* <http://www.ila-hq.org/html/layout_committee.htm>.

[4] In three recent ICJ proceedings, states have challenged both of these principles. Certain Criminal Proceedings in France (Rep. Congo v. Fr.), Request for Provisional Measures (June 17, 2003), 42 ILM 852 (2003); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) (Feb. 14, 2002), 41 ILM 536 (2002) [hereinafter Arrest Warrant];



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This article primarily addresses the extent to which international law immunities may be relied on to prevent prosecution by the International Criminal Court (ICC) of state officials. However, the article considers as a preliminary matter whether state officials accused of committing international crimes in their home state are immune from the criminal jurisdiction of other states. Consideration of the position in national jurisdictions is necessary for two reasons. Firstly, despite the creation of the ICC, the majority of prosecutions for international crimes are expected to take place in domestic courts. This is not only because the ICC has not, as yet, achieved universal acceptance,[5] but because of the complementarity provisions of the Rome Statute of the ICC.[6] Under those provisions, the ICC may not exercise jurisdiction in cases in which a state is willing to investigate or prosecute a person or has genuinely done so. Therefore, the jurisdiction of the ICC supplements national jurisdictions. Secondly, because the ICC has no independent powers of arrest, it must depend on states to arrest and surrender suspects. Where those suspects are serving or former state officials present in the territory of another state, they might be entitled under international law to immunity from the jurisdiction of the latter state. In such circumstances, the "host" state must examine whether that immunity prevents it from arresting and surrendering the suspect to the ICC.

Since this article is devoted to examining the application of international immunities in criminal proceedings, it does not specifically address questions of immunity arising in civil proceedings instituted abroad against foreign states and foreign officials accused of human rights violations. Since the famous *Filartiga* case,[7] a significant amount of such civil litigation has been pursued in the courts of the United States under the Alien Tort Claims Act of 1789 (28 U.S.C. §1350 (2000)) and the Torture Victim Protection Act of 1991 (28 U.S.C. §1350 note (2000)),[8] as well as in the courts of other states.[9] Because the theories that have been proposed by some writers and judges in order to remove the immunity of states and state officials in civil proceedings also apply to criminal proceedings, some of what is said in this article will be relevant to these civil cases.

Part I introduces the different types of immunity available to state officials when abroad by setting out the distinction between immunity *ratione personae* and immunity *ratione materiae*. Brief consideration is given to the application of state and diplomatic immunities in foreign domestic prosecutions for international crimes. It is argued that while immunity *ratione personae* subsists in cases concerning international crimes, developments in international law mean that the reasons for the application of immunity *ratione materiae* do not hold in prosecutions for international crimes.

Part II examines whether international law immunities may be pleaded before international tribunals. It is argued that despite the fact that immunities are primarily designed for horizontal interstate relationships, there are important reasons of principle and policy for recognizing that international immunities may also be pleaded before international tribunals.

and Liberia's application instituting proceedings against Sierra Leone in respect of the indictment by the Special Court for Sierra Leone of the Liberian head of state, ICJ Press Release 2003/26 (Aug. 5, 2003), *available at* <http://www.icj-cij.org>.

[5] By May 3, 2004, ninety-four states were parties to the ICC Statute. *See* <http://www.icc-cpi.int/statesparties.html>.

[6] Rome Statute of the International Criminal Court, July 17, 1998, Arts. 17–20, UN Doc. A/CONF.183/9*, 37 ILM 1002 (1998), *corrected through Jan. 16, 2002, at* <http://www.icc-cpi.int/> [hereinafter ICC Statute]. For an analysis of these provisions, see John T. Holmes, *Complementarity: National Courts Versus the ICC, in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667 (Antonio Cassese, Paola Gaeta, & John R. W. D. Jones eds., 2002) [hereinafter THE ROME STATUTE]; Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUST. 86 (2003).

[7] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), 77 ILR 192.

[8] *See* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN UNITED STATES COURTS (1996); Anne-Marie Burley, *The Alien Tort Claims Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AJIL 461 (1997); Roger O'Keefe, *Civil Actions in US Courts in Respect of Human Rights Abuses Committed Abroad: Would the World's Oppressors Be Wise to Stay at Home?* 9 AFR. J. INT'L & COMP. L. 15 (1997).

[9] *See, e.g.*, Al-Adsani v. Kuwait, 107 ILR 536 (C.A. 1996) (Eng.); Jones v. Ministry of the Interior (Kingdom of Saudi Arabia), No. HQ 02X01805 (Q.B. July 30, 2003), *at* <http://www.redress.org/Briefs/Judgment.pdf>.

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However, whether or not those immunities are available in practice depends on the text of the instrument creating the tribunal and on whether the state of the official is bound by that instrument.

Finally, Part III examines the application of immunities in proceedings initiated by the ICC. This part analyzes the tension between the two provisions of the ICC Statute dealing with immunities (Arts. 27 and 98). It considers whether Article 98(1)—which directs the Court not to proceed with a request for arrest or surrender of a person where such a request would require the requested state to violate the immunities international law accords to that person—may be relied on both by parties to the ICC Statute and by nonparties. Similar consideration is given to Article 98(2) of the ICC Statute, which requires the Court not to request an arrest or surrender where this would compel the requested state to violate an agreement precluding surrender to the Court. Although it may be claimed that even states parties may rely on the provisions of Article 98, it is argued that the better view is that only nonparties may benefit from them because this view alone gives meaningful effect to Article 27 and to the objects and purposes of the Statute.

## I. State and Diplomatic Immunities in National Proceedings Concerning International Crimes

It is commonly accepted that state officials are immune in certain circumstances from the jurisdiction of foreign states.[10] These immunities are derived, firstly, from the customary international law of state immunity—which is concerned with preventing states from exercising control over the public acts of other states. Secondly, under customary international law and applicable treaties, diplomatic agents of states are entitled to immunity from the criminal and civil jurisdiction of the foreign state to which they are accredited.[11] While some officials enjoy broad immunity because of their status or office (immunity *ratione personae*), the immunity of others relates only to acts performed in their official capacity (immunity *ratione materiae*). This part briefly examines the rationale underpinning the conferment of these immunities, as well as their scope. In particular, it will be considered whether these immunities remain applicable in criminal proceedings alleging that an official or diplomat has committed a crime under international law.[12]

### *Immunity* Ratione Personae *(Immunity Attaching to an Office or Status)*

The first type of immunity applicable to certain state officials is immunities which attach to a particular office and are possessed only as long as the official is in office ("personal immunity" or "immunity *ratione personae*"). These immunities are limited to a small group of senior state officials, especially heads of state, heads of government, and foreign ministers.[13] They also apply to diplomats and other officials on special mission in foreign states.[14] These immunities are conferred on officials with primary responsibility for the conduct of the international

[10] *See generally* FOX, *supra* note 1, at 352–60 & ch. 10; Mizushima Tomonori, *The Individual as Beneficiary of State Immunity: Problems of the Attribution of* Ultra Vires *Conduct*, 29 DENV. J. INT'L L. & POL'Y 261 (2001); Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 RECUEIL DES COURS 13 (1994 III); C. A. Whomersley, *Some Reflections on the Immunity of Individuals for Official Acts*, 41 INT'L & COMP. L.Q. 848 (1992); Chanaka Wickremasinghe, *Immunities Enjoyed by Officials of States and International Organizations, in* INTERNATIONAL LAW, *supra* note 2, at 387.

[11] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, Arts. 29, 31, 23 UST 3227, 500 UNTS 95 [hereinafter VCDR].

[12] The issues considered in this part are more extensively explored by this writer elsewhere. *See* Dapo Akande, International Immunities in Respect of Human Rights Violations and International Crimes: Why the Difference Between Civil and Criminal Proceedings? (manuscript under preparation).

[13] *See* Watts, *supra* note 10.

[14] VCDR, *supra* note 11, Arts. 29 & 31; United Nations Convention on Special Missions, Dec. 8, 1969, 1400 UNTS 231.

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relations of the state, and stem from the recognition that the smooth conduct of international relations and international cooperation requires an effective process of communication between states.[15] The effectiveness of this process of communication and cooperation in turn requires that the state agents charged with the conduct of international relations be able to travel freely in order to perform their functions without the fear or possibility of harassment by other states.[16] Thus, these immunities are necessary for the maintenance of a system of peaceful cooperation and coexistence among states.[17] As the International Court of Justice (ICJ) has pointed out, there is "no more fundamental prerequisite for the conduct of relations between States . . . than the inviolability of diplomatic envoys and embassies."[18]

Since heads of states, diplomats, and other officials accorded immunity *ratione personae* will be hindered in the exercise of their functions if they are arrested and detained while in a foreign state, these officials are absolutely immune from the criminal jurisdiction of the foreign state. In the *Arrest Warrant* case, the ICJ held that this type of immunity applies not only in relation to the official acts of this limited group of senior officials, but also in relation to private acts.[19] For the same reason, the immunity applies whether or not the act in question was done at a time when the official was in office or before entry into office.[20] Consequently, the issuance and circulation of an arrest warrant, not to speak of the actual arrest and prosecution of these senior officials, would constitute a violation of international law.[21] However, because immunity *ratione personae* is conferred so as to permit free exercise of diplomatic functions, it attaches only for as long as the person is in office.

The ICJ has confirmed that the absolute nature of the immunity from criminal process accorded to a serving foreign minister subsists even when it is alleged that he or she has committed an international crime and applies even when the foreign minister is abroad on a private visit.[22] The Court stated that "[i]t has been unable to deduce . . . that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."[23]

This principle—which must be taken as applying to all those serving senior state officials and diplomats possessing immunity *ratione personae*[24]—has been justified on the ground that an

[15] *See* Wickremasinghe, *supra* note 10, at 389.

[16] See Michael A. Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651, 656 (2002), who states:

> Head-of-state immunity allows a nation's leader to engage in his official duties, including travel to foreign countries, without fearing arrest, detention, or other treatment inconsistent with his role as the head of a sovereign state [footnote omitted]. Without the guarantee that they will not be subjected to trial in foreign courts, heads of state may simply choose to stay at home rather than assume the risks of engaging in international diplomacy abroad.

The same may be said of others entitled to immunity *ratione personae.*

[17] *See* Arrest Warrant, *supra* note 4, Joint Separate Opinion of Judges Higgins, Kooijmans & Buergenthal, para. 75 (stating that "immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system"); *see also* FOX, *supra* note 1, at 427.

[18] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Merits, 1980 ICJ REP. 3, para. 91 (May 24) (quoting United States Diplomatic and Consular Staff in Tehran, Provisional Measures, 1979 ICJ REP. 7, para. 38 (Dec. 15)).

[19] Arrest Warrant, *supra* note 4, para. 54; FOX, *supra* note 1, at 441. See also the treaty provisions cited *supra* note 14.

[20] Arrest Warrant, *supra* note 4, paras. 54–55.

[21] *Id.*, paras. 55, 70–71.

[22] *Id.*, para. 55.

[23] *Id.*, para. 58.

[24] *See generally* CASSESE, INTERNATIONAL CRIMINAL LAW, *supra* note 2, at 271–73; Hazel Fox, *The Resolution of the Institute of International Law on the Immunities of Heads of State and Government*, 51 INT'L & COMP. L.Q. 119 (2002); Paola Gaeta, *Official Capacities and Immunities, in* THE ROME STATUTE, *supra* note 6, at 975, 983–89; Salvatore Zappalà, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The* Ghaddafi *Case Before the French* Cour de Cassation, 12 EUR. J. INT'L L. 595 (2001).

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absence of immunity in relation to human rights violations committed abroad is likely to hinder international cooperation without significantly increasing protection of human rights.[25] According to this reasoning, the effect of any rule removing immunity will simply be to prevent foreign leaders from traveling abroad.

The principle that immunity *ratione personae* subsists even when it is alleged that the senior serving official has committed an international crime has been applied in recent years by several national courts.[26] Judicial opinion and state practice[27] on this point are unanimous and no case can be found in which it was held that a state official possessing immunity *ratione personae* is subject to the criminal jurisdiction of a foreign state when it is alleged that he or she has committed an international crime.[28]

While the existence and scope of immunity *ratione personae* appears to be reasonably settled, questions remain as to which government officials are entitled to benefit from this absolute immunity from foreign criminal prosecution. In the *Arrest Warrant* case, the ICJ stated that these immunities are available to "diplomatic and consular agents, [and] certain holders of high-ranking office in a State, *such as* the Head of State, Head of Government and Minister for Foreign Affairs."[29] While it has long been clear that serving heads of state, heads of government,[30] and diplomats[31] possess absolute immunity *ratione personae* in criminal cases, the position of foreign ministers has sometimes been controversial.[32] However, in the *Arrest Warrant*

[25] *See* Tunks, *supra* note 16, at 678–79.

[26] *See Ghaddafi* case, No. 1414 (Cass. crim. 2001) (Fr.), 125 ILR 456 (criminal proceedings against Col. Muammar el-Qaddafi, the Libyan head of state, relating to bombing of French airliner dismissed on grounds of immunity); *Castro* case, No. 1999/2723, Order (Audiencia nacional Mar. 4, 1999) (Spain), *cited in* CASSESE, INTERNATIONAL CRIMINAL LAW, *supra* note 2, at 272 n.20 (criminal proceedings against Fidel Castro, the Cuban head of state, dismissed on grounds of immunity); H.S.A. et al. v. S.A., Cass. 2e civ., Feb. 12, 2003, No. P.02.1139.F (Belg.), *translated in* 42 ILM 596 (2003) (criminal proceedings against Israeli prime minister Ariel Sharon alleging crimes against humanity and war crimes dismissed on grounds of immunity); Regina v. Bow Street Stipendiary Magistrate, *ex parte* Pinochet (No. 3), [1999] 2 All E.R. 97, 126–27, 149, 179, 189 (H.L.) (per Goff, Hope, Millett, Phillips, L.JJ.) (stating that serving heads of state are immune from criminal jurisdiction of foreign states); Plaintiffs A, B, C, D, E, F v. Jiang Zemin, 282 F.Supp.2d 875 (N.D. Ill. 2003) (civil proceedings against Chinese president Jiang Zemin alleging torture, genocide, and other human rights violations dismissed on grounds of immunity); Tachiona v. Mugabe, 169 F.Supp.2d 259 (S.D.N.Y. 2001) (civil proceedings against Zimbabwean president Robert Mugabe alleging torture dismissed on grounds of immunity). In January and February 2004, British district judges rejected, on grounds of immunity, applications for warrants for the arrest of Mugabe, the head of state of Zimbabwe, and General Shaul Mofaz, the Israeli minister of defense, regarding allegations of torture and war crimes, respectively Application for Arrest Warrant Against General Shaul Mofaz (Bow St. Mag. Ct. Feb. 12, 2004) (per Pratt, Dist. J.), *reprinted in* 53 INT'L & COMP. L.Q. 769, 771; *Mugabe* case (Bow St. Mag. Ct. Jan. 14, 2004) (per Workman, Sr. Dist. J.), *reprinted in id.* at 770.

[27] In 2002 the United States government issued a suggestion of immunity in a case brought against the then president of China alleging torture, genocide, and other human rights violations. *See* Plaintiffs A, B, C, D, E, F v. Jiang Zemin, 282 F.Supp.2d 875 (N.D. Ill. 2003); Sean D. Murphy, Contemporary Practice of the United States, 97 AJIL 974–77 (2003). In August 2003, Saied Baghban, an Iranian diplomat accused of having been involved in the bombing of a Jewish center in Argentina was briefly detained in Belgium but then released on grounds of diplomatic immunity. Richard Beeston, *Iran Threatens to Hit Back over Diplomat's Arrest*, TIMES (London), Aug. 28, 2003, at 17. Similarly, despite accusations that the Israeli ambassador to Denmark was complicit in torture while he was head of Shin Bet, the Israeli Intelligence Service, Denmark has maintained that he is entitled to diplomatic immunity from Danish criminal jurisdiction. Andrew Osborn, *Danish Protests Greet Israeli Envoy*, GUARDIAN, Aug. 16, 2001, at 13. Likewise, the authorities of the United Kingdom took the view that a serving Israeli defense minister was entitled to immunity from arrest despite the allegation that he had been responsible for war crimes in the West Bank. Chris McGreal, *Sharon's Ally Safe from Arrest in Britain*, GUARDIAN, Feb. 11, 2004, at 19.

[28] Tunks, *supra* note 16, at 663 (stating that "no nation has yet gone so far as to actually pass judgment against a sitting head of state"). *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997), is the only case that can be construed as denying immunity to a head of state. However, immunity was not accorded in this case on the ground that the U.S. government had never recognized General Noriega (the de facto ruler of Panama) as head of state.

[29] Arrest Warrant, *supra* note 4, para. 51 (emphasis added). The use of the words "such as" suggests that the list of senior officials entitled to this immunity is not closed.

[30] *See* Institut de Droit International, Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, Arts. 1, 2, 15 (Aug. 26, 2001), *reprinted in* STATE IMMUNITY: SELECTED MATERIALS AND COMMENTARY 212 (Andrew Dickinson, Rae Lindsay, & James P. Loonam eds., 2004), *available at* <http://www.idi-iil.org/idiE/resolutionsE/2001_van_02_en.PDF>; FOX, *supra* note 1, at 437, 441; Watts, *supra* note 10, at 54, 106–07.

[31] VCDR, *supra* note 11, Arts. 29, 31.

[32] Watts, *supra* note 10, at 106–08.

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case, the ICJ held—without reference to any supporting state practice—that absolute immunity *ratione personae* also applies to foreign ministers because they are responsible for the international relations of the state and "[i]n the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise."[33]

Although basing this type of immunity on the fact that the official concerned is charged with international functions would conform with the rationale for such immunity, it would considerably extend the range of officials entitled to it. The current state of international affairs requires a very wide range of officials (senior and junior) to travel in the exercise of their functions. Ministers other than those specifically designated with responsibility for foreign affairs often represent their state internationally. They may have to conduct bilateral negotiations with other governments or represent their governments at international summits. Indeed, it is difficult to think of any ministerial position that does not require at least some level of international involvement.[34] In the past, it has not been recognized that the mere fact that an official acts in the conduct of international relations suffices to confer immunity *ratione personae*. However, where officials represent their states at international organizations, they will usually be accorded immunity by treaty.[35] Furthermore, it may well be that, under customary international law as well as treaty law, the person of any official sent abroad on a special mission by a state is inviolable, with the result that he or she may not be arrested or detained.[36] This rule would be entirely consistent with the policy underlying immunity *ratione personae*.

### *Immunity* Ratione Materiae *(Immunity Attaching to Official Acts)*

Even state officials that are not entitled to immunity *ratione personae* are immune from the jurisdiction of other states in relation to acts performed in their official capacity ("functional immunity" or "immunity *ratione materiae*").[37] Since this type of immunity attaches to the official act, it may be relied on not only by serving state officials, but also by former officials with respect to official acts performed while in office.[38] It may also be relied on by persons or

[33] Arrest Warrant, *supra* note 4, para. 53.

[34] In *Mofaz*, *supra* note 26, 53 INT'L & COMP. L.Q. at 773, District Judge C. L. Pratt stated:

> The function of various Ministers will vary enormously depending upon their sphere of responsibility. I would think it very unlikely that ministerial appointments such as Home Secretary, Employment Minister, Environment Minister, Culture Media and Sports Minister would automatically acquire a label of [S]tate immunity. However, I do believe that the Defence Minister may be a different matter.

However, in modern international affairs, it is difficult to see that the ministers listed above would not be involved in travel on behalf of the state.

[35] *See* Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, Art. IV, §11, 21 UST 1418, 1 UNTS 15, 90 UNTS 327 (corrigendum to vol. 1) [hereinafter UN Immunities Convention]; General Convention on the Privileges and Immunities of the Organization of African Unity, Oct. 25, 1965, Art. V, 1000 UNTS 393, *available at* <http://www.dfa.gov.za/foreign/Multilateral/africa/treaties/oaupriv.htm>.

[36] *See* UN Convention on Special Missions, *supra* note 14, Arts. 29, 31. Whether these provisions represent customary international law has been doubted. *See* United States v. Sissoko, 121 ILR 599, 1997 U.S. Dist. LEXIS 22115 (S.D. Fla. 1997); Wickremasinghe, *supra* note 10, at 402.

[37] *See, e.g.*, Propend Fin. Pty Ltd v. Sing (C.A. 1997) (Eng.), 111 ILR 611; Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990). For other cases, see Tomonori, *supra* note 10, at 269–73. For a consideration of U.S. and UK law on the matter, see FOX, *supra* note 1, at 352–60; Whomersley, *supra* note 10.

[38] Wickremasinghe, *supra* note 10, at 403; *see also* VCDR, *supra* note 11, Art. 39(2) (in relation to former diplomats); Vienna Convention on Consular Relations, Art. 24, 1963, Art. 43(1), 21 UST 77, 596 UNTS 261 [hereinafter VCCR] (in relation to consular officials). Some have doubted whether the immunity *ratione materiae* applicable to former diplomats is of the same nature as the general immunity applicable to other official acts of other state officials. For example, Yoram Dinstein, *Diplomatic Immunity from Jurisdiction* Ratione Materiae, 15 INT'L & COMP. L.Q. 76, 86–89 (1966), argues that diplomatic immunity *ratione materiae* is broader than that accorded to other state officials. Tomonori, *supra* note 10, at 281, questions whether other state officials possess immunity *ratione materiae* in criminal proceedings and in relation to *ultra vires* acts.

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bodies that are not state officials or organs but have acted on behalf of the state.[39] The application of immunity *ratione materiae* to state officials has occurred more often in civil than criminal cases.[40] However, the reason is not difficult to decipher. The criminal jurisdiction of states is primarily territorial and state officials do not usually exercise their official functions in the territory of other states. Thus, the circumstances in which state officials will be criminally prosecuted in a foreign state for an act done in their official capacity are limited. Nevertheless, the assertion of immunity *ratione materiae* in criminal cases is not unknown and the reasons for which it is conferred apply a fortiori in criminal cases.[41]

Two related policies underlie the conferral of immunity *ratione materiae*. Firstly, this type of immunity constitutes a substantive defense in that it indicates that the individual official is not to be held legally responsible for acts that, in effect, are those of the state.[42] Secondly, the immunity of state officials in foreign courts prevents circumvention of the immunity of the state through proceedings brought against those acting on behalf of the state.[43] In this sense, this immunity operates as a jurisdictional or procedural bar and prevents courts from indirectly exercising control over acts of the foreign state through proceedings against the official who carried out the act.

Even though serving or former state officials are generally entitled to immunity *ratione materiae* in relation to their official acts, such immunity from foreign domestic criminal jurisdiction does not exist when the person is charged with an international crime. There have been a significant number of domestic prosecutions of officials of foreign states for international crimes.[44] Every one of these decisions proceeds—at least implicitly, and sometimes

[39] *See* H. F. Van Panhuys, *In the Borderland Between the Act of State Doctrine and Questions of Jurisdictional Immunities*, 13 INT'L & COMP. L.Q. 1193, 1201 (1964); *see also* UK State Immunity Act, 1978, ch. 33, §14(2); Kuwait Airways Corp. v. Iraq Airways Co., [1995] 3 All E.R. 694 (H.L.); Walker v. Bank of New York, [1994] 16 O.R.3d 504 (Ct. App.) (Can.); Twycross v. Dreyfus, [1877] 5 Ch. D. 605 (C.A.) (Eng.).

[40] For the suggestion that the paucity of domestic criminal cases recognizing the immunity *ratione materiae* of state officials makes it difficult to prove that this type of immunity applies in criminal proceedings, see Tomonori, *supra* note 10, at 262.

[41] The most well-known case in which this type of immunity was asserted with respect to criminal proceedings is *McLeod's* case. *See* R. Y. Jennings, *The* Caroline *and* McLeod *Cases*, 32 AJIL 82, 92 (1938). While both the British and U.S. governments accepted that there was immunity under international law from both civil and criminal processes, McLeod was actually subjected to trial owing to the inability of the U.S. federal government to interfere with the prosecution. However, in the *Rainbow Warrior* case, 74 ILR 241 (arb. 1987), the French government's assertion that military officers should not be tried in New Zealand once France had accepted international responsibility was rejected by New Zealand. See also the few cases cited by Tomonori, *supra* note 10, at 262.

[42] *See* CASSESE, INTERNATIONAL CRIMINAL LAW, *supra* note 2, at 266; FOX, *supra* note 1, at 510–13. In *Attorney General of Israel v. Eichmann*, 36 ILR 277, 308–09 (Sup. Ct. 1962), the Israeli Supreme Court stated:

> The theory of "Act of State" means that the act performed by a person as an organ of the State—whether he was Head of the State or a responsible official acting on the Government's orders—must be regarded as an act of the State alone. It follows that only the latter bears responsibility therefor, and it also follows that another State has no right to punish the person who committed the act, save with the consent of the State whose mission he performed. Were it not so, the first State would be interfering in the internal affairs of the second, which is contrary to the conception of the equality of States based on their sovereignty.

However, the Court was not prepared to accept that this theory applied in all cases. In *Prosecutor v. Blaškić*, Objection to Issue of *Subpoenae duces tecum*, No. IT–95–14–AR 108 *bis* (Oct. 29, 1997), 110 ILR 609, 707, para. 38, the appeals chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) stated that

> [state] officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity". This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.

See also the correspondence in the *McLeod* case, *supra* note 41.

[43] *See* FOX, *supra* note 1, at 353–54; Wickremasinghe, *supra* note 10, at 403; *see also* Propend Fin. Pty Ltd v. Sing, 111 ILR 611, 669 (C.A. 1997) (Eng.); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1101 (9th Cir. 1990); Zoernsch v. Waldock, [1964] 1 W.L.R. 675, 692 (C.A., per Diplock, L.J.).

[44] *See* Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the* Congo v. Belgium *Case*, 13 EUR. J. INT'L L. 853, 870–71 (2002) (referring to cases in which British, Dutch, French, Israeli,

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explicitly[45]—on the basis of a lack of immunity *ratione materiae* in respect of such crimes. Two principal reasons have been advanced in support of this argument. Firstly, it has been argued that while officials possess immunity *ratione materiae* in respect of official acts, acts amounting to international crimes are not to be considered as official acts.[46] Secondly, it has been argued that there is no immunity with respect to international crimes because these crimes constitute violations of *jus cogens* norms and peremptory norms have a higher status than, and ought to prevail over, the rules according immunity.[47] For reasons explored more fully elsewhere,[48] both of these arguments are unpersuasive because they misunderstand the basis upon which state immunity is accorded and suggest a false conflict between the rule according state immunity and the relevant *jus cogens* norms. In any event, the argument that immunity may not be accorded for acts in violation of *jus cogens* has been rejected by the International Court of Justice,[49] the European Court of Human Rights,[50] and most national courts to have considered the issue.[51]

While international crimes, when committed by state officials, will often constitute official acts, a separate rule removes immunity *ratione materiae* in proceedings relating to international crimes. This immunity is not available in such proceedings because the reasons for which such immunity is conferred[52] do not apply to prosecutions for international crimes. Firstly, the general principle that only the state and not the officials may be held responsible for acts done by officials in their official capacity does not apply to acts that amount to international

Italian, Mexican, Polish, Spanish, and U.S. courts have entertained proceedings against foreign state officials [particularly foreign military officers] with respect to war crimes, crimes against humanity, and genocide).

[45] *See, e.g., Eichmann*, 36 ILR 5, 44–48 (Dist. Ct. Jerusalem 1961); *id.* at 308–11 (Sup. Ct. 1962); & *Pinochet* (No. 3), *supra* note 26.

[46] *See* Pinochet (No. 3), *supra* note 26, at 113, 166 (H.L., per Browne Wilkinson, Hutton, L.JJ.); Regina v. Bow Street Stipendiary Magistrate, *ex Parte* Pinochet (No. 1), [1998] 4 All E.R. 897, 939–40, 945–46 (H.L., per Nicholls, Steyn, L.JJ.). It is amazing that these judges could have reached this conclusion about torture, which under Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 UNTS 85 [hereinafter Torture Convention], is limited to acts "of a public official or other person acting in *an official capacity*" (emphasis added). *See also* Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, Arrest Warrant, *supra* note 4, para. 85 (citing *Bouterse* case, para. 42 (Hof Amsterdam Nov. 20, 2000)). A similar position has been taken in a number of U.S. civil cases under the Alien Tort Claims Act. *See, e.g., In re* Estate of Ferdinand Marcos, 25 F.3d 1467, 1469–72 (9th Cir. 1994); Cabiri v. Assasie-Gyimah, 921 F.Supp. 1189, 1197–98 (S.D.N.Y. 1996); Xuncax v. Gramajo, 886 F.Supp. 162, 175 (D. Mass. 1995); *see also* Alexander Orakhelashvili, *State Immunity and International Public Order*, 2002 GER. Y.B. INT'L L. 227, 238–39; Tomonori, *supra* note 10, at 283–86; Tunks, *supra* note 16, at 659–60.

[47] *See* Andrea Bianchi, *Immunity Versus Human Rights: The* Pinochet *Case*, 10 EUR. J. INT'L L. 237, 265 (1999) ("As a matter of international law, there is no doubt that *jus cogens* norms, because of their higher status, must prevail over other international rules, including jurisdictional immunities."); *see also* Michael Byers, *Comment on* Al-Adsani v. Kuwait, 1996 BRIT. Y.B. INT'L L. 537, 539–40; Alexander Orakhelashvili, *State Immunity in National and International Law: Three Recent Cases Before the European Court of Human Rights*, 15 LEIDEN J. INT'L L. 703, 712–13 (2002); Alexander Orakhelashvili, Case Report: Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), *in* 96 AJIL 677 (2002); Orakhelashvili, *supra* note 46, at 255; Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on* Princz v. Federal Republic of Germany, 16 MICH. J. INT'L L. 403, 421–23 (1995).

[48] Akande, *supra* note 12 .

[49] Arrest Warrant, *supra* note 4, para. 58; *see* quote in text at note 23 *supra*.

[50] *Al-Adsani v. United Kingdom*, 2001–XI Eur. Ct. H.R., 123 ILR 24, para. 61, in which the Court held, by 9 to 8:

> Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.

[51] Distomo Massacre Case, No. BGH–112R 245/98 (Greek Citizens v. FRG) (Fed. Sup. Ct. June 26, 2003) (FRG), *translated in* 42 ILM 1030, 1033–34 (2003); Germany v. Margellos, No. 6/17–9–2002 (Spec. Sup. Ct. Sept. 17, 2002) (Greece); Al-Adsani v. Kuwait, 107 ILR 536 (C.A. 1996) (Eng.); Smith v. Libya, 101 F.3d 239 (2d Cir. 1996); Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994),103 ILR 594; Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1984); Sampson v. Federal Republic of Germany, 975 F.Supp. 1108 (N.D. Ill. 1997); Bouzari v. Iran, 124 ILR 427, 2002 Ont. Sup. C.J. LEXIS 701 (Ont. Sup. Ct.).

[52] *See* text *supra* at notes 42–43.

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crimes.[53] On the contrary, it is well established that the official position of individuals does not exempt them from individual responsibility for acts that are crimes under international law, and thus does not constitute a substantive defense.[54]

Secondly, to the extent that international law has subsequently developed rules permitting domestic courts to exercise universal jurisdiction over certain international crimes and to the extent that those rules contemplate prosecution of crimes committed in an official capacity, the second reason for immunity *ratione materiae* disappears. In those circumstances, immunity *ratione materiae* cannot logically coexist with such a grant of jurisdiction. Indeed, to apply in such cases, the prior rule according immunity would serve to deprive the subsequent jurisdictional rule of practically all meaning. This constitutes the best explanation for the decision of the English House of Lords in the *Pinochet* case (No. 3). Most of the judges in that case held that since the Torture Convention limited the offense of torture to acts committed in the exercise of official capacity, the granting of immunity *ratione materiae* would necessarily have been inconsistent with the provisions of the Convention that accord universal jurisdiction over the offense.[55] Accordingly, immunity *ratione materiae* must be regarded as having been displaced by the rule according universal jurisdiction for acts of torture.

Similarly, since grave breaches of the 1949 Geneva Conventions and other war crimes committed in an international armed conflict are almost by definition acts committed by military and other officials of states, the treaty rules according universal jurisdiction over such crimes cannot logically coexist with the grant of immunity *ratione materiae* to state officials.[56] However, because genocide, crimes against humanity, and war crimes committed in an internal armed conflict may be committed by nonstate actors, the rules permitting universal jurisdiction with respect to these crimes are not practically coextensive with immunity *ratione materiae* (which is the case with torture and war crimes committed in an international armed conflict). Nevertheless, it may be argued that these jurisdictional rules contemplate the domestic prosecution of state officials and, for that reason, prevail over the prior rule according immunity *ratione materiae*.[57] Therefore, immunity *ratione materiae* does not exist with respect to domestic criminal proceedings for any of the international crimes set out in the Statute of the ICC.

## II. Are International Law Immunities Available Before International Tribunals?

Since state and diplomatic immunities are derived from notions of state equality and are designed for horizontal interstate relationships, it may be thought that these immunities may

[53] *See* Cassese, International Criminal Law, *supra* note 2, at 267; Cassese, *supra* note 44, at 870; Gaeta, *supra* note 24, at 981–83; Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the* Congo v. Belgium *Case*, 13 Eur. J. Int'l L. 877, 891 (2002); Zappalà, *supra* note 24, at 601–05.

[54] *See In re* Goering, 13 ILR 203, 221 (Int'l Mil. Trib. 1946). Provisions stating that official capacity does not amount to a substantive defense are included in the statutes of several international criminal tribunals. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Art. 7, 59 Stat. 1544, 82 UNTS 279; Charter of the International Military Tribunal for the Far East, Jan. 19 & Apr. 26, 1946, Art. 6, TIAS No. 1589, 4 Bevans 20; Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/25704, annex, Art. 7(2), *reprinted in* 32 ILM 1192 (1993); Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15, Art. 6(2), UN Doc. S/INF/50 (1994), *reprinted in* 33 ILM 1602 (1994); ICC Statute, *supra* note 6, Art. 27(1); Statute of the Special Court for Sierra Leone, *as amended* Jan. 16, 2002, Art. 6(2), *available at* <http://www.specialcourt.org/documents/Statute.html>.

[55] Pinochet (No. 3), *supra* note 26, at 114, 169–70, 178–79, 190 (per Browne Wilkinson, Saville, Millett, Phillips, L.JJ.).

[56] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 49, 6 UST 3114, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, Art. 50, 6 UST 3217, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 129, 6 UST 3316, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 146, 6 UST 3516, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Art. 85(1), 1125 UNTS 609.

[57] See Akande, *supra* note 12, for fuller development of the arguments contained in this paragraph.

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not be pleaded before international tribunals.[58] In the *Arrest Warrant* case, the ICJ stated that "the immunities enjoyed under international law . . . do not represent a bar to criminal prosecution in certain circumstances. . . . [A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."[59]

A similar view was also taken by the Special Court for Sierra Leone (SCSL)[60] in proceedings against the former head of state of Liberia, Charles Taylor.[61] Taylor challenged the validity of his indictment on the basis that it was issued while he was still in office and was therefore contrary to the immunity of a head of state under international law.[62] However, the appeals chamber of the Special Court (agreeing with the Office of the Prosecutor and the amici curiae appointed by the Court) rejected the challenge by Taylor.[63] Relying on the Statutes of the Nuremberg and Tokyo International Military Tribunals, the ad hoc international criminal courts, and the ICC,[64] as well as the *Arrest Warrant* and *Pinochet* cases, the SCSL held that "the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court."[65]

However, the view that international law immunities may never be pleaded in proceedings instituted before international courts and tribunals oversimplifies the matter.[66] Whether or

[58] See Gaeta, *supra* note 24, at 991, who states:

> Strictly speaking, under international law individuals are only entitled to enjoy personal immunities vis-à-vis the authorities of the State where they are authorized to discharge official functions (the 'receiving or territorial State'). Clearly, these immunities cannot be relied upon before the ICC; hence they cannot preclude the exercise of the Court's jurisdiction.

[59] Arrest Warrant, *supra* note 4, para. 61.

[60] The Special Court for Sierra Leone is an international tribunal created under a treaty between the United Nations and Sierra Leone to prosecute persons that committed serious international crimes during the Sierra Leonean civil war. The agreement establishing the Court and its Statute are available online at <http://www.sc-sl.org>. Unlike the ICTY and the ICTR, the Court was not established by Security Council resolution and cannot bind all UN members. While Security Council Resolution 1315 (Aug. 14, 2000), 40 ILM 248 (2000), encouraged the establishment of the Special Court, it is not the legal basis for its creation. *See* Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, para. 9. For analysis of the Court, see Robert Cryer, *A 'Special Court' for Sierra Leone?* 50 INT'L & COMP. L.Q. 435 (2001); John R. W. D. Jones, Claire Carlton-Hanciles, Haddijatou Kah-Jallow, Sam Scratch, & Ibrahim Yillah, *The Special Court for Sierra Leone*, 2 J. INT'L CRIM. JUST. 211 (2004).

[61] Prosecutor v. Charles Taylor, Immunity from Jurisdiction, No. SCSL–03–01–I (May 31, 2004). On March 7, 2003, the prosecutor issued an indictment charging Charles Taylor (then the head of state of Liberia) with responsibility for crimes against humanity and war crimes committed on the territory of neighboring Sierra Leone during the civil war in that state. In June 2003, the prosecutor sought the arrest of Taylor on the basis of the indictment while Taylor was in Ghana for peace talks with Liberian rebels. The Ghanaian government declined to arrest him. *See* Paul Welsh, Liberian Leader's Strange Day in Ghana, BBC News, *at* <http://news.bbc.co.uk/1/hi/world/africa/2965110.stm> (last modified June 5, 2003). After Taylor stepped down from power in Liberia, he was allowed to live in exile in Nigeria. *See Nigeria Defends Taylor Exile*, BBC News, *at* <http://news.bbc.co.uk/1/hi/world/africa/3142659.stm> (last modified Aug. 12, 2003).

[62] Oral hearings relating to the defense motion to quash the indictment against Taylor were held on October 31, and November 1, 2003. For a summary of these proceedings, see No Peace Without Justice, Reports on Appeal Hearings, *at* <http://www.specialcourt.org/documents/WhatHappening/ReportsOnAppealHearings.html> (visited May 11, 2004).

[63] Prosecutor v. Charles Taylor, *supra* note 61.

[64] *See* provisions cited *supra* note 54.

[65] Prosecutor v. Charles Taylor, *supra* note 61, para. 52. The Court's judgment drew from and approved the submissions of amici curiae Philippe Sands and Alison McDonald, and Diane Orentlicher. The former argued that

> [i]nternational practise and a majority of academic commentary supports the view that . . . an international criminal court or tribunal (whether or not it has been established under Chapter VII of the UN Charter) may exercise jurisdiction over a serving head of State and that such person is not entitled to claim immunity under customary international law in respect of international crimes.

Prosecutor v. Charles Taylor (No. SCSL–2003–01–I), Submissions of the Amicus Curiae on Head of State Immunity, paras. 56(3), 118(3), *available at* <http://www.icc-cpi.int/library/organs/otp/Sands.pdf>. This submission (in para. 51) cites an earlier draft of the present article as one of the works taking the opposite view that international immunities might be available before international tribunals.

[66] *See* FOX, *supra* note 1, at 431; Gaeta, *supra* note 24, at 991.

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not those wanted for prosecution by an international criminal tribunal may rely on international law immunities to exempt themselves from its jurisdiction depends, firstly, on the provisions of the statute establishing that tribunal. While these texts tend to include a general rule to the effect that the official position of a defendant may not be relied on as a bar to prosecution,[67] it is important to pay attention to the manner in which immunity is provided.[68]

Secondly, and more important, the possibility of relying on international law immunities (particularly immunity *ratione personae*) to avoid prosecutions by international tribunals depends on the nature of the tribunal: how it was established and whether the state of the official sought to be tried is bound by the instrument establishing the tribunal. In this regard, there is a distinction between those tribunals established by United Nations Security Council resolution (i.e., the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR)) and those established by treaty. Because of the universal membership of the United Nations and because decisions of the Council are binding on all UN members,[69] the provisions of the ICTY and ICTR Statutes are capable of removing immunity with respect to practically all states. But this is only because those states are bound by and have indirectly consented (via the UN Charter) to the decision to remove immunity.[70] On the other hand, since only parties to a treaty are bound by its provisions,[71] a treaty establishing an international tribunal cannot remove immunities that international law grants to officials of states that are not party to the treaty. Those immunities are rights belonging to the nonparty states and those states may not be deprived of their rights by a treaty to which they are not party.[72]

It is not an adequate response to assert that those immunities are conferred by international law only with respect to interstate relations and in proceedings before national courts. The immunities are conferred to prevent foreign states from unduly interfering in the affairs of other states and from exercising judicial jurisdiction over another state in circumstances where it has not consented. It makes little difference whether the foreign states seek to exercise this judicial jurisdiction unilaterally or through some collective body that the state concerned has not consented to. To suggest that immunity is nonexistent before an international tribunal that has not been consented to by the relevant state is to allow subversion of the policy underpinning international law immunities. Indeed, the amici curiae to the SCSL recognized this

[67] *See* provisions cited *supra* note 54.

[68] Because the decision was taken not to prosecute the Japanese emperor after World War II, Article 6 of the Charter of the Tokyo Tribunal (unlike Article 7 of the Nuremberg Tribunal Agreement), both *supra* note 54, does not explicitly provide that a person's position as head of state may not be relied on as exempting individual responsibility. Also, while Article 27 of the ICC Statute, *supra* note 6, denies immunity, Article 98 of the Statute preserves it for certain persons.

[69] UN CHARTER Art. 25.

[70] It may be asked whether the Security Council can override the immunities normally accruing to representatives of states that are not members of the United Nations. This question may have been raised in 1999 when the ICTY indicted the then head of state of the Federal Republic of Yugoslavia (FRY)—Slobodan Milošević—and other senior members of the FRY government. At the time of the indictment, there was some doubt as to whether the FRY was a member of the United Nations. To the extent that the FRY was not a UN member, an attempt by other states to execute the indictment and arrest warrant would arguably have engaged the legal responsibility of the arresting state and/or even that of the United Nations. By the time Milošević was handed over to the ICTY in June 2001, the FRY had been admitted to the United Nations (in 2000). In any event, surrender by the FRY would have constituted a waiver of any available immunities. For analysis of the status of the FRY in the United Nations prior to 2000, see Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618, 628–31 (2003); Yehuda Z. Blum, *UN Membership of the "New" Yugoslavia: Continuity or Break?* 86 AJIL 830 (1992); Matthew Craven, *The* Genocide *Case, the Law of Treaties and State Succession*, 1997 BRIT. Y.B. INT'L L. 127, 131–35; Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L.J. 29 (1995); Michael Wood, *Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties*, 1997 Y.B. UN L. 231, 241–51.

[71] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 34, 1155 UNTS 331 [hereinafter VCLT].

[72] See Liberia's challenge at the ICJ to the indictment by the Special Court for Sierra Leone of the Liberian head of state, ICJ Press Release 2003/26, *supra* note 4. *See also* Cesare P. R. Romano & André Nollkaemper, *The Arrest Warrant Against the Liberian President, Charles Taylor*, ASIL INSIGHTS, June 2003, *available at* <http://www.asil.org/insights/insigh110.htm>.

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point in stating: "If the Special Court had not been established pursuant to Security Council resolution the situation may be materially different: for example, two States may not . . . establish an international criminal court for the purpose, or with the effect, of circumventing the jurisdictional limitations incumbent on national courts . . . ."[73] It is difficult to understand how the amici curiae, having admitted this much, could have reached the conclusion that a serving head of state cannot claim immunity before an international tribunal[74]—a conclusion expressly stated to apply whether or not it was established under Chapter VII of the UN Charter.

Finally, the ICTY has recognized, in *Prosecutor v. Blaškić*,[75] that there are circumstances in which international immunities may be pleaded before an international tribunal. In that case, the appeals chamber held that because state officials are entitled to functional immunity (immunity *ratione materiae*) with respect to official acts, the Tribunal was not entitled to issue an order requiring them to produce documents they held in their official capacity. While the appeals chamber acknowledged that the rule according immunity *ratione materiae* was based on sovereign equality and "undoubtedly applies to relations between States *inter se*," it held that the rule "must also be taken into account, and indeed it has always been respected, by international organizations as well as international courts."[76] In *Prosecutor v. Krstić*, the appeals chamber appeared to contradict its earlier decision in *Blaškić* when it stated that "[i]t may be the case (it is unnecessary to decide here) that, between States, such a functional immunity exists against prosecution for those acts [attributable to the state], but it would be incorrect to suggest that such an immunity exists in international criminal courts."[77] However, the statement in *Krstić* relates to immunity *ratione materiae* and probably amounts to nothing more than a decision that such immunity does not extend to prosecutions for international crimes. Indeed, the *Krstić* appeals chamber did not question the general principle that functional immunities available to state officials restrict the power of the international tribunal to issue orders to state officials. It only questioned the scope of that immunity.[78]

In sum, the statement by the ICJ that international immunities may not be pleaded before certain international tribunals must be read subject to the condition (1) that the instruments creating those tribunals expressly or implicitly remove the relevant immunity,[79] and (2) that the state of the official concerned is bound by the instrument removing the immunity. Therefore, a senior serving state official entitled to immunity *ratione personae* (for example, a head

[73] Submissions of the Amicus Curiae on Head of State Immunity, *supra* note 65, para. 78; *see also* Tunks, *supra* note 16, at 665 n.75 (noting that the ICJ's statement in the *Arrest Warrant* case that immunity does not exist before international tribunals only holds true with respect to officials whose home country has assented to the jurisdiction of that tribunal. "[N]o other country has jurisdiction over a third party's head of state, and, consequently, no two states (or group of states) may agree by treaty to waive the immunity of a third party's head of state without that other nation's consent.").

[74] *See supra* note 65 and corresponding text.

[75] Prosecutor v. Blaškić, *supra* note 42, paras. 38–43.

[76] *Id.*, para. 41.

[77] Prosecutor v. Krstić, Decision on Application for Subpoenas, No. IT–98–33–A, para. 26 (July 1, 2003), *available at* <http://www.un.org/icty/krstic/Appeal/decision-e/030701.htm>

[78] The appeals chamber held in *Krstić* that while state officials could not be compelled to produce a document in their possession in their official capacity, they could be compelled to give evidence of what they had seen or heard in the course of their official functions. *Id.*, para. 27.

[79] Judge Shahabuddeen states in his dissenting opinion in *Krstić*:

> In my view, . . . there is no substance in the suggested automaticity of disappearance of the immunity just because of the establishment of international criminal courts. . . .
>
> . . . International criminal courts are established by States acting together, whether directly or indirectly as in the case of the Tribunal, which was established by the Security Council on behalf of States members of the United Nations. There is no basis for suggesting that by merely acting together to establish such a court States signify an intention to waive their individual functional immunities. A presumption of continuance of their immunities as these exist under international law is only offset where some element in the decision to establish such a court shows that they agreed otherwise.

*Id.*, Dissenting Opinion of Judge Shahabuddeen, paras. 11–12.

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of state) is entitled to such immunity before an international tribunal that the state concerned has not consented to.

## III. THE ICC STATUTE AND IMMUNITY

This part of the article considers the application of immunities in proceedings initiated by the ICC. The first section highlights the tension between the two provisions in the ICC Statute dealing with immunities (Arts. 27 and 98). In the next section, detailed attention is given to whether states parties, nonparties, and international organizations may benefit from the provisions of paragraphs 1 and 2 of Article 98. Those provisions direct the Court not to request the arrest or surrender of a person where such a request would require the requested state to violate either the immunities that international law accords to that person or an international agreement precluding surrender to the Court. Finally, the third section considers whether it is the ICC or national authorities that are competent to decide on whether a person wanted by the Court is entitled to immunity from arrest and surrender.

### *The Tension Between Articles 27 and 98 of the ICC Statute*

As indicated in part II above, the determination whether state, diplomatic, or other immunities are available in relation to the ICC must begin by examining the text of the ICC Statute. Two provisions of the ICC Statute bear on questions of immunity: Articles 27 and 98. Article 27 primarily addresses the position of state officials in relation to the ICC itself. Article 27(1) provides:

> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

This provision has now become standard in the founding instruments of international criminal tribunals. Similar provisions were inserted into the relevant agreements for the Nuremberg and Tokyo Tribunals after World War II, as well as the Statutes of the ICTY and the ICTR.[80] Article 27(1) primarily addresses the substantive responsibility of state officials for international crimes rather than questions of immunity. Its main effect is to establish that the official capacity of a person does not relieve him of individual criminal responsibility and it eliminates a substantive defense that may be put forward by state officials.[81]

It may be argued that Article 27(1) and similar provisions do not deal with immunity at all since a statement that a person may be legally responsible does not address whether that person is subject to the jurisdiction of a particular forum, that is, whether that forum may determine that responsibility. Those jurisdictional issues are addressed, in part, by the law on international immunities, and the possession of immunity does not mean that the person concerned may not be legally responsible for the act in question.

However, deeper analysis shows that Article 27(1) does have the effect of removing at least some of the immunities to which state officials would otherwise be entitled.[82] First of all, questions of legal responsibility are not wholly separate from questions of immunity. As has already been argued, one of the reasons for conferring immunity with respect to official acts is that they are generally regarded as acts of states for which the state and not the official

[80] *See supra* note 54.

[81] FOX, *supra* note 1, at 429–30.

[82] *See* Arrest Warrant, *supra* note 4, para. 58; CASSESE, INTERNATIONAL CRIMINAL LAW, *supra* note 2, at 267; Gaeta, *supra* note 24, at 981–82.

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ought to be held responsible.[83] To the extent that an international rule establishes that the official himself ought to be held responsible for the act, that reason for immunity disappears. Secondly, by providing that the ICC Statute applies to state officials, Article 27(1) establishes that those officials are subject to prosecution by the ICC even when they acted in their official capacity. Therefore, Article 27(1) is also jurisdictional in nature. Not only does the second sentence implicitly exclude immunities based on the official nature of the act; the first sentence also implicitly establishes that the official status of defendants does not exclude them from the jurisdiction of the ICC.

Perhaps as a result of doubts as to whether Article 27(1) completely removes the possibility of reliance on immunities in proceedings before the ICC, Article 27(2) contains an explicit denial of international and national law immunities. It provides: "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." This provision is new. It has no counterpart in the Nuremberg or Tokyo Tribunal agreements or in the ICTY and ICTR Statutes. Article 27(2) conclusively establishes that state officials are subject to prosecution by the ICC and that provision constitutes a waiver by states parties of any immunity that their officials would otherwise possess vis-à-vis the ICC.

However, the removal of immunity vis-à-vis the ICC by Article 27 is not the end of the matter. Because the Court does not have independent powers of arrest and must rely on states to arrest and surrender wanted persons,[84] the immunities of state officials in national jurisdictions become important. To the extent that the Court is seeking arrest and surrender from the state of the official concerned, Article 27 constitutes a waiver of national law immunities by parties to the Statute. States parties are therefore obliged to arrest and surrender their own officials even if those officials would otherwise be entitled to immunity under national law.[85] However, where an official is outside his or her state and is entitled under international law to immunity from arrest and criminal process in the other state, the matter is more complicated. To deal with this issue, Article 98(1) of the ICC Statute provides:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.[86]

Thus, while Article 27 provides that a state official's possession of international immunity shall not bar the *ICC* from exercising jurisdiction, Article 98 directs the Court not to take action that would result in the violation by *states* of their international obligations to accord immunity to foreign officials.[87]

Most likely, the primary way the Court will gain custody of indicted state officials is through the cooperation of *other* states parties on whose territory the officials happen to be. After all, nonparties to the ICC Statute have no obligation to surrender their nationals or officials to

[83] *See* text *supra* at note 42.

[84] States parties have an obligation to cooperate with the ICC with regard to the arrest and surrender of wanted persons. ICC Statute, *supra* note 6, Arts. 86, 89.

[85] *See* BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 139–41 (2003); Gaeta, *supra* note 24, at 996–1000. As a result of the waiver of national law immunities in Article 27(2), some states parties (such as France) have been obliged to amend the provisions of their constitutions that grant immunity to heads of state or government. *See Re* Treaty Establishing the International Criminal Court, 125 ILR 442 (Cons. const. Jan. 22, 1999) (Fr.).

[86] In addition, Article 98(2) of the ICC Statute, *supra* note 6, provides:

> The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

[87] BROOMHALL, *supra* note 85, at 141.

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the ICC, and parties may breach their obligations by refusing to hand over their own officials.[88] However, the Court's ability to gain custody of state officials and the denial of immunity provided for in Article 27 may be undermined by the fact that officials may be entitled to rely on international immunities in order to prevent *other* states from arresting them. Whether or not this proves to be a significant barrier to the exercise of the ICC's jurisdiction will depend on the interpretation given to Article 98(1).

*Who May Benefit from Article 98?*

*The position of officials and diplomats of states not party to the ICC Statute.* Although the ICC is entitled to exercise jurisdiction over nationals of states not party to its Statute,[89] nothing in the ICC Statute can operate to remove the immunities that officials of nonparties would ordinarily possess under international law.[90] Part 9 of the Statute imposes an obligation on parties to cooperate with requests from the ICC for the arrest and surrender of persons on their territory. However, states parties would breach their international obligations to nonparties if they arrested and surrendered to the ICC an official of a nonparty who is entitled to immunity from arrest and prosecution.[91] In these circumstances, Article 98(1), by directing the Court not to proceed with a request for arrest, ensures that ICC parties will not be placed in the position of facing competing legal obligations to the ICC and other states. Indeed, since the ICC operates in effect by "delegation" from (or in the place of) its states parties,[92] the immunity of officials of nonparties applies not only in relation to states parties, but also in relation to the ICC itself. Thus, the Court itself is prevented by international law from taking steps that would amount to a violation of those immunities.[93] In particular, the ICC would be prevented from even issuing an arrest warrant under Article 58 of the Statute.[94] This follows from the decision of the ICJ in the *Arrest Warrant* case,[95] which held that the issuance and circulation of an arrest

[88] The risk of this happening is quite high, since the principle of complementarity adopted in the ICC Statute means that the ICC will exercise its jurisdiction only when the national state has genuinely failed to exercise its own jurisdiction in the case. *See id.* at 143–44.

[89] ICC Statute, *supra* note 6, Art. 12(2)(a) (providing for ICC jurisdiction with respect to crimes committed on the territory of an ICC party). This writer and others have argued that states are legally entitled to create, by treaty, an international tribunal with criminal jurisdiction over nationals of nonparties. Akande, *supra* note 70; Gennady M. Danilenko, *ICC Statute and Third States, in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1871, 1891–97 (Antonio Cassese, Paola Gaeta, & John R. W. D. Jones eds., 2002); Jordan J. Paust, *The Reach of ICC Jurisdiction over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT'L L. 1 (2000); Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 L. & CONTEMP. PROBS. 67 (2001). The United States and others have taken the contrary view and argued that the exercise of ICC jurisdiction over nationals of nonparties is illegitimate and even unlawful. Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 L. & CONTEMP. PROBS. 13 (2001); David J. Scheffer, *The United States and the International Criminal Court*, 93 AJIL 12, 18 (1999); Ruth Wedgwood, *The Irresolution of Rome*, 64 L. & CONTEMP. PROBS. 193, 199–200 (2001).

[90] *See* text at notes 71–73 *supra*. While the provisions of the ICC Statute may eventually influence the development of customary law so that international law immunities are never available in cases of international crimes, this is clearly some way from the present position.

[91] Part I above contains a discussion of the circumstances in which international law immunities are available when a person is accused of committing an international crime.

[92] *See* Akande, *supra* note 70.

[93] *See* text at notes 68–78.

[94] The arrest warrant issued under Article 58(1) by the ICC's pretrial chamber after the conclusion of investigations by the prosecutor appears to be preliminary to, and different from, the request for arrest to which Article 98(1) relates. The latter is provided for in Part 9 of the ICC Statute (specifically Articles 89–92). That there is a difference is implicit in the requirement that a request for arrest under Article 91 must be supported by a copy of the arrest warrant.

[95] Arrest Warrant, *supra* note 4, paras. 70–71. Some of the dissenting judges in this case (Judge Oda and Judge *ad hoc* Van den Wyngaert, paras. 13 & 78–80, respectively, of their dissenting opinions) have argued that the mere issuance or international circulation of an arrest warrant is not a violation of applicable immunities because the receiving state is not obligated to carry it out. *See also* Submissions of the Amicus Curiae on Head of State Immunity, note 65 *supra*. This argument is unconvincing because the mere issuance and circulation of the warrant is sufficient, and likely to restrict the ability of the relevant serving senior state officials (such as heads of state, heads of government, and foreign ministers) to travel and carry out their international functions. The very purpose of immunity *ratione personae* is to permit the senior serving state officials to carry out their international functions.

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warrant for a person entitled to immunity violates that immunity even where no subsequent steps are taken.[96]

*The position of officials and diplomats of parties to the ICC Statute under Article 98(1).* Although it is clear that Article 98(1) applies to immunities enjoyed by officials of nonparties, it is less clear whether that provision also refers to immunities ordinarily enjoyed by officials of ICC parties. The question is whether Article 98(1) prevents the Court from requesting that one state party surrender the official of another state party present on the territory of the first, where the official would normally have immunity under international law. The answer depends on the relationship between Articles 27 and 98. In particular, the answer depends on whether the waiver of immunity contained in the former provision is a waiver not only in relation to the ICC, but in relation to the exercise of authority by other parties where those other parties are acting in support of the exercise of ICC jurisdiction. The view that Article 98(1) applies only to officials of nonparties has been taken by scholars[97] and by some ICC parties.[98] This view is reflected in the legislation of a number of ICC parties implementing their obligations under the ICC Statute. For example, under section 23(1) of the United Kingdom's International Criminal Court Act of 2001, "[a]ny state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC Statute" does not prevent his or her arrest in Britain or surrender to the Court. However, where the state or diplomatic immunity attaches by reason of a connection to a nonstate party, section 23(2) in effect provides that proceedings for arrest or surrender may continue only where the nonstate party has waived immunity. Virtually identical provisions and language are used in the relevant legislation of Malta and Ireland.[99] The relevant legislation of Canada and New Zealand goes even further and appears to provide that no person may rely on international law immunities in proceedings instituted pursuant to an ICC request for arrest and surrender.[100] Nevertheless, in the light of the discussion in the previous section, the Canadian and New Zealand provisions should not be interpreted as applying to officials of states not party to the ICC Statute.[101]

[96] Arguably, the position of diplomatic and consular officials is different since international law accords immunities to these officials only in the state to which they are accredited or through which they transit. VCDR, *supra* note 11, Arts. 39, 40; VCCR, *supra* note 38, Arts. 53, 54. Other states have no obligation to refrain from arresting such persons, and the issuance and circulation of an arrest warrant to other states will not violate immunities accorded by international law.

[97] BROOMHALL, *supra* note 85, at 145; WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 92 (2001); Gaeta, *supra* note 24, at 993–96; Steffen Wirth, *Immunities, Related Problems, and Article 98 of the Rome Statute*, 12 CRIM. L.F. 429, 452–54 (2001).

[98] In the margins of the July–August 1999 session of the ICC Preparatory Commission, delegates from Canada and the United Kingdom circulated a paper, *quoted in* BROOMHALL, *supra* note 85, at 144, in which they stated:

> The interpretation which should be given to Article 98 is as follows. Having regard to the terms of the Statute, the Court shall not be required to obtain a waiver of immunity with respect to the surrender by one State Party of a head of State or government, or diplomat, of another State Party.

This informal paper [hereinafter UK/Canada paper] was circulated after discussions among the "like-minded" group of countries on the relationship between Articles 27 and 98.

[99] International Criminal Court Act, 2001, c. 17, §23(1), (2) [hereinafter UK Act]; International Criminal Court Act, 2002, c. 453 (Malta) (inserting a new Art. 26S into the Extradition Act, c. 276, whose paras. (1) and (2) are identical to §23(1) and (2) of the UK Act); International Criminal Court Bill, 2003, No. 36, §60(1) (Ir.) (to the same effect).

[100] Crimes Against Humanity and War Crimes Act, 2000, ch. 24, §48 (Can.) (inserting a new §6.1 into the Extradition Act, 1999, ch. 18: "Despite any other Act or law, no person who is the subject of a request for surrender by the International Criminal Court . . . may claim immunity under common law or by statute from arrest or extradition under this Act."); *see also id.* §70; International Crimes and International Criminal Court Act, 2000, No. 26, §31(1) (N.Z.) ("The existence of any immunity or special procedural rule attaching to the official capacity of any person is not a ground for—(a) refusing or postponing the execution of a request for surrender or other assistance by the ICC; or (b) holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act." Under §31(2), subsection (1) is subject to §§66 and 120, which permit proceedings to be stayed while the ICC makes a determination under Art. 98).

[101] The courts in these countries will probably apply the common law rule that ambiguous legislation ought to be construed in a manner consistent with the state's international obligations rather than in a manner contrary to them. *See* Salomon v. Customs & Excise Commissioners, [1967] 2 Q.B. 116 (C.A.); Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

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The effect of the provisions referred to in the previous paragraph is that a serving head of state of an ICC party who is on an official visit to the state concerned, or a serving diplomat of an ICC party accredited to that state, may be arrested and surrendered to the Court if the ICC so requests.[102] The immunities *ratione personae* that ordinarily apply to such persons[103] would therefore not apply. Because this is a far-reaching conclusion that constitutes a significant change from the preexisting legal position, it is imperative that it be supported by convincing and compelling reasoning.

The cases in which the ICC will wish to direct a request for surrender of the official of one state party to another state party are likely to be those in which the official's own state, probably in breach of its obligations, has refused to surrender the accused.[104] Absent voluntary appearance and surrender by a nonstate entity, surrender of the official by another state will offer the only realistic possibility of securing custody. It has therefore been argued that the effectiveness of the Statute is best served by an interpretation that permits the Court to direct its requests for the surrender of officials of states parties to other states.[105] However, because any interference with the immunity that international law accords to serving senior state officials and diplomats constitutes an extremely serious interference into the state concerned and its international relations, the fact that a denial of immunity may be desirable to make the ICC more efficacious is not a sufficient reason to imply such a waiver of immunity. On the contrary, it must be shown that such a removal of otherwise applicable immunity is either stated expressly in the Statute or must necessarily be implied from its provisions.

On one view, the text of Article 98(1) itself resolves the question whether it extends to officials of states parties since it refers to the "immunity of a person . . . of a *third State*" (emphasis added). According to this view, the expression "third state," when used in the law of treaties, usually refers to states not party to the relevant treaty,[106] and therefore refers in Article 98(1) to states that are not party to the ICC Statute. However, this argument is neither compelling nor decisive. The fact that Article 98(1) speaks of "third states" does not necessarily mean that it excludes states parties. More likely, "third state" in that provision is not used to refer to nonparties but, rather, to a state other than the one with custody of the suspect. As Paola Gaeta has noted, in other parts of the Statute where reference is made to states not party to the Statute, it is not the term "third state" that is used but terms such as "non-contracting states" and "states not parties."[107] Significantly, the other uses of the term "third state" in the ICC Statute probably do not refer only to nonparties. For example, it is unlikely that the prohibition under Article 108 of extradition to a third state by states that have custody of persons sentenced by the ICC was meant to cover only nonparties. Likewise, when the Statute uses the term "third party" in connection with requests by the ICC to states parties to provide documents or information disclosed in confidence by a third party, that term explicitly includes states parties as well as nonparties.[108]

A more compelling argument in support of the view that Article 98(1) benefits only nonparties is that an interpretation that allows officials of states parties to rely on international law immunities when they are in other states would deprive the Statute of its stated purpose

[102] Under Article 26S(4) of the Maltese Act and §23(4) of the UK Act (but not under the Irish bill), *supra* note 99, the minister or secretary of state may, after consultations with the ICC and the other state, direct that proceedings which, but for subsections (1) & (2), would be prohibited by state or diplomatic immunity, shall not be taken.

[103] See Part I for a discussion of the immunities available to state officials in cases in which they are accused of committing international crimes.

[104] *See supra* note 88.

[105] BROOMHALL, *supra* note 85, at 145.

[106] *See* VCLT, *supra* note 71, Arts. 34–38.

[107] Gaeta, *supra* note 24, at 993; *see, e.g.*, ICC Statute, *supra* note 6, Art. 90(4).

[108] ICC Statute, *supra* note 6, Art. 73; *see also id.*, Art. 93(9)(b) (providing that where a request for assistance from the Court "concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization").

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of preventing impunity and ensuring that the most serious crimes of international concern do not go unpunished.[109] Furthermore, the removal of immunity from the exercise of the Court's jurisdiction contained in Article 27 would be nullified in practice if Article 98(1) were interpreted as allowing parties to rely on the same immunities in order to prevent the surrender of their officials to the Court by other states.[110] This argument is supported by the principle that "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[111] Thus, the removal of immunity in Article 27 must be understood as applying not only in relation to the ICC itself, but also in relation to states acting at the request of the ICC. This argument is supported by the fact that, as discussed above, the removal is contained not only in Article 27(2)—which stipulates that immunities are not to bar the *ICC* from exercising jurisdiction—but also in Article 27(1). Steffen Wirth has pointed out that when the parties agreed in the first sentence of Article 27(1) that the Statute applies to their officials, they thereby agreed that all parts of the Statute, including the cooperation regime in Part 9, apply to those officials.[112] Since the international law immunities of officials of states parties are removed by the Statute, another state on whose territory such an official is present would not be acting "inconsistently with its obligations under international law"[113] by arresting and surrendering that official to the ICC.

In response to the arguments just set out, it may be maintained that an interpretation of Article 98(1) that extends its application to officials of ICC parties does not deprive Article 27 of all meaning. Even under such an interpretation of Article 98, Article 27 would allow the ICC to conduct an investigation and even issue an arrest warrant under Article 58 for persons who would otherwise be immune.[114] Furthermore, Article 27 would bar any reliance on immunity once the ICC has taken an accused person connected with a state party into custody.[115] On this view, Article 27 is directed solely at the position of state officials vis-à-vis the Court and does not affect the immunity of those officials from the jurisdiction of other states. Rather than having been waived by Article 27, those immunities, according to this view, are expressly preserved by Article 98(1). Thus, Article 98(1) would prevent the Court from requesting that a host state arrest and surrender an official of another state entitled to international law immunities. However, the Court would remain free to request the surrender of the official from his home state, which is obliged under Part 9 of the ICC Statute to cooperate with the Court in executing the request.

While interpreting Article 98(1) as also applying to officials of parties to the Statute does not totally negate the effect of Article 27, this interpretation leaves only a very small scope of application for Article 27(2). Firstly, it is incorrect to assert that the waiver of international law immunities in Article 27(2) at least allows the Court to conduct an investigation and issue arrest warrants for officials of ICC parties in circumstances where it would otherwise have been unable to do so. If Article 98(1) were interpreted as preventing the Court from requesting that host states arrest those officials of other ICC parties that possess immunity

[109] *See id.*, pmbl., 4th & 5th paras.:

> *Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
>
> *Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.

[110] BROOMHALL, *supra* note 85, at 145; Gaeta, *supra* note 24, at 993–94; Wirth, *supra* note 97, at 452.

[111] United States—Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R, at 23 (adopted May 20, 1996) (Appellate Body report).

[112] Wirth, *supra* note 97, at 452.

[113] ICC Statute, *supra* note 6, Art. 98(1).

[114] *See supra* note 94.

[115] *See* Otto Triffterer, *Article 27, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 513 margin n.24 (Otto Triffterer ed., 1999) [hereinafter ROME COMMENTARY].

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under international law, then the warrants issued under Article 58 could be directed only at the official's home state. Such an interpretation would render that part of Article 27(2) that removes the immunity of officials under *international law* redundant. Since officials do not possess immunities under international law with respect to their home state, the removal in Article 27(2) of "immunities or special procedural rules which may attach . . . under . . . international law" could not have been for the purpose of allowing the ICC to issue arrest warrants that operate only in relation to the official's home state.

Secondly, the view that Article 27 operates solely in relation to the *ICC* and removes immunity only when the *Court* has custody of accused persons (but not when they are still within the territory of a state other than their own) will mean in practice that the provision will rarely apply. In the vast majority of cases, the Court is expected to obtain custody of accused officials through surrender by either their own state or another state. Where an official in the Court's custody has been surrendered by his own state, reliance on Article 27 to remove immunity from the exercise of ICC jurisdiction is hardly necessary, as the surrender itself constitutes a waiver. If Article 98(1) is interpreted as allowing states parties to rely on immunities to prevent the surrender of their officials to the ICC by other states, it would mean that the removal of immunity contained in Article 27 is effectively applicable only in the minority of cases in which custody is secured through the acts of nonstate entities[116] or voluntary appearance.[117] To confine what on its face appears to be an important provision to these limited and exceptional circumstances would appear to defeat the objects and purposes of the Statute.

To give meaningful effect to Article 27, Article 98(1) must be interpreted as applying only to officials of nonparties. Thus, Article 98(1) does not prevent the Court from requesting the surrender of officials of parties even where those officials would otherwise be protected by international law immunities from arrest by national authorities of other states. Correspondingly, parties to the ICC Statute have an obligation under Part 9 to comply with the Court's requests for arrest and surrender where an official of another state party is on their territory. The ICC Statute therefore gives parties the power (or more accurately the *obligation*) to arrest and surrender senior officials, including a serving head of state or a serving head of diplomatic mission, when—and only when—such persons have been indicted by the ICC and it has issued a warrant for their arrest.

The practice of several parties subsequent to their ratification of the ICC Statute supports the view that Article 27 operates to remove the immunity of officials of states parties in the territory of other states that are acting at the Court's request. Reference has already been made to the implementing legislation of Canada, Ireland, Malta, New Zealand, and the United Kingdom, all of which incorporate Article 27 of the Statute and explicitly deny immunity to officials of states parties in domestic proceedings relating to a request for arrest and surrender by the ICC.[118] Moreover, the provisions in the South African and Swiss legislation appear to take the same view of Article 27.[119] Although this subsequent practice in the application of

[116] It cannot be excluded that private parties, or peacekeeping or peace enforcement forces operating under a mandate from an international organization will be involved in surrendering persons to the ICC. Some persons have been transferred to the ICTY by NATO forces operating in Bosnia and Croatia. In one case there appeared to be collusion between private parties and the NATO force. *See* Prosecutor v. Nikolić, Interlocutory Appeals Decision, No. IT–94–2–AR73 (June 5, 2003). Since peacekeeping or peace enforcement forces are composed of state forces, any limitations that apply to states (e.g., the immunities retained in Article 98) would arguably apply to such forces as well.

[117] Gaeta, *supra* note 24, at 994; Triffterer, *supra* note 115.

[118] *See* notes 99 and 100 *supra*; *see also* UK/Canada paper, *supra* note 98. For collected national legislation implementing the ICC Statute, see, for example, <http://web.amnesty.org/web/web.nsf/pages/implementation>; <http://www.nottingham.ac.uk/law/hrlc/hrlc_enacted%20legislation.htm>.

[119] Co-operation with the International Criminal Court, Arts. 6, 4, June 22, 2001 (Switz.) (providing, respectively, that the Swiss Federal Council "shall decide on questions of immunity relating to article 98 in conjunction with article 27 of the Statute which arise in the course of the execution of requests,"and that consultations be held with the ICC where it appears that a request from the Court could violate state or diplomatic immunity); Implementation of the Rome Statute of the International Criminal Court Act, 2002, No. 27, §10(9) (S. Afr.) (providing that the fact that, under §4(2)(a), a person "is or was a head of State or government, a member of a government or parliament,

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the Statute involves only a minority of parties and does not "*establish[] the agreement of the parties* regarding its interpretation,"[120] it certainly supports the view that Article 98(1) does not prevent the Court from requesting the arrest of officials (even senior serving officials) of states parties.

Conferral of the power to arrest a visiting head of state or serving ambassador is practically unprecedented (though not unknown)[121] in international relations and may lead to significant tensions and disruptions in those relations if that power is not exercised judiciously. It is not certain that the drafters of the relevant parts of the ICC Statute consciously contemplated (at the time of drafting) the possibility that states would be empowered to arrest a serving head of state or ambassador.[122] Nevertheless, as demonstrated above, this power follows from the text of the Statute. In addition, the objects and purposes of the Statute as expressed in the preamble and Article 27 make clear that the drafters did intend that even the most senior state officials of ICC parties should not be excluded from the Court's jurisdiction. Likewise, the drafters took the view that international law immunities ought not to stand in the way of the exercise of such jurisdiction by the Court. While tensions will doubtless arise from the arrest by one state of the head of state or diplomats of another state, the fact that such arrests cannot be unilaterally initiated by the host state but must follow an investigation and a request from the ICC, and the fact that the state of the head of state or diplomat must be an ICC party, ought to reduce these tensions to some degree.

*The position of parties and nonparties under Article 98(2).* If Article 98(1) applies only to officials of nonparties, the question arises as to whether the same holds true for Article 98(2). Under that provision,

> [t]he Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Like the first paragraph of Article 98, the second paragraph is designed to avoid a situation in which a state, to which a request for surrender or arrest is directed by the Court, is subjected to conflicting obligations. Article 98(2) allows states to honor treaty obligations prohibiting the surrender of persons sent to their territory by other states.[123] In particular, this paragraph allows states to respect the provisions of status of forces agreements (SOFAs), which prohibit states, on whose territory armed forces of another state are located, from arresting troops and related personnel of the sending state.[124] That provision would also cover extradition

an elected representative or a government official" does not constitute a ground for refusing to issue an order for surrender to the ICC). The latter provision arguably refers only to domestic and not foreign officials, but since §4(2) states that the official position of these persons shall not constitute a defense despite any other law to the contrary, "including customary and conventional international law," it suggests that foreign officials are contemplated as well.

[120] VCLT, *supra* note 71, Art. 31(3)(b) (emphasis added).

[121] See the cases of Charles Taylor, *supra* note 61, and Slobodan Milošević, *supra* note 70, and text at notes 68–74.

[122] Articles 27 and 98 were drafted by different committees. *See* Triffterer, *supra* note 115. It is not clear whether any thought was given to the consistency of the two provisions with one another or to the question whether Article 98 applied to ICC parties.

[123] For an analysis of Article 98(2), see Akande, *supra* note 70, at 642–46; Salvatore Zappalà, *The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UNSC Resolution 1422 (2002) and Article 98 Agreements*, 1 J. INT'L CRIM. JUST. 114 (2003).

[124] *See, e.g.*, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 4 UST 1792, 199 UNTS 67 [hereinafter NATO SOFA]. Some have doubted whether the NATO and similar SOFAs come within the scope of Article 98(2). *See* AMNESTY INTERNATIONAL, INTERNATIONAL CRIMINAL COURT: US EFFORTS TO OBTAIN IMPUNITY FOR GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES, pt. III (AI Index No. IOR 40/025/2002), *available at* <http://web.amnesty.org/library/index/engior400252002>; Dieter Fleck, *Are Foreign Military Personnel Exempt from International Criminal Jurisdiction Under Status of Forces Agreements?* 1 J. INT'L CRIM. JUST. 651 (2003); Paust, *supra* note 89, at 10; Wirth, *supra* note 97, at 455.

This writer has argued elsewhere, Akande, *supra* note 70, at 644, that Articles VII(3)(C) and VII(5) of the NATO SOFA fall within the language of Article 98(2). Moreover, it is generally admitted that Article 98(2) was drafted with

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agreements providing that a person who has been extradited from one state to another may not be re-extradited to a third state without the consent of the first state.[125]

But can an ICC party rely on the agreements covered by Article 98(2) to prevent other states from surrendering personnel of the ICC party to the ICC? This question is of practical importance because a fair number of ICC parties have concluded agreements with other states (mainly the United States) specifically stating that neither party may transfer persons of one party, present in the territory of the other, to the ICC without the consent of the first party. It is worth noting that these agreements with the United States, as currently worded, are not limited to persons sent by one party to the agreement to the other party.[126] Since Article 98(2) only covers agreements requiring the consent of the "sending state" for surrender to the ICC, the U.S. agreements (to the extent that they apply to persons who have not been "sent") are not covered by that provision.[127] Therefore, the Court is not obliged to refrain from requesting the arrest of persons who have not been sent, even though the ICC party is bound by the agreement with the United States not to surrender the person.

In considering whether ICC parties may rely on agreements covered by Article 98(2) to bar a request for surrender by the Court, it is significant that not only have some ICC parties been willing to conclude these agreements with the United States,[128] but the provisions of the agreements are reciprocal so that they also benefit persons of the ICC party. In addition, at least one such agreement was concluded for the benefit of a number of ICC parties with a state other than the United States. Under the Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, Afghanistan agreed not to surrender ISAF personnel to any international tribunal without the express consent of the contributing nation.[129] At the time the Military Technical Agreement was signed, most of the ISAF troop-contributing states were ICC parties, and this remained the

the intention of applying to SOFAs. *See* Kimberly Prost & Angelika Schlunck, *Article 98*, *in* ROME COMMENTARY, *supra* note 115, at 1133 margin n.6.

[125] *E.g.*, European Convention on Extradition, Dec. 13, 1957, Art. 15, 359 UNTS 273; *see* Akande, *supra* note 70; Prost & Schlunck, *supra* note 124, at 1133 margin n.6; Wirth, *supra* note 97, at 455.

[126] Typically, under these agreements,

> Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,
>
> (a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or
> (b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.

For the purposes of the agreement, "'persons' are current or former government officials, employees (including contractors), or military personnel or nationals of one Party." For the text of the agreement, see Sean D. Murphy, Contemporary Practice of the United States, 97 AJIL 200, 201–02 (2003).

[127] *See* Akande, *supra* note 70, at 643–44; JAMES CRAWFORD, PHILIPPE SANDS, & RALPH WILDE, IN THE MATTER OF THE INTERNATIONAL CRIMINAL COURT AND IN THE MATTER OF BILATERAL AGREEMENTS SOUGHT BY THE UNITED STATES UNDER ARTICLE 98(2) OF THE STATUTE (June 5, 2003), *available at* <http://www.lchr.org/international_justice/Art98_061403.pdf> (arguing that these agreements are inconsistent with Article 98(2) because (1) they deal with persons who cannot objectively be treated as having been "sent" by a state, and (2) the object and purpose of the ICC Statute precludes a state party from entering into an agreement whose purpose or effect may lead to impunity); Zappalà, *supra* note 123, at 129. For similar views, see Council of the European Union, EU Guiding Principles Concerning Arrangements Between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, *in* Council Conclusions—International Criminal Court, annex (Sept. 30, 2002), 42 ILM 240, 241 (2003).

[128] By April 7, 2004, the Department of State reported that seventy-four states had concluded such agreements with the United States. Thirty-four are parties to the ICC Statute. For a list, see <http://www.iccnow.org/documents/usandtheicc.html>. It has been debated whether Article 98(2) covers agreements entered into after the entry into force of the Rome Statute or only preexisting agreements. The better view is that it covers both. *See* CRAWFORD, SANDS, & WILDE, *supra* note 127, para. 38; Akande, *supra* note 70, at 645; Zappalà, *supra* note 123, at 122–23.

[129] Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, Jan. 4, 2002, Annex A, §1(4), 41 ILM 1032 (2002) ("The Interim Administration agree that ISAF and supporting personnel, including associated liaison personnel, may not be surrendered to, or otherwise transferred to the custody of, an international tribunal or any other entity or State without the express consent of the contributing nation.").

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case thereafter.[130] The only conclusion that can be drawn from these agreements is that at least some ICC parties take the view that ICC parties may rely on agreements covered by Article 98(2).[131] Some observers have even argued that *only* agreements benefiting ICC parties are protected by that provision.[132] For reasons discussed earlier,[133] the view that agreements for the benefit of nonparties are not covered by Article 98(2) cannot be accepted. The ICC Statute cannot be taken as overriding the rights of nonparties.

At least three reasons demonstrate the importance of construing Article 98(2)—like Article 98(1)—as benefiting only nonparties. Firstly, the reasons described above for so construing Article 98(1) also apply to agreements covered by Article 98(2),[134] which confer immunity based on official capacity (e.g., SOFAs).[135] Secondly, the significant degree of overlap in the two provisions suggests that they must be given similar interpretations. The overlap arises because treaties conferring state or diplomatic immunities clearly fall within the language of Article 98(2). Whatever the intent of the drafters of the ICC Statute, it cannot be doubted that the Vienna Convention on Diplomatic Relations of 1961 and the UN Convention on Special Missions of 1969 are "international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court."[136] Thus, if Article 98(2) is not limited to nonparties, the limitation of Article 98(1) to nonparties would easily be avoided by relying on Article 98(2) instead. Thirdly, interpreting Article 98(2) as extending to ICC parties while Article 98(1) does not would lead to the manifestly absurd result that troops of parties and extradited persons may not be surrendered to the ICC (because of the SOFAs and extradition agreements covered by Article 98(2)) but that a serving head of state, head of government, or foreign minister who goes to visit those troops in the same country (or the head of the diplomatic mission) has no immunity and may be surrendered to the ICC. Thus, an interpretation of Article 98(2) in context, that is, in the light of the interpretation

[130] For the composition of ISAF at its inception, see Fact Sheet: International Security Assistance Force (ISAF) in Afghanistan, *at* <http://www.cdi.org/terrorism/isaf.cfm> (last modified Feb. 14, 2002). For a more recent list, see International Assistance Security Force, *at* <http://www.afnorth.nato.int/ISAF/index.htm> (last modified Apr. 20, 2004).

[131] This is evidently not the view of the members of the EU. Council of the European Union, *supra* note 127, annex, at 241 (stating: "Nationality of persons not to be surrendered: any solution should only cover persons who are not nationals of an ICC State Party.").

[132] *See* EC Commission Legal Service, *Effective Functioning of the International Criminal Court Undermined by Bilateral Agreements as Proposed by the U.S.*, 23 HUM. RTS. L.J. 158–59 (2002) (internal opinion); Human Rights Watch, United States Efforts to Undermine the International Criminal Court: Legal Analysis of Impunity Agreements (Sept. 4, 2002), *at* <http://www.hrw.org/campaigns/icc/docs/art98analysis.htm>. Those taking this view argue that to interpret Article 98(2) as extending to agreements with nonparties would result in impunity in cases where the nonparty decides not to prosecute. They then argue that such an interpretation must be rejected since one of the purposes of the Statute is the prevention of impunity. According to this view, Article 98(2) is only a "routing device," allowing the ICC party on whose territory a national of another ICC party is found to comply with its treaty obligations to the latter ICC party but leaving the Court free to request surrender from the latter state.

[133] *See* pp. 421–22 *supra*. See also Akande, *supra* note 70, at 643, for further reasons suggesting this argument is unacceptable.

[134] Admittedly, it is more difficult to interpret the wording of Article 98(2) as applying only to agreements concluded by nonparties. Since that provision prevents requests for surrender that would "require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required," it does not explicitly exclude agreements concluded by parties. In addition, while obligations under the Statute (such as those in Article 27) are part of the "obligations under international law" of states parties and can therefore be taken into account under Article 98(1), it may be argued that Article 98(2) only requires consideration of the obligations under other international agreements and not under the Statute. Although, as between the same parties, the obligations under the Statute would normally prevail over those in prior agreements, *see* VCLT, *supra* note 71, Art. 30(3), it could be argued that Article 98(2) effectively specifies that the Statute is subject to the agreements referred to in that provision. In such circumstances, the provision of that other agreement would prevail, *see id.*, Art. 30(2).

[135] While extradition agreements within the scope of Article 98(2), *see supra* note 125 and corresponding text, will not be covered by the waiver in Article 27, it has been argued that the right of ICC parties, under those extradition treaties, to demand that persons they extradite not be transferred to the Court has been waived by Article 89 of the ICC Statute. *See* Wirth, *supra* note 97, at 455.

[136] *See* Akande, *supra* note 70.

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given to 98(1), must lead to the conclusion that only agreements for the benefit of nonparties to the ICC Statute come within the scope of Article 98(2).

In concluding this examination of Article 98(2), it should be noted that agreements requiring the consent of a state for the surrender of a person to the ICC that do not come within the scope of that provision (for example, the U.S. agreements or other agreements intended to benefit ICC parties) may nevertheless be legally effective in preventing such transfers to the ICC. This effect may ensue where the agreement was concluded after the entry into force of the ICC Statute. As an ordinary treaty with no "constitutional" status, the ICC Statute does not prevail over subsequent treaties. Clearly, the obligation to confer immunity under preexisting agreements between ICC parties is superseded by the provisions of the ICC Statute.[137] However, obligations under agreements between ICC parties entered into after the Statute came into force will, *as between the parties to that later agreement*, prevail over their obligations under the ICC Statute.[138] Likewise, obligations under agreements with a nonparty that are not covered by Article 98(2) (such as the U.S. agreements) are valid and binding under international law;[139] but these obligations do not detract from those which ICC parties continue to have, under the ICC Statute, to the other ICC parties not party to the later agreement, and to the ICC. Thus, an ICC party that has entered into a relevant agreement not covered by Article 98(2) and has received a request by the ICC to surrender a person covered by that subsequent agreement will have to contend with inconsistent obligations. If the ICC party chooses to surrender a person covered by such an agreement, it will breach valid treaty obligations and be legally responsible to the other party for that breach.

*Officials of international organizations.* A further question that may arise in connection with requests by the Court to states for the surrender of persons is whether such requests may be issued when the person wanted is an official of (or an expert on mission for) an international organization. While most international officials possess immunity only with respect to acts performed in their official capacity,[140] an official could conceivably be accused of committing an international crime in the exercise of his official duties.[141] For example, it might be alleged that such a crime was committed during the planning or implementation of a peacekeeping or other military operation conducted or authorized by the international organization.[142] Furthermore, the immunity of the most senior officials of international organizations, such as the UN secretary- general and assistant secretaries-general, is analogous to that of diplomats since those senior officials are generally immune from the jurisdiction of states for as long as they hold office.[143] Therefore, they may not be arrested while in office in relation to any acts, whether committed before or during that period. Similarly, under the UN Immunities Convention, experts on mission are immune from arrest or detention.[144] In all these cases, states are bound to refrain from arresting and surrendering officials or experts of international organizations, even if they are accused of having committed international crimes.

[137] VCLT, *supra* note 71, Art. 30(3).

[138] *Id.*

[139] *Id.*, Art. 30(4)(b).

[140] *See, e.g.*, UN Immunities Convention, *supra* note 35, Art. V, §18(a). A range of treaties deal with the immunities of international organizations. However, the provisions in those treaties dealing with immunity from arrest and criminal process tend to be uniform.

[141] See part I above for the argument that acts which amount to international crimes are nevertheless to be regarded as official acts where they are done under "color of law."

[142] *See* HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW 358, §534 (3d rev. ed. 1995); Paul C. Szasz & Thordis Ingadottir, *The UN and the ICC: The Immunity of the UN and Its Officials*, 14 LEIDEN J. INT'L L. 867, 880 (2001).

[143] *See, e.g.*, UN Immunities Convention, *supra* note 35, Art. V, §19. Since many heads of international organizations were previously senior state officials or government members, it is not inconceivable that they may be accused of having committed or been involved in the commission of an international crime prior to their appointment by the organization. For example, it was alleged that Kurt Waldheim—a former Austrian UN secretary-general (1972–1981)—had been involved in the commission of war crimes during World War II.

[144] *See, e.g., id.*, Art. VI, §22(a).

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Whether or not the ICC may require the arrest and surrender of an official or expert of an international organization in circumstances where that person is immune from arrest in the host state is not addressed in Article 98. The text of that provision makes no mention of immunities accruing to international organizations but is limited to "immunity of a person or property of a third *State*"[145] and "international agreements pursuant to which the consent of a sending *State* is required to surrender a person of that *State* to the Court."[146] While the declaration in Article 27(1) that the Statute applies equally, irrespective of official capacity, may be taken as including officials of international organizations,[147] this declaration cannot bind the organization as a nonparty to the Rome Statute and may not be regarded as a waiver of the immunity of the official.[148] The position remains the same even if all members of the organization are parties to the ICC Statute. Since the organization is a separate legal person, the immunity of its officials and experts is a right belonging to the organization and not to the member states.[149] Only the international organization itself can waive the immunities of its officials and experts[150] and nothing in the Statute can be regarded as having this effect.

Thus, while Article 98 does not preclude the ICC from requesting the surrender of officials and experts of international organizations who ordinarily possess immunity, an ICC party that is party to a treaty conferring such immunity would be violating that treaty if it arrests and surrenders the official or expert. To prevent the possibility that inconsistent obligations will arise, the ICC would be prudent not to request the surrender of officials or experts of international organizations until the organization has waived the immunity of that person.[151] In the case of UN officials, Article 19 of the Draft Relationship Agreement Between the United Nations and the ICC provides that the United Nations undertakes to waive any immunities that may otherwise apply where such persons are wanted for prosecution by the Court.[152] Importantly, the wording of this provision makes clear that it does not in itself constitute a waiver of immunity but, rather, an undertaking to waive the immunity. Therefore, if an actual case were to arise, a further act of waiver by the UN secretary-general would still be required.

*Who Decides Whether a Person Is Entitled to Immunity in Another State?*

A final question that must be addressed in the application of Article 98 is: Who decides whether a person sought by the ICC is entitled to state or diplomatic immunity or is covered

[145] ICC Statute, *supra* note 6, Art. 98(1).

[146] *Id.*, Art. 98(2). This provision is wide enough to cover treaty provisions conferring immunity on the representatives of states to international organizations since it is the member state and not the organization that is usually empowered to waive the immunity. *See, e.g.*, UN Immunities Convention, *supra* note 35, Art. IV, §14.

[147] *See* Triffterer, *supra* note 115, at 509.

[148] Szasz & Ingadottir, *supra* note 142, at 881–82.

[149] This follows from the principle that an official or expert of an international organization is entitled to immunity even from the jurisdiction of his own state. *See* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 ICJ REP. 62, para. 46 (Apr. 29); Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 ICJ REP. 177, paras. 51–52 (Dec. 15); *see also* C. F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 370 (1996).

[150] *See, e.g.*, UN Immunities Convention, *supra* note 35, Art. V, §20 & Art. VI, §23.

[151] Under Article 87(6) ICC Statute, the Court is empowered to request cooperation and assistance from international organizations.

[152] Article 19 provides:

> If the Court seeks to exercise its jurisdiction over a person who is alleged to be criminally responsible for a crime within the jurisdiction of the Court and if, in the circumstances, such person enjoys, according to the relevant rules of international law, any privileges and immunities as are necessary for the independent exercise of his or her work for the United Nations, the United Nations undertakes to cooperate fully with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities.

Draft Relationship Agreement Between the United Nations and the International Criminal Court, UN Doc. ICC–ASP/13 (2002), *available at* <http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_g_e.pdf> (last modified Dec. 19, 2003).

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by an agreement precluding surrender? Is that decision to be made by the ICC or by the state on whose territory the person is located? Furthermore, if the ICC is to make the decision, by what procedure is it to do so and will the decision bind the state to which the request for surrender is directed?

Under Article 97, a state party that has received a request from the Court "in relation to which it identifies problems which may impede or prevent the execution of the request . . . shall consult with the Court without delay in order to resolve the matter." Since Article 98 states that "the Court may not proceed with a request for surrender" unless the conditions stipulated therein are met, the Court must first decide whether those conditions apply.[153] This reading is confirmed by Rule 195 of the ICC's Rules of Procedure and Evidence (Rules), which provides that a requested state that believes that a request for surrender raises a problem under Article 98, "shall provide any information relevant to assist the Court in the application of article 98." Moreover, "[a]ny concerned third State or sending State may provide additional information to assist the Court."[154]

Unfortunately, neither the Statute nor the Rules stipulate the procedure for the Court to follow in making this decision. However, on a matter of such importance, it can only be assumed that the state concerned is entitled to a decision by the pretrial chamber. Although this issue is not specifically covered in the list of functions of the pretrial chamber in Article 57 of the Statute, Rule 195 arguably grants procedural rights to concerned third states or sending states in any hearings before the pretrial chamber.

Despite the fact that the Court must, in the first place, make a decision under Article 98, there remains the issue whether that decision is binding on the requested state. Once a request for surrender is made, Article 89 of the Statute imposes an obligation on parties to comply. But since a request governed by Article 98 deals with a situation involving an ICC party's obligations to nonparties, leaving the final decision to the ICC is very far-reaching,[155] as any errors by the Court would render the ICC party concerned legally responsible to the nonparty. It may be argued that Article 59(2)(c) of the Statute—which provides that a person arrested at the request of the Court shall be brought before the competent judicial authorities of the custodial state for the purpose, inter alia, of determining whether his or her rights have been respected—allows those judicial authorities to make a decision on immunity. However, disagreements relating to whether or not a requested state is obliged to surrender a person to the Court are disputes "concerning the judicial function of the Court," which under Article 119 of the Statute "shall be settled by the decision of the Court."[156]

The national statutes that deal with the immunity of foreign officials when a request for arrest has been made by the ICC reveal that states have taken differing views on the identity of the body entitled to decide the issue. Both the Canadian Crimes Against Humanity and War Crimes Act of 2000[157] and the New Zealand International Crimes and International Criminal Court Act of 2000[158] leave the final decision on immunity to the ICC. On the other hand, the Australian and Swiss laws provide for consultation by their nation's executive branch with the

[153] *See* CRAWFORD, SANDS, & WILDE, *supra* note 127, paras. 58–59 (arguing that where the ICC has requested or intends to request the surrender of a person, it is for the Court to decide whether a bilateral nonsurrender agreement covering the person is consistent with Art. 98(2)).

[154] ICC Rules of Procedure and Evidence, Rule 195, Doc. ICC–ASP/1/3, *available at* <http://www.icc-cpi.int> (visited May 10, 2004).

[155] BROOMHALL, *supra* note 85, at 145, and Wirth, *supra* note 97, at 458, argue that the final decision should be left to the ICC.

[156] *See* CRAWFORD, SANDS, & WILDE, *supra* note 127, para. 58(6).

[157] Ch. 24, §48, 2000 S.C. (amending Extradition Act, ch. 18, §6, 1999 S.C.); *see also* Crimes Against Humanity and War Crimes Act, *supra* note 100, §70 (amending State Immunity Act, ch. 41, §16, 1991 S.C.).

[158] International Crimes and International Criminal Court Act, *supra* note 100, §31, *amended by* No. 67, 2000. Under sections 66 and 120, the New Zealand executive may request that the ICC make a final determination on whether or not Article 98 applies to a request for surrender. However, if the ICC advises that it intends to proceed with the request, the New Zealand authorities must comply.

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ICC but leave the final decision to the relevant national authorities (the Australian attorney general and the Swiss Federal Council), whose decision appears to be binding on the courts.[159] Similarly, under the Maltese and United Kingdom implementing legislation, the relevant minister may certify with conclusive effect whether or not a state is a party to the Statute and whether a nonparty has waived its immunity.[160] More important, the relevant minister may also direct, after consultation with the ICC and the state concerned, that proceedings in the United Kingdom or Malta that would ordinarily be barred by state or diplomatic immunities shall not be taken.[161] Thus, a decision by the executive that immunities are available would appear to bind the courts of those countries. However, in the case of an official or diplomat of a nonparty, if the executive takes no view or finds that international immunities are not available, the UK or Maltese courts may decide for themselves whether arrest or surrender would be inconsistent with any immunity attaching to that person.

## IV. CONCLUSION

The basic aims of those states that drafted the ICC Statute were "that the most serious crimes of concern to the international community as a whole must not go unpunished" and "to put an end to impunity for the perpetrators of these crimes."[162] These goals can be realized only to the extent that there is an attempt to bring to justice those who initiate and plan these crimes, as opposed to those who merely carry them out. Since history suggests that international crimes are often the work of state agents, a strategy of prosecuting right to the top of the planning chain will entail attempts to prosecute senior state officials. In all probability, the ICC will depend on cooperation from states to secure the custody of persons wanted for trial, so that the question of the immunity of state officials from arrest and surrender is likely to prove essential to the work of the Court.

When applied to criminal cases alleging the commission of international crimes, the rules of international law concerning immunity must, and do, strike a fair balance between the need to ensure that undue interference with the functioning of foreign states is avoided and the need to ensure that those who perpetrate international crimes are punished. Thus, very senior state officials, as well as serving diplomats and officials abroad on special mission, are entitled to immunity and may not be arrested or subjected to prosecution while in office or working as part of the mission. However, the position is different for other state officials as well as former officials (irrespective of the rank they held). The development of the rule of universal jurisdiction means that all states are entitled to prosecute those persons on their territory who are accused of committing certain international crimes irrespective of the nationality of the perpetrator or the place where the crime was committed. Where this rule contemplates prosecutions of state officials, those officials that are not entitled to immunity as a result of their current status (immunity *ratione personae*) may not rely on immunity *ratione materiae* in cases in which universal jurisdiction is exercised.

The parties to the ICC Statute have gone beyond the developments in customary international law. In subjecting all state officials to possible prosecution by the ICC and explicitly removing the international law immunities of senior officials, including heads of state (Article 27), the ICC parties agreed not only to prosecution by the ICC, but also to the possibility that senior officials may be arrested and surrendered to the ICC by other states. This conclusion

[159] International Criminal Court Act, 2002, No. 41, §12 (Austl.); Co-operation with the International Criminal Court (Switz.), *supra* note 119, Arts. 4(d), 6.

[160] UK Act, *supra* note 99, §23(3); International Criminal Court Act (Malta), *supra* note 99, Art. 14 (inserting a new Art. 26S(3) into the Extradition Act).

[161] UK Act, *supra* note 99, §23(4); International Criminal Court Act (Malta), *supra* note 99, Art. 14 (inserting a new Art. 26S(4) into the Extradition Act).

[162] ICC Statute, *supra* note 6, pmbl.

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seems unavoidable despite Article 98 of the Statute. Although it is not easy to dismiss the argument that Article 98 preserves the international law immunities of officials of ICC parties when they are in a third state, this interpretation must ultimately be rejected because it would render certain parts of Article 27 ineffective. The conferral of a power on states to arrest a visiting serving head of state or a serving ambassador is very far-reaching but is probably the only way in practice that such persons will be subjected to the jurisdiction of the Court. In view of the parties' determination under the ICC Statute to bring all perpetrators of international crimes to justice, the Statute must be construed in a way that permits this possibility.

Since state immunity is derived from the independence and sovereign equality of states,[163] it is appropriate to set this principle aside where a state is acting in support of an international tribunal. In such a case, the maxim *par in parem non habet imperium* ("An equal has no power over an equal") is hardly applicable because it is the ICC and not the arresting state that is ultimately seeking to exercise authority. However, it must be emphasized that this waiver of immunity vis-à-vis other states applies only when the ICC requests an arrest and surrender and not in relation to domestic prosecutions.

It must equally be emphasized that it is only parties to the ICC Statute that have waived the international law immunities (*ratione personae*) of their senior officials. Although the ICC may exercise jurisdiction over nationals and officials of nonparties, nothing in the Statute can affect the immunities that the officials of nonparties would otherwise enjoy. Accordingly, Article 98 of the Statute represents an instruction to the Court and to ICC parties not to interfere with those officials of nonparties who ordinarily possess immunity in international law.

[163] FOX, *supra* note 1, at 30.

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# 40

# THE OBLIGATION TO COOPERATE

Annalisa Ciampi


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## I. Introductory Remarks

Unlike national courts and the military tribunals of Nuremberg and Tokyo established in the territory occupied by the Allied Powers in the aftermath of World War II, the ICC is not endowed with police or military forces authorized and empowered to apprehend suspects or to gather evidence. For these tasks, the ICC



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depends, as the ICTY and the ICTR do, on the cooperation of existing national criminal justice systems.[1]

Part 9 of the Statute deals with the key issues of international cooperation with the Court. Provisions laying down an obligation for States to cooperate with, and assist, the Court in discharging its functions, however, are to be found also in other parts of the Statute. The first provision in Part 9 is Article 86 of the Statute, which provides that 'States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'. On the one hand, this provision makes it clear that there exists a general obligation for States to comply with requests of the Court. On the other hand, the wording of Article 86 also shows that the duty is conditional on requests from the Court that are made in accordance with the provisions of the Statute. Article 87 and the Rules of Procedure and Evidence adopted in relation thereto define some of the modalities to be followed with a view to complying with requests by the Court for cooperation. Article 88 provides that 'States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part [9]', that is, for arrest and surrender of persons to the Court (in accordance with the specific provisions under Articles 89–92 and 101–102) and for other forms of cooperation (as detailed in Articles 93–96 and 99). Articles 97–98 and 100 also set out rules of general application with respect to all forms of cooperation provided for under Part 9 of the Statute.

This chapter is devoted to the analysis of the general aspects of the obligation to cooperate with the ICC which apply in relation to both requests for arrest and surrender and requests for other forms of cooperation. Rather than a textual analysis of the relevant provisions of Part 9 (Articles 86–88, 97–98, and 100), it will follow a systematic approach, by addressing under separate headings those which appear as the most relevant issues arising thereunder. Where appropriate, a comparison will be made with the system of cooperation of the two *ad hoc* Tribunals as well as with the general features of inter-State judicial assistance mechanisms in criminal matters, with a view to underlining both the analogies and the specificity of the ICC cooperation regime.[2]

## II. The Obligation to Cooperate

The ICC being established by treaty, only States becoming a party to the Statute will be in principle under an international obligation to cooperate with the Court.

[1] That cooperation of States will be vital to the proper functioning of the Court is shown in the previous chapter, in which the general features of the system of cooperation established under the Statute are discussed in depth.

[2] On this fundamental issue, see also the general analysis in Ch. 39 above.



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Here lies one of the fundamental differences between the Court and the two *ad hoc* Tribunals which were established by a decision of the UN Security Council on the basis of Chapter VII of the UN Charter.[3]

### *A. The Legal Basis of the Obligation to Cooperate*

In all matters of international cooperation and judicial assistance, Part 9 of the Statute systematically distinguishes between States Parties to the Statute and States that are not parties thereto. The obligations arising out of the Statute are obligations for States Parties only. In principle, cooperation cannot be imposed upon other States.[4]

For States which are not parties to the Statute, the Statute expressly provides for the possibility of either accepting the jurisdiction of the Court with respect to a specific case or undertaking to provide assistance to the Court on the basis of an *ad hoc* arrangement or agreement with the Court. Only a decision by the Security Council would place all Member States of the UN, whether or not parties to the Statute, in the same position with respect to the Court. Furthermore, although the Statute is not open to signature, ratification, or accession on the part of international subjects other than States, the possibility for the Court to avail itself of the cooperation by intergovernmental organizations or other international bodies is expressly provided for under the Statute.

#### 1. Customary International Law

One may argue that, according to current customary international law, all States are under an obligation to cooperate at least with respect to some of the crimes within the jurisdiction of the Court (e.g. in relation to war crimes set out in the Geneva Conventions of 12 August 1949, the provisions of which are generally held to correspond to customary rules). But it is doubtful whether a general rule of this kind—were it deemed to exist under customary international law—may imply an obligation to comply with requests by the Court for cooperation outside the Statute framework, for States which do not become a party to it.[5]

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[3] For a thorough analysis of this basic difference between the *ad hoc* Tribunals and the Court and implications arising thereof, see again the previous chapter.

[4] The Statute, as an international treaty, only binds States which are parties to it. This is in accordance with a well-established principle of international law. For a restatement of the rule, see Art. 34 of the Vienna Convention on the Law of the Treaties: 'A treaty does not create either obligations or rights for a third State without its consent' (UN Doc. A/CONF./39/27 (1969), reprinted in 8 *ILM* (1969) 679).

[5] This view was shared by the ICTY, according to which 'under customary international law, States, as a matter of principle, cannot be "ordered" either by other States or by international bodies', Ap. Ch., Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, *Blaškić*, IT-95–14–AR108*bis* (hereinafter *Blaškić Subpoena* case), para. 26.



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## 2. The Obligation to Cooperate with the ICTY and the ICTR

The two *ad hoc* Tribunals were established by a decision of the UN Security Council on the basis of Chapter VII of the UN Charter. The UN Member States were under an obligation to cooperate with the Tribunals in order to allow them to effectively carry out their mandates. The Secretary-General had stated in his report concerning the Yugoslav Tribunal that

> the establishment of the International Tribunal on the basis of a Chapter VII decision . . . means that all States would be under an obligation to cooperate with the International Tribunal and to assist it in all stages of the proceedings to ensure compliance with requests for assistance in gathering evidence, hearing witnesses, suspects and experts, identification and location of persons and the service of documents. Effects shall also be given to orders issued by the Trial Chamber, such as warrants of arrest, search warrants, warrants for surrender or transfer of persons, and any other orders necessary for the conduct of the trial. In this connection, an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations.[6]

A general obligation to cooperate with the Tribunals was stated in operative paragraph 4 of SC Res. 827 (1993) and operative paragraph 2 of SC Res. 955 (1994), the resolutions establishing the Yugoslav and Rwanda Tribunals, respectively. These provisions both read as follows: '[The Security Council] [*d*]*ecides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 [Article 28] of the Statute'.[7] The Statutes of both Tribunals reiterate the obligations spelt out in the resolutions. Article 29 of the ICTY Statute comprises both a general duty for States to cooperate and an obligation for States with regard to specific forms of legal assistance, although this is by no means an exhaustive list. Article 28 of the ICTR Statute contains identical language.[8] Additional rules have been laid down in the

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[6] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), reprinted in 14 *HRLJ* (1993) 201, paras. 125–126.

[7] SC Res. 827 (1993), reprinted in 32 *ILM* (1993) 1203; SC Res. 955 (1994), reprinted in 33 *ILM* (1994) 1602.

[8] Art. 29 of the ICTY Statute and Art. 28 of the ICTR Statute read as follows:

1. States shall cooperate with the International Tribunal 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) the taking of testimony and the production of evidence;



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(virtually identical) Rules of Procedure and Evidence, adopted by the Tribunals pursuant to Article 15 of the Statute of the ICTY and Article 14 of the Statute of the ICTR.[9]

Another important basis for cooperation with the ICTY is the General Framework Agreement for Peace in Bosnia and Herzegovina, agreed upon by Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia/Serbia and Montenegro) in Dayton, Ohio, on 2 November 1995, and signed by them in Paris on 14 December 1995 (Dayton Peace Agreement).[10] States, e.g. the United States, have also concluded bilateral agreements with both Tribunals on the surrender of persons.[11] Finally, cooperation may also result from unilateral action. This is the case for Switzerland, not a Member State of the United Nations. In 1994, Switzerland decided that it would cooperate with both Tribunals and implement the provisions of their Statutes.[12]

## 3. The Legal Bases of the Obligation to Cooperate with the ICC

The obligation to lend cooperation and judicial assistance to the ICC, by contrast, derives its binding force from the Statute *qua* an international treaty.

Under certain circumstances, however, an obligation could also be imposed upon all Member States of the UN through a Security Council resolution adopted under Chapter VII of the UN Charter, as was the case with the ICTY and the ICTR. This exceptional legal basis may be available to the ICC in cases referred to the Court by the Security Council acting under Chapter VII of the UN Charter, pursuant to Article 13(c) of the Statute.[13] But an obligation to cooperate with the Court could also be imposed by the Security Council in cases referred to the Court by a State or initiated by the Prosecutor *proprio motu* should the Security Council decide that cooperation with the Court is needed in a situation amounting to a threat to the peace.

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(c) the service of documents;
(d) the arrest or detention of persons;
(e) the surrender or the transfer of the accused to the International Tribunal.

[9] SC Res. 827 (1993) and 955 (1994) and the Statutes of the Tribunals are not the only legal bases for cooperation. In later years, the Security Council adopted Res. 1019 (1995), 1031 (1995), 1034 (1995), 1207 (1998), and 1244 (1999), all of which confirm the obligations for States arising out of Res. 827 (1993) and the Statute of the ICTY; in Res. 978 (1995) the Council did the same with regard to cooperation with the ICTR. Moreover, Res. 1031 (1995), 1037 (1996), 1088 (1996), and 1244 (1999) provide a mandate for international forces to take part in the arrest and surrender or transfer of persons. With the exception of Res. 1019 (1995) and 1034 (1995), all these resolutions have been adopted under Chapter VII of the Charter.

[10] For the text of the Agreement and the Annexes thereto, see S/1995/999.

[11] For the text of the Agreement with the ICTY, see 2 *Yearbook of the ICTY* (1994) 190.

[12] For an English translation of the Swiss Federal Order on Cooperation with the International Tribunals for the Prosecution of Serious Violations of International Humanitarian Law of December 21, 1995 implementing the Statutes, see 3 *Yearbook of the ICTY* (1995) 325.

[13] See Ch. 17.2 above.



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In all cases where the obligation to cooperate with the Court derives its binding force from a Security Council resolution adopted pursuant to the provisions of Chapter VII of the UN Charter, this legal basis has special consequences, as we shall see.

### *B. The General Obligation of States Parties to Cooperate with the Court*

The general obligation to cooperate fully with the Court is expressly stated in the opening article of Part 9. According to Article 86, 'States Parties shall, in accordance with the provisions of th[e] Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'. This provision is broader in scope than subsequent provisions in Part 9 (with the exception of some provisions which, as we shall see, are also cast in general terms). According to the very wording of Article 86, the extent to which States Parties are under an obligation to cooperate with the Court appears not to be limited to the forms of cooperation and assistance specified in Part 9, but to encompass all the obligations provided for in the Statute.[14] This plain reading of Article 86 is supported by the drafting history of the provision in question.[15] Indeed Article 85 of the Draft Statute for the International Criminal Court adopted by the Preparatory Committee, to which Article 86 of the Statute corresponds, stated the general obligation of States Parties to cooperate with the Court referring, alternatively, to the provisions of Part 9 or to the entire Statute.[16] The second option was finally retained at the Rome Conference. It follows that in order to assess the content of the obligation of States Parties to cooperate with the Court, one has to look throughout the whole Statute. The Draft Statute also makes clear that the word 'Court' is to be understood to include its constituent organs, including the Prosecutor,[17] whose respective powers are to be distinguished according to the

[14] This aspect is often overlooked in authors' writings. According to C. Kress, 'Penalties, Enforcement and Cooperation in the International Criminal Court Statute', 6 *European Journal of Crime, Criminal Law and Criminal Justice* (1998) 442, at 450, commenting upon the basic obligation of States Parties to fully cooperate with the Court: 'Taken as such, it will hardly [be] possible to deduce concrete duties from this principle. But the principle of full co-operation may well serve as an overarching interpretative guideline to concretize *the obligations subsequently stated in this Part*' (emphasis added).

[15] Cf. Art. 32 of the Vienna Convention on the Law of Treaties, which admits recourse to 'supplementary means of interpretation, including the preparatory works' in order to confirm the meaning resulting from the application of the general rule of interpretation set out in Art. 31. That both provisions correspond to general rules of international law was found by the ICJ in the *Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal)* case and in the *Territorial Dispute (Lybian Arab Jamahiriya v. Chad)* case (ICJ Reports (1991) 53, at 69–70 and ICJ Reports (1994) 6, at 21, respectively).

[16] For the Report of the Preparatory Committee on the Establishment of an International Criminal Court, containing the Draft Statute for the International Criminal Court and the Draft Final Act which were referred to the Rome Conference, see UN Doc. A/CONF. 183/2/Add. 1, p. 92.

[17] Ibid., note 224, p. 136.



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provisions of Parts 5 and 6 of the Statute. Furthermore, that States Parties are under an obligation to 'cooperate fully with the Court' implies that they are duty-bound to act promptly and with all due diligence, in accordance with the general principle of good faith governing performance of international obligations. It was, therefore, not necessary to spell out explicitly, as the Draft Statute did, that States have to comply without undue delay.[18]

The States' obligation to cooperate with the Court as laid down in Part 9 of the Statute is generally to be discharged upon a request by the Court. This is unequivocally implied by Article 87, the first sentence of which reads as follows: 'The Court shall have the authority to make requests to States Parties for cooperation.' If the Court is vested with a general power to issue requests to States Parties for cooperation, it would be hard to view this provision as a sufficient basis for imposing an obligation which has no other basis in the Statute or elsewhere. It is submitted that for a request of the Court to be binding upon States Parties, two requirements should be met: the Court's authority to issue the request (which will hardly be possible to challenge, in the light of the overreaching provision of Article 87(1) ), and a specific duty of the requested State that is based in the Statute.[19]

No doubt, States Parties are under an obligation to cooperate with respect to requests by the Court for 'arrest and surrender' and 'other forms of assistance' under Part 9 (Articles 89–92 and 101–102; and Articles 93–96 and 99, respectively). Moreover, they have to give 'international cooperation' with respect to the Court's proceedings for 'offenses against its administration of justice' (Article 70) and 'enforcement of fines or forfeiture measures' ordered by the Court (Article 109). While requests for arrest and surrender and other forms of cooperation are to be complied with in accordance with the modalities detailed throughout Part 9, pursuant to Article 70(2), the conditions for providing international cooperation to the Court with respect to its proceedings over offences against its administration of justice 'shall be governed by the domestic laws of the requested State'. Similarly, under Article 109 of the Statute, States Parties shall give effect to fines and forfeiture measures ordered by the Court 'in accordance with the procedure of their national law'. Therefore, while States Parties are indeed under an obligation to comply with all the above-mentioned requests, they are free to determine the way in which they give effect to the Court's orders under both Article 70(2) and Article 109 of the Statute.

[18] Art. 85 of the Draft Statute reads as follows: 'States Parties shall, in accordance with the provisions of this [Part] [Statute], fully cooperate with the Court in its investigations and prosecutions of crimes under this Statute. States parties shall so cooperate without [undue] delay.' For an analysis of the preparatory works on this point, see C. Kress, 'Art. 86', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999) 1051, at 1053.

[19] The problem of definitively ascertaining the nature and scope of the powers with which the ICC has been entrusted is discussed *infra* in the text.



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The question arises as to whether States Parties are also under an obligation to comply with requests of cooperation that the Court may assert to be based on its implied or inherent powers.[20] The answer is to be given with reference to the provisions of the Statute dealing with the powers of different organs of the Court and the Rules of Procedure and Evidence. It will ultimately depend on the interpretation to be given by the Court itself.[21]

If one compares the ICC with the ICTY and the ICTR, two remarks seem possible. On the one hand, the powers of the Court provided for under the Rules of Procedure and Evidence, not being judge-made, will hardly be questionable. On the other hand, the different legal basis with respect to that of the ICTY and the ICTR appears to give the Court a more limited discretion in resorting to powers that are not expressly provided for in the Statute. Therefore, the decisions of the *ad hoc* Tribunals asserting those powers on the basis of their having been established through a Security Council resolution, are of very little relevance here.[22] A Court established by treaty will have to be cautious when interpreting its powers.

[20] As it is known, the doctrine of 'implied powers' is well accepted under international law. The ICJ recognized it in express terms as early as 1949 (*Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949) 174, at 180–182) and applied it in several subsequent cases (e.g. in the *Effects of Arbitral Awards of Compensation Made by the UN Administrative Tribunal* case, ICJ Reports (1954) 47, at 56–57). Under this doctrine, international organizations are said to possess an implied power if the exercise of the power is necessary for the organization to attain its object and purpose as defined in its constituent instrument. Tribunals are also said to possess 'inherent powers' by virtue of their status as judicial bodies. For a clear appraisal of the distinction between the two doctrines, see D. Sarooshi, 'The Powers of the United Nations International Criminal Tribunals', 2 *Max Planck Yearbook of UN Law* (1998) 141, at 150.

[21] The issue is discussed by B. Swart and G. Sluiter, 'The International Criminal Court and International Criminal Co-operation', in H. A. M. Von Hebel, J. G. Lammers, and J. Schukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1998) 91, at 103. According to these authors, 'this question should not *a priori* be answered in the affirmative, although it should be borne in mind that given the detailed character of the Statute, it was clearly the objective of the framers to limit the powers of the Court to those set out in the Statute'. This in light of 'the detailed and apparently exhaustive character of Part 9 of the Statute'.

[22] With regard to the functions of the ICTY which are judicial in nature and not expressly provided for in the Statute, the Appeals Chamber stated in the *Blaškić Subpoena* case, *supra* note 5, at para. 27, that it preferred to speak of 'inherent powers', rather than of 'implied powers', and referred to the statement of the ICJ in the *Nuclear Tests* case (ICJ Reports (1974) 253, at 259–260). The Appeals Chamber found that the ICTY has the 'inherent power' to make a judicial finding concerning a State's failure to observe the provisions of the Statute or the Rules. The Court stated: 'The power to make a judicial finding is an inherent power; the International Tribunal must possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction. This inherent power inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged and its judicial role safeguarded' (ibid., at para. 33). The Appeals Chamber had earlier found in the *Tadić* case that it has the 'jurisdiction to determine its own jurisdiction' as '[i]t is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of . . . tribunals, although this is often done' (Ap. Ch., Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, *Tadić*, IT-94-1-AR72, para. 18). Cf. M. Buteau and G. Oosthuizen, 'When the Statute and Rules are Silent: The Inherent Powers of the Tribunal', in R. May *et al.* (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (2001) 65.

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According to the basic rule governing treaty interpretation, Statute provisions are to be construed in the light of their object and purpose. This also applies to provisions conferring powers on the Court vis-à-vis States Parties. In this respect, it is at least arguable that the purpose of the Statute is to create a court as effective as an international court could *in abstracto* be. While States Parties intended to establish a court with the power to investigate and prosecute persons allegedly responsible for crimes within its jurisdiction, this was only to the extent, and under the conditions, provided for in the Statute. The Statute does not necessarily purport to maximize the powers of the Court, and the corresponding States Parties' obligations. Therefore, the Court will have to reckon with this when asserting implied or inherent powers that are not expressly provided for in the Statute or the Rules of Procedure and Evidence. The Court will anyway have to rely on States in order to enforce compliance with its requests. Moreover, should the problem arise whether the Court's powers be given a different scope depending on the trigger mechanism by which the procedure is set in motion in a given case, the solution should be in favour of the stricter interpretation in all cases.

Although the Court's power to address a request for cooperation to States has to be made in accordance with the Statute, this does not provide the requested States with a way to challenge the request on the ground that it does not comply with the Statute. It only allows States to consult with the Court. This raises the important question of who has the final say in case the Court and the requested State disagree with regard to the Court's right to request cooperation and the States' duty to comply with the said request. Under Article 119 of the Statute, the Court is expressly endowed with the power to determine any judicial question, with a decision binding on States Parties.[23] Such a power conforms with the Court's status as a judicial organ.

### C. *Cooperation by Non-Parties States*

Being a treaty, the Statute does not impose in principle obligations on States which have not become parties to it. However, various provisions in the Statute may be considered as invitations to cooperate to such States. The most far-reaching provision to this effect is Article 12(3). It provides that a State which is not a party may accept the jurisdiction of the Court in individual cases if

[23] Cf., on this point, the critical remarks by Swart and Sluiter, *supra* note 21, at 104: 'An explicit basis in the Statute would have the additional advantage of making it perfectly clear that the Court has the final say in any dispute arising under Part 9. It is doubtful whether that basis can be found in Article 119 of the Statute. The provisions on the settlement of disputes in this article seem to have regard to disputes between States Parties and not to disputes between States Parties and the Court.' It is our view that, while Art. 119(2), of the Statute only concerns dispute settlement between States Parties, it is not in doubt that, under Art. 119(1), the Court will have the final say in any dispute with a State Party challenging the legality of its requests. Indeed this would be a 'dispute concerning the judicial functions of the Court'.



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acceptance is required for the Court to be able to exercise its jurisdiction. Another provision is Article 87(5). Pursuant to this provision, the Court may invite any State that is not a party to the Statute to provide assistance on the basis of an *ad hoc* arrangement, an international agreement, or any other appropriate basis. Cooperation may also be provided unilaterally by the non-parties States.

Apart from this, the distinction between States Parties and other States is the unavoidable consequence of the Court being established on the basis of a treaty. It is only when the Security Council has referred a case to the Court that the distinction between States Parties and non-parties States loses significance. However, the nature and the content of the obligation to cooperate do not vary, nor are the limits to such an obligation and the remedies available in case of non-compliance any different.

### 1. Acceptance of Jurisdiction by way of Declaration under Article 12(3)

Third States which have accepted the jurisdiction of the Court with respect to a crime by way of a declaration lodged with the Registrar of the Court pursuant to Article 12(3), 'shall cooperate with the Court without any delay or exception in accordance with Part 9'.[24] From the interpretation which has been given of the opening article of Part 9, according to which Article 86 sets out a general obligation to cooperate with the Court in accordance with the provisions of the whole Statute, it follows that the position of a third State which has accepted the jurisdiction of the Court with respect to a certain crime becomes very close to that of States Parties to the Statute, with regard to that crime.[25] In view of the language of Article 12(3), which requires cooperation 'without any delay or exception', it is more than doubtful that the Court may, pursuant to Article 12(3), conclude an

[24] This in accordance with the general principle embodied in Art. 35 of the Vienna Convention on the Law of the Treaties: 'An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing'. Cf. G. Palmisano, 'The International Criminal Court and Third States', in F. Lattanzi and W. A. Schabas (eds.), *Essays on the Rome Statute of the ICC* (1999) 391, at 393–394, for the view that '[f]rom the standpoint of its legal qualification, Art. 12(3) should be considered a treaty stipulation in favour of third States. This provision allows, in fact, third States interested in effectively prosecuting a given crime, to accede, in relation to that crime only, to the judicial mechanism provided for by the Statute, on condition that they *expressly* accept the Court's jurisdiction *and* the obligation of cooperation and judicial assistance set out in Part 9 of the Statute. . . . To be more precise, when the third State lodges its declaration with the Registrar, a new agreement between the States Parties to the Statute, on the one hand, and the third State, on the other, relating to the exercise of the ICC's jurisdiction over the crime in question, would be concluded' (emphasis added). Cf. also Ch. 16 above.

[25] This is not to say that the State which has accepted the jurisdiction of the Court should no longer be considered a third State. It would hardly be possible, for example, to conclude that this State is under an obligation to contribute to the financing of the Court. For the opposite view, see Palmisano, *supra* note 24, at 393, according to whom 'once a State has accepted the Court's jurisdiction over a specific case, this State should no longer be considered a third State, as its position becomes equivalent to that of a State party to the Statute'.

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agreement with a third State accepting its jurisdiction with respect to a given crime which limits, or provides exceptions to, that State's obligations of cooperation under Part 9.

### 2. *Ad Hoc* Arrangements, Agreements, or Other Appropriate Basis under Article 87(5)

Furthermore, States which are not parties to the Statute may conclude with the Court an agreement to provide assistance under Part 9. Article 87(5) expressly empowers the Court to 'invite any State not party to [the] Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis'. When an *ad hoc* arrangement with respect to the investigation and prosecution of a given crime within the jurisdiction of the Court or an agreement to cooperate with the Court in a wider set of cases is concluded with a State not party, such a State undertakes an international obligation to cooperate with the Court vis-à-vis all States Parties to the Statute.[26] The difference with declarations made pursuant to Article 12 is that cooperation on the basis of Article 87 does not necessarily imply acceptance of the jurisdiction of the Court by the State which is not a party. Moreover, this State is free to determine how far it is prepared to go in assuming an obligation to arrest and surrender. The extent of the obligation to cooperate will depend on the content of the agreement. In this respect, however, it seems hardly likely that a non-party State will bind itself to an obligation which is broader in scope than that provided for under the Statute for State Parties. The third State will probably accept to cooperate with the Court to a more limited extent, e.g. by only undertaking to give some, but not all, forms of cooperation specified under Part 9.

## *D. Cooperation by International Organizations*

The Statute is not open to signature, ratification, or accession on the part of international subjects other than States. Article 87(6), however, expressly envisages the possibility for the Court to avail itself of cooperation by intergovernmental organizations. The ICTY and ICTR Statutes do not contain an analogous provision; however, practice of the ICTY shows instances of this type of cooperation.

[26] For the view that the Court concluding an agreement with a third State under Art. 87(5), acts in fact as a common organ of the States Parties to the Statute, see Palmisano, *supra* note 24, at 405–406: 'By including in the Statute the provision at issue, States Parties have indeed decided to bind themselves reciprocally to grant the Court, *as their common organ*, the power to carry out not only an internal state activity, of a judicial nature, but also an external state activity, concerning the conclusion of agreements of cooperation and judicial assistance with States which are not parties to the Statute. These agreements are to be reached by the Court on behalf of the States parties to the Statute, which are thus the subjects entitled to request the implementation of such arrangements' (emphasis added).



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### 1. Cooperation with the ICTY

As has been noted, several resolutions adopted by the Security Council envisaged cooperation of international bodies with the ICTY. Moreover, with regard to execution of arrest warrants, Rule 59*bis* of the Rules of Procedure and Evidence provides that 'on the order of a Judge, the Registrar shall transmit to an appropriate authority or international body a copy of a warrant for the arrest of an accused, on such terms as the Judge may determine, together with an order for his prompt transfer to the Tribunal in the event that he be taken into custody by that authority or international body'. This rule was adopted to provide for the transmission of arrest warrants to IFOR, taking into account that Rules 55–59 were drafted with States, and not international organizations, in mind. However, even before such a rule was adopted, the ICTY had held to be able to transmit orders and warrants for arrest to IFOR on the basis of Article 20(2) of the Statute.[27]

Several indictees were brought into the custody of the ICTY by the Prosecutor in cooperation with the UN Transitional Authority in Eastern Slavonia, Baranja, and Western Sirmium (UNTAES) in Croatia and by the NATO Implementation force (IFOR) in Bosnia-Herzegovina.[28]

An important aspect of the Dayton Peace Agreement was the establishment of IFOR, envisaged in Article VI of its Annex 1-A and authorized by SC Res. 1031 (1995). Under the General Framework Agreement for Peace in Bosnia and Herzegovina and the Annexes thereto, IFOR-contributing States were granted the right to use military force in the implementation of the Peace Agreement. Several articles in the Annexes specifically refer to the ICTY, reaffirming the Parties' duty to cooperate with it and comply with its orders.[29] Although there has

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[27] See e.g. Judge Jorda's Order for the Transmission to IFOR of Indictments and Arrest Warrants, 24 December 1995, *All Cases*, ordering that 'copies of indictments and arrest warrants issued to [that] date by the Tribunal be transmitted to IFOR and that any indicted person detained by IFOR be taken into custody, immediately informed of the charges against him and transferred as soon as reasonably practicable to the International Tribunal' (reproduced in *ICTY Judicial Reports* (1994–1995) 1163). For the opinion that 'the Tribunal's Statute does not exclude the possibility of arrest by international bodies', for 'Article 20(2) of the Statute is drafted in general language not limited to arrest by States', see J. R. W. D. Jones, 'The Implications of the Dayton Peace Agreement for the International Criminal Tribunal for the Former Yugoslavia', 7 *EJIL* (1996) 226, at 240.

[28] For an account, see S. D. Murphy, 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', 93 *AJIL* (1999) 57, at 75–76, discussing in particular the arrest and transfer to the ICTY of Dokmanović, the first suspect to be arrested by UN officials in the former Yugoslavia, and the Trial Chamber decision that the arrest was justified and legal (T.Ch.II, 22 October 1997, *Dokmanović*, IT-95-13a-PT).

[29] Cf. SC Res. 1031 (1995), recognizing under para. 5 'that the parties shall cooperate fully with all entities involved in implementation of the peace settlement, as described in the Peace Agreement, or which are otherwise authorized by the Security Council, including the International Tribunal for the Former Yugoslavia, and that the parties have in particular authorized the multinational force [IFOR . . .] to take such actions as required, including the use of necessary force, to ensure compliance with Annex 1-A of the Peace Agreement'. For a thorough analysis of this issue, see J. R. W. D.



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been some debate on the question of which provision of Article VI of Annex 1-A permitted IFOR to arrest persons on request of the ICTY and transfer them to its seat, there is no doubt that Article VI granted IFOR the right to do so.[30] As far as the ICTY itself is concerned, initially it seems to have based IFOR's powers to arrest persons on paragraph 4 of Article VI. This paragraph provides that the North Atlantic Council may 'establish further additional duties and responsibilities for the IFOR in implementing this Annex'. Later, the Tribunal pointed at the general power of IFOR to 'assist the movement of organizations in the accomplishment of humanitarian missions' pursuant to paragraph 3(b) of Article VI as the legal basis.[31] In Res. 1088 (1996), the Security Council authorized the establishment of SFOR as the legal successor to IFOR.

The question has been raised whether Annex 1-A to the Dayton Peace Agreement imposes on IFOR and SFOR a duty to arrest persons and transfer them to the ICTY. The position of the ICTY on this issue is that it does not.[32] The ICTY stated that IFOR was neither a party to the Dayton Agreement nor specifically obliged to cooperate with the Tribunal. However, it added, that IFOR was 'in the unique position of possessing both the legal and logistical capacity to assist the Tribunal in its work'.[33] Another remark worth quoting is that, in the opinion of the ICTY, some 'forms of assistance to facilitate the implementation of the Tribunal's mandate were not always forthcoming during the reporting period, most obviously with respect to the arrest of accused persons'. In its Fifth Annual

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Jones, *supra* note 27, arguing that, under the Agreement, IFOR enjoys rights analogous to that of an occupying force. This author also discusses the impact which the various international organizations and human rights bodies established by the Agreement may have on the Tribunal's activities, namely besides IFOR, the International Police Task Force, the Commission on Human Rights, the Commission for Displaced Persons and Refugees and the Commission of Inquiry. For a brief discussion of the significance of the Dayton Agreement in terms of cooperation with the Tribunal, see also 'State Cooperation', in *Yearbook of the ICTY* (1995) 317, at 321–322.

[30] For the debate, see K. Ambos, 'Zur Rechtsgrundlage der Festnahme mutmaßlicher Kriegsverbrecher durch die SFOR im ehemaligen Jugoslawien', 18 *Juristenzeitung* (1997) 886; N. Figà-Talamanca, 'The Role of NATO in the Peace Agreement for Bosnia and Herzegovina', 7 *EJIL* (1996) 164; J. R. W. D. Jones, *supra* note 27; G. Sharp, 'International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?', 7 *Duke Journal of Comparative and International Law* (1997) 411; P. Gaeta, 'Is NATO Authorized or Obliged to Arrest Persons Indicted by the International Tribunal for the Former Yugoslavia?', 9 *EJIL* (1998) 174. See also P. Akhavan, 'The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond', 18 *HRQ* (1996) 261.

[31] *Yearbook of the ICTY* (1996) 229.

[32] The Dayton Peace Agreement has been interpreted by NATO itself as including the power, but not the duty, to arrest persons indicted by the ICTY. See the Rules of Engagement on the detention and transfer of persons indicted by the ICTY in Bosnia-Herzegovina adopted by the North Atlantic Council on 16 December 1996, by which NATO agreed that IFOR should detain any persons indicted by the ICTY 'who come in contact with IFOR in its execution of assigned tasks in order to ensure the transfer of those persons to the International Criminal Tribunal', and the agreement with ICTY for practical arrangements for the transfer to it of such indicted persons. For the debate, see the authors mentioned *supra* note 30.

[33] *Yearbook of the ICTY* (1996) 232.



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Report, the ICTY noted an apparent willingness on the part of SFOR to use its authority under the Dayton Peace Agreement to enforce the Agreement, 'a willingness that was notably lacking in the previous years with respect to the provisions concerning the Tribunal'.[34]

Two other resolutions adopted by the Security Council impose a duty on international bodies to cooperate with the ICTY. The first is SC Res. 1037 (1996), establishing UNTAES. The second is SC Res. 1244 (1999), establishing KFOR. Paragraph 14 of the latter resolution '[*d*]*emands* full cooperation by all concerned, including the international security presence', with the ICTY.

## 2 Cooperation with the ICC

According to Article 87(6) of the ICC Statute, '[t]he Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate'. Moreover, the Prosecutor may seek information from any source, including 'organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate', for the purpose of initiating an investigation (Article 15(2) ).[35] Information so provided will be admissible as evidence at trial according to the general rules on admissibility.

The Statute does not rule out the possibility that an international organization has a duty to provide information to the Court when requested to do so, e.g. on the basis of a resolution of the Security Council acting under Chapter VII of the UN Charter.[36] Authority to seek information should not imply that there is a prohibition on accepting information which is submitted without having been requested by a constituent organ of the Court.

Other forms of cooperation and assistance, namely arrest and surrender of suspects or accused, preservation and collection of evidence and service of judicial documents, are subject to the conclusion of an agreement with the organization in question. The condition that such an agreement be in accordance with the

[34] Fifth Annual Report, A/53/737, para. 217. For an overview of arrests effected by IFOR and SFOR, see Annex III to the Report. See also Murphy, *supra* note 28.

[35] For an assessment of the role of non-governmental organizations and their contributions to the ICTY, *inter alia*, by 'providing the Prosecutor with information useful for investigations', see the Tribunal's Second Annual Report, 23 August 1995, in *Yearbook of the ICTY* (1995) 251, at 278–279, further developing previous statements of the Tribunal's First Annual Report, 28 July 1994, in *Yearbook of the ICTY* (1994) 81, at 105–106. On the role of NGOs with respect to the ICC

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organization's competence or mandate conforms to the general principle of international law according to which international organizations may only exercise powers which are attributed to them by their respective constituent instruments. This principle is further restated in Article 54(3)(c), according to which the Prosecutor may seek the cooperation of any 'intergovernmental organization or arrangement in accordance with its respective competence and/or mandate'. As with regard to the provision of information or documents, cooperation is, in principle, voluntary, but again the legal situation may change in case of a Security Council decision under Chapter VII of the UN Charter.

Due to the complementary nature of the Court's jurisdiction, it is very likely that the Court will find itself investigating and prosecuting crimes where the accused or the relevant evidence are located in areas where an international force established or authorized by the Security Council may suitably intervene. At the Rome Conference there was a lengthy debate as to whether or not peacekeeping forces should be mentioned in the Statute. The compromise achieved was to add the term 'arrangement' in Article 54(3)(c), in order to ensure that peacekeeping forces are included. Even in the absence of an express reference in Article 87(6), the Court is thus in a position to cooperate with all kinds of peacekeeping forces, acting within their mandate.[37]

## III. The Implementation of the Obligation to Cooperate

States Parties are under an international obligation to enact any implementing legislation necessary to permit them to comply with requests of the Court, unless, of course, no amendment to national law is needed for them to do so.

### *A. The Obligation to Make National Procedures Available for Cooperation with the Court*

Article 88 of the Statute expressly provides that 'States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part [9]'.

#### 1. Irrelevance of Internal Law with Respect to the Observance of Treaties

According to a well-established principle of international law, a State may not invoke provisions (or absence of provisions) of its internal law in order to avoid

[37] For this conclusion, based on the general rule of systematical interpretation according to which the complementary rules in Part 5 and Part 9 must be coherent, see C. Kress and K. Prost, 'Art. 87', in Triffterer (ed.), *supra* note 18, 1055, at 1065.



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compliance with its international obligations.[38] This rule is restated with respect to treaty obligations by Article 27 of the Vienna Convention on the Law of Treaties, which reads as follows: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

## 2. The Implementation of the ICTY and ICTR Statutes

Even in the absence of an express provision to this effect in the ICTY and ICTR Statutes, SC Resolutions 827 and 955 establishing the *ad hoc* Tribunals mandated all States to 'take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 [Article 28] of the Statute'.[39]

Security Council Resolutions 827 (1993) and 955 (1994) thus distinguished between two types of obligations. On the one hand, there is the obligation to cooperate fully with the Tribunal in each individual case. On the other, there is the obligation to take any measures necessary under domestic law to implement the provisions of the resolutions and the Statutes, including the obligation to comply with requests for assistance or orders issued under Articles 29 or 28 of the Statutes. Which measures are necessary largely depends on the domestic law of each Member State. One may expect, however, that most Member States have to enact imple-

[38] See e.g. the Advisory Opinion of the PCIJ in the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* case, 1932 PCIJ Series A/B, No. 44, at 24: 'a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force'. See also Art. 3 of the Draft Articles on State Responsibility adopted on second reading by the ILC at its fifty-third session (UN Doc. A/56/10): 'The characterization of an act of State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.'

[39] Following the vote on Res. 827, the need for implementing legislation was raised by a number of SC members, including the United States, the United Kingdom, and China. The US Ambassador explained that 'States may find it necessary to take measures under their domestic law to enable them to implement the provisions of the Statute, and [the resolution] pledges them to endeavour to take any such measures as soon as possible'. The Chinese Ambassador, although objecting to the Chapter VII basis of the Yugoslav Tribunal, recognized that 'United Nations Member States must implement [the Statute] to fulfil their obligations provided for in the Charter'. Referring to requests for cooperation under Art. 29 of the Statute, the British Ambassador indicated that 'domestic procedures will be needed to give effect to the obligation [. . .] to comply with a request or order concerning the transfer of an accused to the International Tribunal' (UN Doc. S/PV.3217 (1993) at 15, 33, and 19). The issue resurfaced during Security Council debates on the Rwanda Tribunal, when the British Ambassador remarked that '[i]t will be necessary for States to establish their own procedures for implementing their obligations under the Statute. Domestic procedures will be needed to give effect to the obligations under Article 28 of the Statute to comply with a request or order concerning the surrender and transfer of an accused to the International Tribunal'. Similarly, the French Ambassador characterized Res. 955 as a 'solution, which is binding on all States and hence requires that they meet the requests of the Tribunal and, if necessary, adapt their domestic legislation to enable them to fully cooperate with it' (UN Doc. S/PV.3453 (1994) at 6 and 3, respectively).

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menting legislation in order to be able to satisfy requests for the arrest and transfer or surrender of individual persons as well as for other forms of cooperation.

Following the adoption of Resolutions 827 and 955, a number of States have passed legislation regulating the cooperation with one or both *ad hoc* Tribunals.[40] The ICTY has tried to stimulate the enactment of implementing legislation by issuing Guidelines.[41] In the Fall of 1993, experts of the Member States of the Council of Europe held a meeting in which they discussed problems of implementation. The results of these discussions have influenced implementing Statutes of some European States.

Nevertheless, there have been cases in which a failure properly to implement the Statutes in domestic law led to non-compliance with requests or orders by the Tribunals. In the *Tadić* case, for instance, the ICTY asked Germany to defer to its competence on 8 November 1994. However, because Germany had not yet passed implementing legislation, Tadić could not immediately be surrendered. Legislation followed almost six months later, and Tadić was then surrendered to the Tribunal in April 1995.[42] In 1997, a US District Court denied a request of the US government for the surrender of Elizaphan Ntakirutimana to the ICTR on the grounds that a proper treaty basis for the surrender of the accused did not exist.[43]

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[40] Up to the end of 1998, twenty-one States had enacted legislation implementing the provisions of one or both Statutes: Australia, Austria, Belgium, Bosnia and Herzegovina, Croatia, Denmark, Finland, France, Germany, Hungary, Iceland, Italy, Ireland, The Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, United Kingdom, United States. For the text and translation of a number of implementing laws, see the first three *Yearbooks of the ICTY*. For an analysis, see S. O'Shea, 'Interaction between International Criminal Tribunals and National Legal Systems', 28 *International Law and Politics* (1995–1996) 367; I. Josipović, 'Implementing Legislation for the Application of the Law on the International Criminal Tribunal for the Former Yugoslavia and Criteria for its Evaluation', 1 *YIHL* (1998) 35; G. Sluiter, 'Obtaining Evidence for the International Criminal Tribunal for the Former Yugoslavia: An Overview and Assessment of Domestic Implementing Legislation', 45 *NILR* (1998) 87. See also Fox, 'The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal', 46 *ICLQ* (1996) 434; R. Kushen and K. J. Harris, 'Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda', 90 *AJIL* (1996) 510; K. J. Harris and R. Kushen, 'Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution', 7 *Criminal Law Forum* (1996) 561; C. Warbrick and D. McGoldrick, 'Co-operation with the International Criminal Tribunal for Yugoslavia', 45 *ICLQ* (1996) 947.

[41] The Registrar of the Yugoslav Tribunal drafted Tentative Guidelines for National Implementing Legislation of United Nations, SC Res. 827 of 25 May 1993, which were sent by the President of the Tribunal to Members of the UN on 15 February 1995 (text in Amnesty International, *International Criminal Tribunals: Handbook for Government Cooperation*, Supp. One (1996) 28). Although they do not have any clear legal status, the Guidelines are intended to assist States in the drafting of adequate implementing legislation. It has to be recalled, however, that the Guidelines were published after implementing legislation had already entered into force in nine States, namely Denmark, Finland, France, Iceland, Italy, The Netherlands, Norway, Spain, and Sweden.

[42] *Tadić* case, IT-94-1.

[43] *In the Matter of Surrender of Elizaphan Ntakirutimana*, US District Court for the Southern District of Texas, Laredo Division, 1 *YIHL* (1998) 607. For comments see J. J. Paust, 'The Freeing of Ntakirutimana in the United States and Extradition to the International Criminal Court for Rwanda', 1 *YIHL* (1998) 205; G. Sluiter, 'To Cooperate or not to Cooperate? The Case of the



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However, a second request for the surrender of the same person was later granted by the same court and upheld by the United States Court of Appeals, Fifth Circuit.[44] More serious is the case of the Federal Republic of Yugoslavia (Serbia and Montenegro) ('FRY'), which repeatedly invoked national legislation (in particular, a constitutional prohibition on the extradition of its nationals) as an excuse for not cooperating with the ICTY. This led the Security Council to adopt Resolution 1207 (1998), in which it called again upon FRY and other States to take any measures necessary under their domestic law to implement the provisions of the Statute of the ICTY and affirmed that a State may not invoke provisions of domestic law as an excuse for its failure to perform its binding obligations under international law.[45]

Article 29 of the ICTY Statute, which reiterates the obligation to cooperate laid down in operative paragraph 4 of SC Res. 827 (1993), was held by the ICTY to lay down not a generic obligation, but a quite specific one, although leaving States some choice or leeway in identifying the modalities of its fulfilment. The ICTY characterized the obligation to cooperate as an 'obligation of conduct (*obligation de conduite*) requiring States to perform a specifically determined action' and concluded, accordingly, that by not enacting implementing legislation, a State would be in breach of its obligation to cooperate with the International Tribunal as from the entry into force of the Statute.[46]

### 3. The Obligation under Article 88 of the ICC Statute

Notwithstanding the express provision of Article 88 of the ICC Statute, States Parties' obligation to cooperate with the Court under the Statute does not seem amenable to the same interpretation.[47] There is no known drafting history to the

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Failed Transfer of Ntakirutimana to the Rwanda Tribunal', 11 *Leiden Journal of International Law* (1998) 383.

[44] *Elizaphan Ntakirutimana v. Janet Reno, Madeleine Albright and Juan Garza*, 184 F. 3d 419 (5th Cir. 1999), 1999 US App. LEXIS 18253.

[45] On the absence of implementing legislation in FRY and its consequences for transferring nationals see Josipović, *supra* note 40, at 54.

[46] Decision of the President on the Defence Motion Filed Pursuant to Rule 64, 3 April 1996, *Blaškić*, IT-95-14-T, at para. 8. The President stated: 'It should be emphasised that this is not a generic obligation, but a *very specific one*. More precisely, this is an "obligation of conduct" (*obligation de conduite*) or "obligation of means" (*obligation de moyens*) namely, an obligation requiring States to perform a specifically determined action, unlike "obligations of results" (*obligation de résultat*), which require States to bring about a certain situation or result, leaving them free to do so by whatever means they choose. . . . It is apparent from the above that, by not enacting implementing legislation, since 1993 the Republic of Croatia has undisputedly violated its obligation to implement the Statute, stemming from the relevant Security Council resolution as well as Article 29 of the Tribunal's Statute' (emphasis in the original).

[47] For a critique of the ICTY President's Decision characterizing the obligation to cooperate with the ICTY as an obligation of conduct, see M. L. Padelletti, 'Sulla custodia cautelare disposta dal Tribunale penale internazionale per i crimini commessi nella *ex*-Jugoslavia', *Rivista italiana di diritto e procedura penale* (1996) 1225, at 1227–1230.



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provision in question, for no express requirement to enact implementing legislation was included in the ILC Draft Statute for an International Criminal Court of 1994 or in the Preparatory Committee's Draft Statute for the International Criminal Court referred to the Rome Conference. Anyway, one could hardly read the provision of Article 88 as setting out an obligation of conduct, even if one should accept the controversial distinction between obligations of conduct and obligations of result.[48] Article 88 does not require States to adopt a course of conduct specifically defined, since there is no precise determination of its content. Article 88 clearly sets out an obligation of result (or an obligation of prevention, which is nothing but a 'negative' obligation of result, should one assume prevention of non-compliance with requests of the Court as the goal of Article 88), which is only combined with a description of the means to be set up in order to achieve the goal of compliance with all requests for cooperation and assistance specified under Part 9. What is at stake is the end result to be achieved, not the means to be set up: only a failure to cooperate with the Court will amount to a breach of the obligation to cooperate, giving rise to the international responsibility of the State actually requested to cooperate in a concrete case. In other words, as we shall see further, a breach will exist only when the conduct of the responsible State has prevented compliance with a Court's request. In determining the time of the breach of the obligation to cooperate, the decisive element will be when the result is not attained, not the actual conduct of the State.[49]

[48] See e.g. P.-M. Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility', 10 *EJIL* (1999) 371, at 377: '[this c]lassification of States obligations . . . is of no use because it is, at one and at the same time, too rigid and approximate. This position, already expressed some 15 years ago by authors such as Jean Combacau, Ian Brownlie and the present author is most generally shared in the legal literature'. See also J. Crawford, *Second Report on State Responsibility*, 17 March 1999, UN Doc. A/CN.4/498, para. 89, reviewing the distinctions between obligations of conduct, result, and prevention, as set out in Arts. 20, 21(1), and 23 of the Draft Articles on State Responsibility adopted on first reading by the ILC in 1996: 'there is clearly a strong case for simply deleting them. They have been criticized by a number of Governments as over-refined. They have been widely criticized in the literature. Their relationship to similar concepts under national law is obscure and even contradictory.'

[49] The possibility should also be excluded of applying, *mutatis mutandis*, with respect to a State Party's failure to enact implementing legislation as mandated by Art. 88 of the ICC Statute, the reasoning of the ICTY holding the importance of the obligation, and the corresponding gravity of its violation, as the decisive factor for the identification of the *momentum a quo* a State could be held internationally responsible. The ICTY stated: 'Normally, the maintenance or passage of legislation inconsistent with international rules generates State responsibility . . . only when such legislation is concretely applied. 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 States responsibility' (T.Ch.II, Judgment of 10 December 1998, *Furundžija*, IT-95-17/1-T, paras. 149–150). In our view, this reasoning can only apply with regard to peremptory norms of general international law. It cannot be extended to obligations to cooperate with an International Criminal Court, which are indeed of a *procedural* character. See also Crawford, *supra* note 48, at para. 78: 'Whether the enactment of inconsistent legislation constitutes *itself* a breach of international law depends on the content and importance of the primary rule' (emphasis added).



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Article 88 was introduced into the Statute during the Rome Conference as part of the compromise achieved to resolve the critical issue of the relevance, if any, of national laws under Part 9. Articles 89 and 93, concerning requests for arrest and surrender and other forms of cooperation, respectively, provide that States Parties shall comply with requests by the Court 'in accordance with the provisions of this Part and the procedure under their national law'. In order to avoid any misuse of these references, Article 88 makes it clear that a State Party cannot use the absence of adequate procedures under national law in order to justify a refusal of a request.[50]

All that can be deduced from the provision in question is a restatement of the general obligation already incumbent upon States Parties to the Statute to introduce into their legislation any change which may be necessary in order to ensure compliance with requests by the Court for cooperation or assistance in accordance with the Statute.[51] The meaning of Article 88 is thus to expressly invite States to act quickly in taking appropriate measures under domestic law, in order to avoid delays in (or failure of) compliance with the Court's requests as has been far too often the case with respect to the ICTY's requests or orders.[52]

### *B. Modalities of Implementation of the Obligation to Cooperate with the Court: A Comparison with Inter-State Mechanisms Pursuant to Treaties*

Article 87(1)–(3) and Article 100 set out some general provisions which apply to all forms of cooperation and assistance, concerning the channel for transmission of the Court's requests, the language of the requests and their supporting documents, the obligation of confidentiality on the part of the requested State and, finally, the partition of costs between the Court and the requested State.

As far as these features are concerned, the system of cooperation which is established under the ICC Statute appears to follow the traditional inter-State cooperation model. With regard to cooperation with the ICTY and the ICTR, instead, in the absence of any express provision to this effect in the Tribunals' Statutes and Rules of Procedure and Evidence, States have dealt with these modalities in very different ways. The implementing legislation of the ICTY Statute enacted by some States provides that any order or request of the International Tribunal should be addressed to a specific central body, which then

[50] See K. Prost, 'Art. 88', in Triffterer (ed.), *supra* note 18, 1069.

[51] *Supra* note 38.

[52] In this respect, the same value should be given, e.g., to Rule 58 of the ICTY Rules of Procedure and Evidence. In the relevant part, this provision reads as follows: 'The obligation laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or a witness to the Tribunal which may exist under . . . national law . . .'.

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channels it to the relevant prosecutorial or judicial agencies.[53] Other national laws are more flexible.[54]

Article 87(1)(a) of the ICC Statute provides that 'requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.'[55] According to Article 87(1)(b), '[w]hen appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization' (Article 87(1)(b) ).[56] Under Rule 177(1) of the Rules of Procedure and Evidence, '[c]ommunications concerning the national authority charged with receiving requests for cooperation . . . shall provide all relevant information about such authorities'. In addition, paragraph 2 of Rule 177 states that also '[w]hen an intergovernmental organization is asked to assist the Court under Article 87,

[53] See e.g. Section 7(1) of the Australian International War Crimes Act of 1995; Art. 5 of the Belgian Law on the Recognition of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda of 1996; Arts. 7 and 8 of the French Law No. 95-1 of 1993; Art. 2 of the Hungarian Act XXXIX of 1996; Art. 2(2) of the Italian Law No. 544 of 1993; Section 4(2) of the New Zealand International War Crimes Tribunal Act of 1995; Art. 3(1) of the Spanish Organization Act No. 15 of 1994; Section 2 of the Swedish Act amending the Act relating to the Establishment of an International Criminal Tribunal for the Former Yugoslavia of 1995; Art. 4 of the Swiss Federal Order on Co-operation with the International Criminal Tribunal for the Former Yugoslavia of 1995; Arts. 14 and 15 of the United Kingdom Statutory Instrument No. 716 of 1996; Art. 7(2) of the Bosnia-Herzegovina Decree on Extradition at the Request of the International Tribunal of 1995; and Art. 2 of the Croatian Constitutional Act on the Co-operation with the International Tribunal of 1996. For references, see *supra* note 40.

[54] Thus, for instance, Section 6(1) of the Austrian Federal Law on Co-operation with the International Tribunals of 1996 provides that communication with the International Tribunals shall pass through the Ministry of Foreign Affairs; however, Section 6(3) provides that '[i]n urgent cases as part of official criminal police assistance, direct communication between the Austrian authorities and the International Tribunal or communication through the International Criminal Police Organisation INTERPOL shall be permitted'. Similarly, Section 2 of the Finnish Act on the Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia of 1995, after designating the Ministry of Justice as the authority competent to receive 'requests and notifications' from the International Tribunal, provides that the International Tribunal is allowed directly to contact the competent authorities either through diplomatic channels or through INTERPOL. Under Section 3 of the Norwegian Act Relating to the Incorporation into Norwegian Law of UN SC Resolution on the Establishment of an International Criminal Tribunal for the Former Yugoslavia of 1994, legal assistance to the International Tribunal is the responsibility of 'Norwegian courts and other authorities'. For references, see *supra* note 40.

[55] Art. 87(1)(a), continues as follows: 'Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence'. In this regard, Rule 176(3), provides that '[t]he Registrar shall be the recipient of any communication from States concerning subsequent changes in the designation of the national channels charged with receiving requests for cooperation, . . . and shall, upon request, make such information available to States Parties as may be appropriate'.

[56] Art. 86(1) of the Draft Statute for the International Criminal Court referred to the Rome Conference contained identical language. The same is true with respect to other technical aspects dealt with under Art. 87 of the Statute. See Report of the Preparatory Committee on the Establishment of an International Criminal Court, *supra* note 16.

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paragraph 6, the Registrar shall, when necessary, ascertain its designated channel of communication and obtain all relevant information relating thereto'.

These provisions appear to take the lowest common denominator of modalities for transmission of requests for cooperation between States. While leaving States the option to designate a different channel as they may deem appropriate, Article 87(1) retains the traditional device for transmission through the diplomatic channel as the default option for communication of the Court's requests to the national authorities of the State concerned. Some bilateral and multilateral extradition treaties instead provide for direct communication between the Ministries of Justice or other authorities designated by the Parties as an option generally available to States Parties or subject to specific consent by the States concerned.[57] Mutual legal assistance treaties typically provide for the direct exchange of information between central authorities—normally an agency of the Ministries of Justice—designated by each State Party, bypassing both the diplomatic channel and the involvement of national courts (though a judicial authority may still be involved in the process of execution of a request for assistance); direct communication between judicial authorities is only provided for under exceptional circumstances.[58] Even under these modalities, international cooperation is usually slow and ineffective.

In this respect, the relevant provisions of the ICC Statute appear not to overcome the main flaws of inter-State cooperation, namely the length of time it takes for proceedings to go through the administrative process.[59] As to Interpol, which is used by some States for transmission of extradition requests, a State Party is free to indicate whether or not requests for cooperation by the Court can be transmitted to it through Interpol (or a regional organization). It is to be hoped that States becoming parties to the Statute will make available to the Court the channel of

[57] See e.g. Art. 12(1) of the European Convention on Extradition of 13 December 1957, ETS No. 24. Cf. also Art. 5 of the Model Treaty on Extradition adopted by the General Assembly in its Res. 45/116 of 14 December 1990, UN Doc. A/CONF.144/28: 'A request for extradition . . . shall be transmitted through the diplomatic channel, directly between the ministries of justice or any other authorities designated by the Parties.' For a general comment on the UN model treaties in criminal matters, see R. S. Clark, 'Crime: The UN Agenda on International Cooperation in the Criminal Process', 15 *Nova Law Review* (1991) 475 and by the same author, *The United Nations Crime Prevention and Criminal Justice Programme* (1994) 210.

[58] See e.g. Art. 15 of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, ETS No. 30. Cf. Art. 3 of the Model Treaty on Mutual Assistance in Criminal Matters adopted by the General Assembly in its Res. 45/117 of 14 December 1990, UN Doc. A/CONF.144/28: 'Each Party shall designate and indicate to the other Party an authority or authorities by or through which requests . . . should be made or received.'

[59] Execution of requests, as a general rule, in accordance with the law of the requested State is another main flaw in inter-State cooperation procedures. Under the ICC Statute, States Parties shall comply with requests by the Court for arrest and surrender and other forms of cooperation in accordance with the relevant procedure under their national law (see Art. 89(1) and Art. 99(1) ). This aspect and the difficulties arising thereof, with respect to both 'arrest and surrender' and 'other forms of cooperation', are discussed in Chs. 41 and 42 below.

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communication which best serves the interest of fast and efficient processing of cooperation requests. For, as may be inferred from Article 87(1), the channel of communication which is thereby established between the Court and each State Party to the Statute is exclusive and any request should, therefore, be addressed to the authority designated.[60]

With regard to the language of the Court's requests, Article 87(2) reads as follows: 'Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.'[61] Rule 178(1) clarifies that when a requested State Party has more than one official language, it may indicate that requests for cooperation and any supporting documents can be drafted in any one of its official languages. In accordance with Rule 178(2), when the requested State has not chosen a language for communication with the Court, 'the request for cooperation shall either be in or be accompanied by a translation into one of the working languages of the Court'. The same principle applies pursuant to Rule 179, when a State that is not a party to the Statute has agreed to provide assistance to the Court under Article 87(5) and has not made a choice of language for such requests.

Article 87(3) imposes upon the requested State the obligation to 'keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.'

On allocation of costs, Article 100 sets out the general rule that costs are borne by the requested State on whose territory a request is executed, unless expenses are of an extraordinary nature.[62]

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[60] See *infra* note 77 and corresponding text. The related issue of whether the Court may enter into direct contact with individuals or must refer to national authorities is discussed in Ch. 42 below.

[61] Art. 87(2) continues as follows: 'Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence'. Rule 180 provides that such changes 'shall be communicated in writing to the Registrar at the earliest opportunity' and 'shall take effect in respect of requests for cooperation made by the Court at a time agreed between the Court and the State or, in the absence of such an agreement, 45 days after the Court has received the communication and, in all cases, without prejudice to current requests or requests in progress'.

[62] Art. 100 contains an only apparently exhaustive list of what are to be considered as costs other than ordinary:

(a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;
(b) Costs of translation, interpretation and transcription;
(c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;
(d) Costs of any expert opinion or report requested by the Court;
(e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and
(f) Following consultation, any extraordinary costs that may result from the execution of a request.



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These provisions also generally conform to inter-State practice, which typically provides for translation of requests into the language of the requested State, confidentiality of requests and their supporting documents (either upon a demand of the requesting State or independently of it) and reciprocal representation and payment of ordinary costs.

## IV. Limits to the Obligation to Cooperate

While the ICC Statute does not envisage any ground for denying a request for arrest and surrender, three exceptions to the obligation to comply with requests by the Court for other forms of cooperation are expressly provided for: under Article 93(3), a State may refuse to execute a particular measure of assistance if execution of that measure is prohibited on the basis of an existing fundamental legal principle of general application and, after consultation with the Court, the matter cannot be resolved; pursuant to Article 72 and Article 93(4), a State may deny a request for assistance if the request concerns the production of documents or disclosure of evidence which relate to its national security interests; furthermore, with respect to a request by the Court for a type of assistance which is not specified under Article 93(1)(a)–(k), the obligation is limited to assistance 'which is not prohibited by the law of the requested State' (Article 93(1)(l) ).[63]

The question arises as to whether, outside the exceptions expressly provided for under the Statute, States are under an unconditional duty to execute requests by the Court, in the light of the general obligation to cooperate laid down in Article 86 and further restated in Articles 89 and 93 with regard to requests for arrest and surrender and other forms of cooperation, respectively.

With respect to conflicting provisions of national law, a well-known principle of international law prevents States from hiding behind their national law in order to evade their international obligations arising under the Statute.[64] Article 88, combined with Articles 89 and 93, makes it clear that there have to be procedures in place for all forms of cooperation specified under Part 9. Therefore, while national procedures have to be resorted to in order to comply with requests by the Court, they may not be used for justifying the refusal of a request. It follows that any prohibition or requirement provided for under domestic, statutory, or constitutional law is not a ground for refusal to comply with requests for cooperation or assistance by the Court. On the contrary, various provisions in the Statute specifically provide for a duty on the part of the requested State to advise and consult

[63] For details on these limits to the obligation to cooperate with requests by the Court, see Ch. 42 below.

[64] See *supra* note 38 and corresponding text.



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with the Court regarding any requirements under its national law that may apply to the execution of a request for surrender or for other forms of cooperation (Articles 91(4) and 96(3) ).

More complex issues arise with regard to the relationship between the obligation to cooperate with the Court under the Statute and inconsistent international obligations incumbent upon the requested State under both customary law and treaties vis-à-vis States not parties. One of the main consequences of the Court itself being established by means of a treaty is that, in principle, decisions of the Court do not prevail over a State's duty under treaty or customary law towards States which are not a party to the Statute.[65]

In this respect, the position of the Court under the Statute is markedly different from that of the *ad hoc* Tribunals established under Chapter VII of the UN Charter. Here lies the most fundamental difference between the duty of States to cooperate under the Statute and the duty to cooperate with the *ad hoc* Tribunals under their Statutes. Since the *ad hoc* Tribunals have been established pursuant to resolutions of the Security Council, decisions by the ICTY and the ICTR come within the provision of Article 103 of the UN Charter.[66] Thus the obligation for States to cooperate prevails over obligations States may have assumed under any other international agreement. This is not the case for the obligations arising out of the Rome Statute, except for what may occur in cases referred to the Court by the Security Council acting under Chapter VII of the Charter.

Some provisions of the Statute explicitly exempt the requested State from compliance with requests the execution of which would amount to a violation of its international obligations vis-à-vis States that are not parties to the Statute.

Under Articles 90 and 93(9)(a), relating to competing requests for the surrender of persons and for other forms of assistance, respectively, the requested State retains the final say in determining whether or not to execute a request by the Court which would make it act inconsistently with an existing international obligation to cooperate vis-à-vis a State that is not a party to the Statute.

Articles 73 and 93(9)(b) allow a State to refuse to provide documents or information disclosed to it in confidence by a third State or an international organization, if the consent to disclosure (which the requested State is under an obligation to seek) is refused by the originator.

Article 98 provides that the Court may not proceed with a request for cooperation which would require the requested State to act inconsistently with its obligations

[65] For a general analysis of this issue, see *supra* note 3.

[66] Art. 103 of the UN Charter reads as follows: 'In the event of conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'



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under international law or international agreements with respect to State or diplomatic immunity or otherwise agreed immunity of persons or property of a third State, unless the Court itself can first obtain the consent of the third State concerned. To this end, Rule 195 of the Rules of Procedure and Evidence states that when the requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of Article 98, 'the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.'

Finally, in various provisions of the Statute, care has been taken to provide a consistent body of rules with regard to arrest and detention of persons by the requested State, thus reducing the possibility that the obligation for a State under the Statute to arrest and detain a person will conflict with its obligation under one or more human rights treaties to respect that person's liberty and security. Similarly, provisions on searches and seizures are cast so as to not prejudice the rights to property of persons affected by measures requested by the Court.

To some extent, the Rome Statute has thus anticipated the possibility of conflicting obligations and tried to find a solution to them. However, it is, of course, difficult to anticipate all conflicts that may arise.

Should the execution of a request by the Court be inconsistent with other international obligations previously undertaken by the requested State with respect to a State that is not a party to the Statute, it should be open to the State concerned to legitimately refuse to cooperate, subject only to the requirement of consultation with the Court to resolve the matter under Article 97. Article 97 of the Statute imposes on the requested State a general duty to consult with the Court in order to solve any problem which may impede or prevent the execution of a request. Among the problems impeding or preventing the execution of a request, Article 97(c) expressly mentions: 'The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.'

Article 97 recognizes that there may be situations of conflicting treaty obligations not anticipated by the Statute. In these situations, the solution may vary depending on whether or not the State whose rights would be infringed by the execution of a Court's request is itself a party to the Statute. That States parties 'shall consult with the Court without delay in order to resolve the matter' presumes a good faith effort on the part of both the Court and the State. However, the provision implies that a situation may arise in which a State Party could lawfully refuse a request for cooperation by the Court, where execution would inevitably infringe upon the rights of a State that is not a party to the Statute.



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## V. Remedies for Non-Compliance

Failure on the part of a State Party 'to comply with a request to co-operate by the Court contrary to the provisions of th[e] Statute, thereby preventing the Court from exercising its function and powers under th[e] Statute', empowers the Court to 'make a finding to that effect and refer the matter to the Assembly of States parties or, where the Security Council referred the matter to the Court, to the Security Council'. So provides Article 87(7), with regard to a State Party's failure to cooperate with the Court.

Article 87(5) deals with cases where a State, which is not a party to the Statute but is under an obligation to cooperate with the Court on the basis of an *ad hoc* arrangement, an agreement, or any other appropriate basis, fails to cooperate with requests by the Court. In such situations, 'the Court may so inform the Assembly of States parties or, where the Security Council referred the matter to the Court, the Security Council'. Although under this provision the Court is not expressly endowed with the power to make a finding, but may only 'inform' either the Assembly or the Security Council about the State's failure to cooperate, such a power may be deemed inherent to its judicial function. The reason for the difference in wording is the belief of some delegations that weaker language should be used with respect to States not parties to the Statute. It is not easy, though, to find a solid justification for a distinction in substance as the non-cooperating State infringes its obligations in both cases.[67]

Article 87(6) does not explicitly deal with the consequences of a failure of an intergovernmental organization to cooperate with the Court. Cooperation by an intergovernmental organization or arrangement is, in principle, a voluntary one. It is perfectly conceivable, however, that an intergovernmental organization, including a peacekeeping force, might assume an international treaty obligation to cooperate or be under a corresponding obligation because of a Security Council resolution under Chapter VII of the UN Charter. In any such cases, it would incur international responsibility in case of failure to cooperate, and the Court—it is submitted—would have the inherent power to make a finding as to the organization's failure to cooperate.[68]

### *A. The Practice of the ICTY*

In the context of Article 29 of the ICTY Statute, the Appeals Chamber found, in its *Blaškić Subpoena* decision, that 'the International Tribunal is endowed with the inherent power to make a judicial finding concerning a State's failure to observe the

[67] For a similar remark, see C. Kress and K. Prost, *supra* note 37, at 1063.
[68] For this view, see again Kress and Prost, *supra* note 37, at 1065.



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provisions of the Statute or the Rules. It also has the power to report this judicial finding to the Security Council'. As to the first point, the Court stated: 'The power to make a judicial finding is an inherent power; the International Tribunal must possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction. This inherent power inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged and its judicial role safeguarded.'[69] With regard to the second point, the Court found that the International Tribunal's power to report to the Security Council derives from the relationship between the two organs, as a 'logical corollary' of the Tribunal having been established by a Security Council resolution pursuant to Chapter VII of the UN Charter.[70] In this respect, it added, the ICTY has no power to go beyond such a finding and the consequent referral to the Security Council: 'the finding by the International Tribunal must not include any recommendations or suggestions as to the course of action the Security Council may wish to take as a consequence of that finding.'[71] The Court went on further to qualify the obligation to cooperate with the International Tribunal set out in Article 29 of the Statute as an obligation *erga omnes partes*, in the fulfilment of which 'every member State of the United Nations has a legal interest'. Faced with a situation where a judicial finding by the International Tribunal of a breach of Article 29 has been reported to the Security Council, each Member State of the UN may act upon the legal interest referred to, either unilaterally or collectively. According to the Tribunal, in order 'to limit, as far as possible, the risks of arbitrariness and conflict', priority should be given to collective or joint action to be taken through an intergovernmental organization. This collective action may take various forms, 'such as a political or moral condemnation, or a collective request to cease the breach, or economic or diplomatic sanctions'. 'In addition'—according to the Tribunal—'collective action would be warranted in the case of repeated and blatant breaches of Article 29 by the same State; and provided the Security Council had not decided that it enjoyed exclusive powers on the matter, the situation being part of a general condition of threat to the peace.'[72]

[69] Ap. Ch., Judgment of 29 October 1997, *Blaškić*, *supra* note 5, para. 33.

[70] Accordingly, the Appeals Chamber found 'as falling within the authority of the International Tribunal' the adoption of Rules 7*bis*, 11, 13, 59(b), and 61(e) of the ICTY Rules of Procedure and Evidence, which all provide for direct notification to the Security Council where a State fails to cooperate. Ap. Ch., Judgment of 29 October 1997, *Blaškić*, *supra*, note 5, para. 34. See ibid., notes 47 and 48, for a list of cases in which the President of the Tribunal has referred to the Security Council a failure by a State or an Entity to comply with Art. 29 and the follow-up given by the Security Council, normally a statement made, on behalf of the whole body, by the President of the Security Council and addressed to the non-cooperating State or Entity. See also D. A. Mundis, 'Reporting Non-Compliance: Rule *7bis*', in R. May *et al.* (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (2001) 421 and the corresponding provisions (identical in their wording) in the ICTR Rules of Procedure and Evidence.

[71] Ap. Ch., Judgment of 29 October 1997, *Blaškić*, *supra* note 5, para. 36.

[72] Ibid.



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### B. The ICC Statute and the General Rules on State Responsibility

With respect to the consequences of a failure to cooperate with the ICC, the Statutes provides for the means endorsed by the ICTY in the Appeals Chamber *Blaškić Subpoena* decision.

Where the Security Council acting under Chapter VII of the UN Charter refers the matter to the Court pursuant to Article 13(b) of the Statute, the Court may refer a State's failure to cooperate to the Security Council. In such a case, the Security Council will proceed in accordance with its competences under the UN Charter. The Council may, for instance, consider the appropriateness of the adoption of measures against the responsible State.

In all other cases, the Court may inform the Assembly of States Parties. Pursuant to Article 112(2)(f), the Assembly of States Parties may consider 'any question relating to non-cooperation'. Article 112(2)(f), however, does not state which options are open to this body. Reference must then be made to the general rules on State responsibility. Thus, the Assembly of States Parties would be entitled to ask for the immediate cessation of the international wrongful act and arguably also consider the appropriateness of collective countermeasures, such as economic sanctions, against the non-cooperating State.[73]

Also in cases where the matter was not previously referred by it to the Court, the Security Council could act under Chapter VII of the UN Charter, whenever the State's failure to cooperate with the Court amounted to a threat to international peace or security or a breach thereof.[74] The silence of the Statute, however, leaves the question open as to how action by the Security Council would be coordinated with that of the Assembly of States Parties.

Failing any action either taken or recommended by the Assembly of States Parties or the Security Council, States Parties to the Statute or any Member State of the United Nations, as the case may be, may resort to remedies generally available to them under international law, with a view to ensuring compliance with requests for cooperation by the Court. The Assembly of States Parties and the Security Council do not appear to enjoy exclusive powers on the matter under the Statute.[75] Furthermore, the Statute only addresses a *characterized* infringement of the obligation to cooperate by a State Party, namely one which prevents the Court

[73] See Ch. 9 above.

[74] See A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *EJIL* (1999) 144, at 166: 'Of course this possibility is not *excluded* by the ICC Statute, but it also would have been a good idea expressly to include it' (emphasis in the original).

[75] This view is shared by Kress, *supra* note 14, at 450: 'The questions of State responsibility are not really answered so that it appears impossible to qualify the Statute as a self-contained regime.'



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from carrying out its functions.[76] After the Court finds that a characterized infringement has occurred, any State Party should have the right to resort to countermeasures, should the Assembly of States Parties or the Security Council fail to take action. The question of remedies for *minor* infringements of the obligation to cooperate with the Court, which are not dealt with in the Statute, arguably remains entirely subject to the general rules on State responsibility, subject only to the specific dispute-settlement mechanism provided for under Article 119. Also with respect to such violations, however, the Court would be vested with an exclusive power of finding whether an infringement has taken place. In both cases, the *erga omnes partes* character of the obligation to cooperate with the ICC entails that any reaction albeit not channelled through the Assembly of States Parties or the Security Council should be taken by States in cooperation. This would not exclude, however, the adoption, as a last resort, of individual countermeasures.

## VI. Concluding Remarks

As the foregoing analysis has shown, the general legal framework of the cooperation regime established under the Statute appears to follow treaty-based mechanisms for judicial assistance in criminal matters in inter-State relations.

Unless there is an obligation imposed by the Security Council acting under Chapter VII of the UN Charter, the obligation to cooperate with the Court derives its binding force from the Statute *qua* an international treaty. Therefore the Court's power to issue a binding request for cooperation or assistance needs in principle to be based on the Statute. However, two basic differences between the system of cooperation which is provided by the Statute and traditional inter-State cooperation need to be emphasized.

First, the obligation to cooperate with the Court, unlike obligations to cooperate provided for under most bilateral and multilateral treaties, appears to be cast in very stringent if not absolute terms. In this respect the position of States and international organizations which come under an obligation to cooperate with the Court is very similar to the position of these same subjects vis-à-vis the two *ad hoc* Tribunals.

The other, and perhaps most fundamental, difference is that extradition and mutual legal assistance treaties are generally intended to establish optional, not exclusive, procedures for obtaining the custody of persons or taking evidence

[76] For a different view see, Kress and Prost, *supra* note 37, at 1067, expressing doubts as to the usefulness of the condition that the Court makes a finding. According to these authors, '[i]n any event the condition will normally be fulfilled as it is very hard to think of a case where the non-cooperation would not prevent the Court from exercising its functions and powers'.



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abroad,[77] while the modalities of cooperation specified in the relevant provisions of the Statute set out the only procedures available to the Court in order to carry out its functions.

## Select Bibliography

### ICTY AND ICTR

A. O'Shea, 'Interaction between International Criminal Tribunals and National Legal Systems', 28 *International Law and Politics* (1995–1996) 367; N. Figà-Talamanca, 'The Role of NATO in the Peace Agreement for Bosnia and Herzegovina', 7 *EJIL* (1996) 164; J. R. W. D. Jones, 'The Implications of the Dayton Peace Agreement for the International Criminal Tribunal for the Former Yugoslavia', 7 *EJIL* (1996) 226; K. Lescure and F. Trintignac, *International Justice for Former Yugoslavia: The Working of the International Criminal Tribunal of the Hague* (1996) 61; D. Vandermeersch, 'La Loi du 22 Mars 1996 rélative à la reconnaissance du Tribunal international pour l'ex-Yugoslavie et du Tribunal international pour le Rwanda et la cooperation avec ces tribunaux', 76 *RDP* (1996) 855; C. Warbrick and D. McGoldrick, 'Co-operation with the International Criminal Tribunal for Yugoslavia', 45 *ICLQ* (1996) 947; J. R. W. D. Jones, *The*

[77] The issue of the exclusive or optional character of inter-States cooperation procedures provided for under international treaties has been amply discussed with respect to extradition treaties. Cf. e.g. *United States v. Alvarez Machain*, 15 June 1992, 504 US (1992) 655, in which the US Supreme Court held that the respondent's forcible abduction from Mexico—although it might be in violation of general international principles—was not in violation of the extradition treaty between the United States and Mexico. On the debate following thereof, see e.g. M. Abbell, 'The Need for U.S. Legislation to Curb State Sponsored Kidnapping', in R. D. Atkins (ed.), *The Alleged Transnational Criminal Law* (1993) 87. As to mutual legal assistance treaties, the issue was first discussed by the US Supreme Court in the well known *Aerospatiale* case, with reference to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters of 1970. The Court held that '[t]he Convention does not provide exclusive or mandatory procedures for obtaining documents and information located in a foreign signatory's territory. The Convention's plain language, as well as the history of its proposal and ratification by the United States, unambiguously supports the conclusion that it was intended to establish optional procedures for obtaining evidence abroad. Its preamble speaks in non-mandatory terms, specifying its purpose to "facilitate" discovery and to "improve mutual judicial co-operation". Similarly, its text uses permissive language, and does not expressly modify the law of contracting States or require them to use the specified procedure or change their own procedure. The Convention does not deprive the District Court of its jurisdiction to order, under the Federal Rules, a foreign national party to produce evidence physically located within a signatory nation.' *Societé Nationale Industrielle Aerospatiale et al. v. US District Court for the Southern District of Iowa*, 15 June 1987, 482 US (1987) 522. This issue is but one aspect of the much larger debate over extraterritorial application of both procedural and substantial, national laws, particularly between the USA and Western European Countries. For the debate arising with respect to treaties on mutual assistance in criminal matters, see E. A. Nadelmann, 'The Role of the United States in the International Enforcement of Criminal Law', 31 *Harvard International Law Journal* (1990) 37; C. L. Blaskesly and O. Lagodny, 'Finding Harmony Amidst Disagreement over Extradition, Jurisdiction, the Role of Human Rights and the Issue of Extraterritoriality under International Criminal Law', 24 *Vanderbilt Journal of Transnational Law* (1991) 1.



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*Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (1998); M. Leigh and M. Shenk, 'International Criminal Tribunals for the Former Yugoslavia and Rwanda', 32 *International Lawyer* (1998) 509; D. Sarooshi, 'The Powers of the United Nations International Criminal Tribunals', 2 *Max Planck Yearbook of United Nations Law* (1998) 141; M. Buteau and G. Oosthuizen, 'When the Statute and Rules are Silent: The Inherent Powers of the Tribunal', in R. May *et al.* (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (2001) 65.

## ICC STATUTE

P. D. Marquardt, 'Law Without Borders: The Constitutionality of an International Criminal Court', 33 *Columbia Journal of Transnational Law* (1995) 73; L. Caflisch, 'Réflexions sur la création d'une Cour criminelle internationale', in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21 Century: Essays in Honour of Krzysztof Skubiszewski* (1996) 859; L. S. Sunga, *The Emerging System of International Criminal Law* (1997); A. Cassese, 'Reflections on International Criminal Justice', 61 *MLR* (1998) 9; C. Kress, 'Penalties, Enforcement and Cooperation in the International Criminal Court Statute', 6 *European Journal of Crime, Criminal Law and Criminal Justice* (1998) 442; F. Mosconi and N. Parisi, 'Co-operation between International Criminal Court and States Parties', in F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998) 312; B. Swart and G. Sluiter, 'The International Criminal Court and International Criminal Co-operation', in H. A. M. Von Hebel, J. G. Lammers, and J. Schukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1998) 91; A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *EJIL* (1999) 144; D. Sarooshi, 'The Statute of the International Criminal Court', 48 *ICLQ* (1999) 387; G. Palmisano, 'The ICC and Third States', in F. Lattanzi and W. A. Schabas (eds.), *Essays on the Rome Statute of the ICC* (1999) 391; C. Kress, K. Prost, A. Schlunck, and P. Wilkitzi, 'Preliminary Remarks', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999) 1045.



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## I. Introduction

Part 9 of the Rome Statute of the International Criminal Court is concerned with international cooperation and judicial assistance. A number of articles in this part of the Statute are devoted to the arrest and surrender by States of persons who are under suspicion of having committed crimes over which the International (p. 1640) Criminal Court has jurisdiction or who have been convicted for such crimes by the Court.

The surrender of suspects and accused to the International Criminal Court is of vital importance to its proper functioning. The duty of States to arrest and surrender persons whose presence before the Court is needed is one of the corner-stones on which the Rome Statute rests. Historical precedents make the fundamental nature of the duty to arrest and surrender abundantly clear. Attempts to create an international system for the adjudication of war crimes and other international crimes in the aftermath of World War I have largely failed because surrender of persons could not be secured. On the other hand, the successes of the International Military Tribunals of Nuremberg and Tokyo and of other tribunals erected after World War II would not have been possible without the operation of a smooth system for arresting and surrendering the accused. In the last few years, the world witnessed the activities of two *ad hoc* international criminal tribunals created by the Security Council of the United Nations. The continuous and precarious struggle of the International Criminal Tribunal for the former Yugoslavia in obtaining the presence of accused persons is well known. A closer look at these historical precedents may, therefore, help in assessing the strengths and weaknesses of the system created in the Rome Statute with regard to surrender.

Any study of the provisions of the Rome Statute with regard to arrest and surrender will immediately reveal one characteristic. It is clear that these provisions have been strongly influenced by the examples of both *ad hoc* international criminal tribunals and that lessons have been drawn from their experiences. On the other hand, there is much in them that reminds one of traditional features of extradition law. In a sense, the system of the Rome Statute is a compromise between traditional extradition law and the 'new law' of the *ad hoc* Tribunals. It is, therefore, worthwhile to study the elements of the compromise first by paying separate attention to the 'old' and the 'new' before embarking upon a commentary of the Statute itself.

In the following, I will first pay attention to the historical precedents of World War I and II. I will then discuss extradition for international crimes between States and transfer of suspects and accused to the *ad hoc* Tribunals. Finally, the provisions of the Rome Statute will be analysed.

## (p. 1641) II. Surrender for International Crimes in the Aftermath of World Wars I and II

### A. World War I[1]

As Bierzanek has remarked, World War I marked a new phase in the historical development of criminal responsibility for war crimes.[2] While, in the past, peace treaties ending international armed conflicts usually contained provisions granting amnesty to those suspected of having violated the laws and customs of war, public opinion in France, the United Kingdom, and other countries made a similar solution with regard to war crimes and other crimes committed in the course of World War I impossible. The Allied and Associated Powers, therefore, included provisions in the peace treaties they wanted to conclude with Austria, Bulgaria, Germany, Hungary, and Turkey aimed at bringing to justice such persons before courts of the victorious powers or before courts especially established by them for the occasion. An integral part of these provisions was the duty of the vanquished powers to hand over persons accused of having committed international crimes.

Penal provisions on the trial and surrender of persons accused of having committed international crimes were included in the peace treaties with Austria, Bulgaria, Germany, Hungary, and Turkey.[3] With the exception of the peace treaty with Turkey these provisions applied to violations of the laws and customs of war only and did not also envisage violations of the laws of humanity.[4] In them, the vanquished powers recognized the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war and assumed the duty to provide assistance in the investigation and trial of these persons, by handing them over on request and by other means. Of the five peace treaties, the treaty with Germany is the only one to include also provisions with regard to acts which provoked the world war and accompanied its inception. Article 227 of the Treaty of Versailles provided for the arraignment of the former German Emperor William II for 'a supreme offence (p. 1642) against international morality and the sanctity of treaties'. It envisaged the creation of a special tribunal that would have to try him and, in doing so, would be guided by the highest motives of international policy with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. This tribunal would have to fix the punishment which it would consider to be appropriate. Finally, Article 227 provided that a request for the surrender of the ex-Emperor would be addressed to The Netherlands, where William II had found refuge in the meantime.

The history of the implementation of Articles 227–230 of the Treaty of Versailles is well documented. During the negotiations of these provisions as well as afterwards the German government and large sections of the German public, for a variety of reasons, strongly resisted the idea of surrender of German nationals with a view to their trial by foreign tribunals.[5] As an alternative Germany advanced the possibility of trying them before German courts. A special statute was even enacted for that purpose in December 1919. Meanwhile, in February 1920, a month after the Versailles Treaty entered into force, the Allied and Associated Powers presented Germany with a list of almost 900 persons to be surrendered to them. This list, which was published by the German government, comprised many of the highest politicians and members of the military. Feeling politically unable to comply with the request the German government proposed to bring the accused persons to trial before the Supreme Court in Leipzig. This proposal was eventually accepted by the Allied and Associated Powers in May 1920. They presented to Germany a new provisional list comprising 45 names, accompanied with the warning that they reserved the right to institute criminal proceedings themselves if the results of the German efforts would appear to be unsatisfactory. The Leipzig trials took place in 1921 and 1922. Of a total of 901 cases brought before the German Supreme Court on the basis of requests by the Allied and Associated Powers, thirteen cases ended in a conviction; 888 accused were acquitted or

summarily dismissed.[6] While, in August 1922, the Allied and Associated Powers expressed their dissatisfaction with these results, they refrained from taking further action against Germany. In Belgium and France a number of trials *in absentia* were conducted afterwards.

In January 1920 the Allied and Associated Powers addressed a request based on Article 227 of the Versailles Treaty to The Netherlands for the surrender of William II. The Netherlands, which had remained neutral during World War I and had not become a Party to the Treaty, refused to satisfy the request. In doing (p. 1643) so the Dutch government invoked principles of national constitutional law as well as a secular tradition of granting asylum. A second request, made in February 1920, was equally unsuccessful.[7] Given the fact that the former Article 4 of the Dutch Constitution permitted extradition on the basis of a treaty only, that the acts alleged did not constitute criminal offences according to Dutch law or to extradition treaties concluded with the Allied and Associated Powers, and that the Constitution did not permit the conclusion of an extradition treaty for the surrender of one person only, it is hard to see that the Dutch government could have reacted in a different way.

Little to nothing is known about the implementation of the penal provisions in the peace treaties with Austria, Bulgaria, and Hungary. As far as the peace treaty with Turkey is concerned, it did not enter into force and was later replaced by the Treaty of Lausanne, concluded in 1923. That Treaty did not contain any provisions with regard to war crimes and violations of the laws of humanity. It was accompanied by a Declaration of Amnesty for all offences committed between 1 August 1914 and 20 November 1922.

It is generally held that the attempts to punish the war criminals of World War I in accordance with the provisions of the peace treaties ended in failure.[8] As for the reasons why the Treaty of Versailles was not enforced, the United Nations War Crimes Commission has noted that the sanctions came too late, when public opinion no longer demanded them, that the Allies were no longer united when the war was over, that the world in 1919–1920 was not internationally mature enough to understand the consequences of a failure to ensure respect of the provisions of the Treaty, and that Articles 228–230 were hastily and imperfectly framed, so that it would have been impossible to carry them out.[9] Meanwhile, the experiences with the peace treaties exerted a considerable influence on the system of repression of international crimes committed during World War II.

## B. World War II[10]

Already from an early date during World War II, Allied governments continually expressed their resolve to prosecute and punish persons guilty of war crimes and (p. 1644) other international crimes. Declarations to that effect by the American, British, and Soviet governments, made in the autumn of 1941, were followed by the Declaration of Saint James's Palace, signed in London by the governments of nine occupied countries on 13 January 1942. In it, the governments placed 'among their principal war aims the punishment, through the channel of organised justice, of those guilty of or responsible for' war crimes. They announced their resolve 'to see to it in a spirit of international solidarity that (a) those guilty of or responsible, whatever their nationality, are sought out, handed over to justice and judged, (b) that the sentences pronounced are carried out'. Moreover, they declared that the acts envisaged had nothing in common with 'the conceptions of an act of war or of a political crime as understood by civilised nations'. In July 1943, the governments of the United Kingdom, the United States, and the Soviet Union forwarded communications to a number of neutral States to the effect that these States should refrain from granting asylum to persons guilty of war crimes committed in Italy or elsewhere. Of all the declarations made during World War II with regard to the surrender of persons suspected of international crimes, the most important one is the Moscow Declaration of 1 November 1943. In it, the governments of the United States, the United Kingdom, and the Soviet Union, speaking 'in the interest of the thirty-two United Nations', warned Germany that all those guilty of having committed

atrocities, massacres, and executions would 'be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries'. The Declaration was to be 'without prejudice to the case of the major criminals whose offences have no particular geographical location and who will be punished by a joint decision of the Governments of the Allies'. That decision was adopted in the London Agreement of 8 August 1945, establishing an International Military Tribunal for the trial of the major war criminals of the European Axis. Thus, the Moscow Declaration set the pattern that was followed after World War II for the prosecution and punishment of those suspected of having committed international crimes.

During World War II, the Allies, apart from warning enemy States of their intention to prosecute and punish persons guilty of war crimes and other international crimes, also took specific measures to prepare an (international) system of repression. An important step in this regard was the establishment of the United Nations War Crimes Commission in October 1943. Of the many activities carried out by the Commission between 1943 and 1947 those with regard to the apprehension and surrender of persons suspected of having committed war crimes and other international crimes should be mentioned here. During World War II, the Commission prepared a Draft Convention for the surrender of war criminals, which was based on the conviction that the rules and machinery for surrendering them should be fundamentally different from those of traditional (p. 1645) extradition law. The Draft Convention was limited to the surrender of persons between Allied Nations; it was not regarded as wise to attempt to obtain adherence of neutrals. As far as enemy States were concerned, in the opinion of the Commission their obligations to surrender persons would have to be settled in armistice and/or peace treaties; draft articles were drawn up for that purpose. The procedure for surrendering persons would be an administrative one and the conditions for applying for and obtaining surrender reduced to a minimum. However, in April 1945 the British government rejected the proposal. In their view, the powers they possessed were sufficient to enable this matter to be dealt with rapidly and satisfactorily by executive action, provided that it was kept on an informal basis and not made the subject of a formal treaty. The other Allied governments followed suit. They all established an informal machinery for surrendering persons by executive action.[11] Another important activity of the Commission to be mentioned here was the preparation of lists of persons suspected of having committed international crimes. These lists often served as a basis for the surrender of persons between governments.[12]

World War II came to an end with the conclusion of a series of armistice agreements and declarations of surrender between the victorious and the vanquished States, almost all of them including explicit provisions on the apprehension and surrender of persons accused of war crimes. Similar provisions, extending the obligation to surrender persons to those accused of having committed crimes against peace and crimes against humanity, can be found in the peace treaties signed in 1947 with Bulgaria, Finland, Hungary, Italy, and Roumenia.[13] Moreover, the Allied governments set up administrative procedures for the mutual surrender of wanted persons in order to implement the Moscow Declaration. The most important instrument in this regard was the Allied Control Council Law No. 10, which was issued by the Allied Control Council for Germany on 29 December 1945, and remained in force until 1956.[14] For a certain period, this network of instruments seems, on the whole, to have functioned well. Rather soon, however, the Cold War virtually brought an end to surrender between the Western and the Eastern European States, while, after 1950, the whole system of administrative surrender seems to have fallen into decay.[15]

(p. 1646) During World War II as well as afterwards, the Allied Governments gave several warnings to neutral countries that no refuge should be given to war criminals. However, they refrained from negotiating specific instruments with these States for the surrender of persons accused of international crimes. Their (sporadic) efforts in the years following World War II to obtain the extradition or expulsion of such persons generally met with very little success.[16]

Finally, the involvement of the United Nations in the matter of surrender should be mentioned here. On 13

February 1946, the General Assembly of the United Nations unanimously adopted Resolution 3(I).[17] Using the language of the Moscow Declaration, the Resolution recommended the Member States of the United Nations to take all necessary measures to arrest and send back war criminals to the countries in which their abominable deeds were done. Moreover, it called upon other States to take all necessary measures for the apprehension of such criminals with a view to their immediate removal to the countries in which they had committed their crimes. A year later, the matter came back before the General Assembly due to charges made by Yugoslavia to the effect that certain Member States and candidate Member States were not surrendering war criminals in conformity with Resolution 3(I). At the end of the debate a new resolution was adopted. Resolution 170(II) of 31 October 1947 reaffirmed the earlier resolution.[18] However, it made two important additional points. First, it recommended that Member States support their request for surrender with sufficient evidence to establish that 'a reasonable *prima facie* case exists as to identity and guilt' of the persons requested. Secondly, it stated that 'trials of war criminals, like all other trials, should be governed by the principles of justice, law and evidence'.[19]

In retrospect, two general observations can be made with regard to the developments during and shortly after World War II. The first is that the Allied Nations drew a number of lessons from the experiences of some of them after World War (p. 1647) I. They made their intention to bring to justice the perpetrators of international crimes perfectly clear to their enemies already during the war, they took specific steps to implement their plans in the meantime and they concluded armistice agreements and surrender declarations which obligated their enemies to hand over to them persons accused of having committed international crimes. However, all this does not sufficiently explain why they succeeded after 1945 where they had failed after 1918. The decisive difference seems to be that World War II, unlike World War I, ended with the Allied Nations occupying the territories of their enemies and thus being able to impose their will on them without too many difficulties.

The second observation relates to the fact that the system for surrendering perpetrators of international crimes created by the Allied Nations was short-lived. It did not develop into a more general system designed to cope with future needs arising from future conflicts. It is especially important to note here that, in the first decade following World War II, no proposals to create such a system were debated within the framework of the United Nations. Undoubtedly, this was mainly due to the fact that, in the same period, no progress could be made with regard to the adoption of an International Criminal Code and the establishment of an International Criminal Court. Instead, for some forty years the development of a more general system for surrendering persons accused of international crimes became a slow and unsystematic process which yielded piecemeal results.

## III. Extradition for International Crimes in National and International Law

In the years after 1945, the problem of whether and to what extent States were prepared and obligated to extradite persons accused of having committed the crimes now mentioned in the Rome Statute of the International Criminal Court (genocide, other crimes against humanity including the crime of apartheid, war crimes, and the crime of aggression) attracted much attention. Important developments took place over the next forty to forty-five years. The same is true with regard to the problem of what could be the consequences of a refusal to extradite or of extradition not occurring for another reason. A discussion of these problems should include the crime of torture. Although torture is not mentioned in the Statute as a separate international crime and, consequently, the International Criminal Court has jurisdiction over torture only in a situation in which torture amounts to genocide, a crime against humanity, or a war crime, international developments with regard to the prohibition of torture may nevertheless shed light on those with regard to

the crimes mentioned in the Statute. On the other hand, there is hardly any need to pay separate attention to the crime of aggression, the (p. 1648) simple reason being that virtually no relevant developments seem to have taken place here at all. There are no reported cases on extradition for aggression; more-over, it seems that most States have not criminalized aggression in their penal laws.[20]

## A. Extradition

### *1. The Political Offence Exception*

The first question to be discussed in the matter of extradition is whether the crimes mentioned in the Rome Statute may be regarded as political offences for which extradition may or will be refused.[21]

The idea that war crimes should not be considered political offences for the purpose of extradition is not of recent times.[22] Nevertheless, in the first ten to fifteen years after 1945, extradition of war criminals was refused regularly, although usually not for the reason that their acts qualified as political offences.[23] Cases in which national courts attached a political character to war crimes or other international crimes remained rare.[24] The most important example is *Karadzole v. Artukovic*, decided by the United States Court of Appeals in 1957. In it, the Court upheld the decision of a District Court which had assumed that ordering the death of 1,293 named persons and a much higher number of unnamed persons amounted to political offences because they were committed at the time of a political uprising, the fight for political supremacy in wartime Croatia. The Court of Appeals first equated crimes against humanity with war crimes and then held that post-war developments within the United Nations with regard to the surrender of alleged war criminals did not carry sufficient weight to modify long-standing (p. 1649) judicial interpretation of provisions in extradition treaties relating to political offences, in this case the Treaty with Yugoslavia.[25]

Starting from the 1960s, national courts in a number of countries have become increasingly resolute and explicit in denying, for the purpose of extradition or of other forms of assistance in criminal matters, a political character to war crimes and other international crimes mentioned in the Rome Statute. One of the first examples is provided by the *Kroeger* case, decided by the Swiss Supreme Court in 1966.[26] Applying its long developed predominance test to war crimes and crimes against humanity, it concluded that the killing of communists, Jews, and inmates of mental institutions in the Ukraine during World War II could not constitute political offences according to Swiss law. In the same year, the Court of Appeal of Accra, Ghana, rendered a similar decision in *The State v. Schumann*, a case involving the killing of Jews and mental patients in a concentration camp.[27] Finally, in 1968 the Argentinian Supreme Court held that the political offence exception should not be applied in the case of offences amounting to cruel or immoral acts which shock the conscience of civilized people.[28] In later years, courts in other States took the same direction. Of special importance in this regard is the case law of courts in the United States. In 1986, a renewed Yugoslavian request for the extradition of Artukovic met with more success. This time, a district court granted his extradition.[29] Its decision was subsequently affirmed by the United States Court of Appeals.[30] Another well known case, in which a political character was denied to crimes against humanity, is that of Demjanjuk.[31] British and Australian State practice provide examples of the granting of other forms of legal assistance in cases in which the requesting State was carrying out investigations into war crimes or crimes against humanity.[32] Finally, one has to bear in mind that in most other States, the general criteria in national law for determining whether or not an offence is a political offence virtually preclude the person requested from invoking the political offence exception with any chance of success where war crimes, crimes against humanity, and genocide are concerned. This may explain (p. 1650) why, in some cases, persons whose extradition was requested for such crimes did not even attempt to argue that their acts had a political character.[33]

In addition to developments at a national level there have been international developments. The first international instrument to be discussed here is the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide. Article VII of the Convention provides that genocide and other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition. On the other hand, the absence of a similar provision in the four 1949 Geneva Conventions is striking. Article III of the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity provides that States Parties undertake to adopt all necessary domestic measures with a view to making possible extradition, 'in accordance with international law', of the persons to which the Convention refers. It has been stated that this provision obligates States Parties not to refuse extradition on the basis of political offence exceptions, unless the human rights of the person requested would be seriously jeopardized by extraditing him to the requesting State.[34] More straightforward is the 1975 Additional Protocol to the European Convention on Extradition. Article 1 of the Protocol excludes three different categories of offences from the political offence exception in the 1957 Convention. The first and second categories relate to genocide as defined by the Genocide Convention and to the grave breaches of the Geneva Conventions. The third category has regard to any comparable violations of the laws of war having effect at the time when the Protocol enters into force and of customs of war existing at that time, which are nor already provided for in the provisions of the Geneva Conventions with regard to grave breaches. This covers violations of the 1899 and 1907 Hague Conventions but also violations of customary humanitarian law in armed conflict insofar as they entail individual criminal responsibility.[35] The last relevant multilateral convention is the 1973 UN Convention on the Suppression and Punishment of the Crime of Apartheid. Article XI of the Convention repeats the formula of Article VII of the Genocide Convention with regard to the crime of apartheid. Finally, a series of four resolutions concerning the punishment of war criminals and persons committing crimes against humanity, adopted by the General Assembly of the United Nations during the years 1969–1973, should be mentioned here.[36]

(p. 1651) Although none of these resolutions explicitly rejects the use of the political offence exception where extradition for war crimes and crimes against humanity is concerned, they all, in one way or another, emphasize the duty of Member States of the United Nations under the Charter and generally recognized norms of international law to cooperate with each other in arresting and bringing to trial persons suspected of having committed such crimes.[37]

The developments discussed here show an ever stronger tendency to exclude international crimes such as war crimes and crimes against humanity from the political offence exception. Recently, Gilbert has concluded that there is a developing customary international law norm to the effect that war crimes and crimes against humanity are not to be regarded as political offences.[38] In an *obiter dictum* in *Prosecutor v. Anto Furundžija*, the International Criminal Tribunal for the former Yugoslavia expressed the same opinion more forcefully with regard to the crime of torture. It held that torture is prohibited by a peremptory norm of international law and discussed the various consequences of the prohibition of torture having acquired the status of *jus cogens*. In its view, one of the consequences is that torture 'must not be excluded from extradition under any political offence exemption'.[39] What is true for torture must *a fortiori* be true for aggression, war crimes, and crimes against humanity.

One cannot but agree in principle with the point of view that the political offence exception should not be applied to aggression, war crimes, and crimes against humanity. Since these crimes are crimes under general international law and since all States are guardians of the international legal order, States have a shared interest in and a shared responsibility for their suppression. As a consequence, the two main traditional justifications for the political offence exception are irrelevant where aggression, war crimes, and crimes against humanity are concerned. The wish to stay aloof from political conflicts in other States and to avoid getting involved in them by extraditing political offenders cannot serve as a justification for not extraditing a

person who is suspected of a crime that affects the international community as a whole. Equally, the idea that political offences need not always be morally reprehensible but may be justified by circumstances, the second (p. 1652) traditional justification for the exception, cannot be applied to aggression, war crimes, and crimes against humanity.

At first sight, matters seem to be different where the third traditional justification is concerned, the wish to protect political offenders against unfair justice or against other violations of their basic individual rights in the requesting State. That concern remains as valid as it has always been. It is even true that one of the main developments in extradition law during the past two decades, both at a national and at an international level, consists in the increasing concern of national and international judicial bodies with protecting individual persons against infringements of their basic human rights which could result from their being extradited or deported to another State. The judgments of the European Court of Human Rights in the cases of *Soering v. the United Kingdom* and *Chahal v. the United Kingdom* are but among the most striking examples of that development.[40] In *Chahal*, a deportation case, the Court held that the European Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Thus, alleged offenders of crimes under general international law are no less entitled to protection of their basic rights than other persons whose extradition is requested. However, there is now no longer a need to use the political offence exception for that purpose. If a person needs protection, that protection can now be given by applying more modern escape clauses in extradition laws or extradition treaties with regard to the protection of human rights, by applying human rights conventions directly within the framework of extradition proceedings, or even by having recourse to *jus cogens* in the field of human rights.

### *2. Other Impediments to Extradition*

War crimes and crimes against humanity are crimes under general international law. Their prohibition has acquired the status of *jus cogens*. Apart from entailing that the political offence should not be applied to them, this may, or should, also have a number of other consequences for extradition law that will be briefly discussed here.

A cornerstone of extradition law is the requirement of double criminality. The rule of double criminality requires that the conduct with regard to which extradition is requested constitute criminal offences according to the laws of both the requesting and the requested States. Where crimes under general international law are concerned, this requirement should not be rigorously maintained. Rather than asking the question whether the acts to which an extradition request relates may be considered to be offences under its national laws, the requested State should ask whether they constitute criminal offences under customary inter(p. 1653) national law. This is especially important where crimes against humanity are concerned, since many States have not introduced legislation making crimes against humanity separate offences under national law.

The *jus cogens* character of the prohibition of war crimes and crimes against humanity would seem to influence the operation of the double criminality requirement in yet another way: its time dimension. In examining whether the conduct with regard to which extradition has been requested constitutes a criminal offence according to the law of the requested State, many States consider the date of the extradition request or the decision on that request to be the relevant date. Other States require that the acts constitute criminal offences according to their law at the time of their commission. A recent example of the latter approach is provided by the judgment of the House of Lords of 24 March 1999, in *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*.[41] This approach caused the House of Lords to exclude Pinochet's extradition with regard to twenty-two out of twenty-five charges of torture, the reason being that they related to conduct prior to the date on which the Criminal Justice Act 1988, implementing the 1984 UN Torture Convention, entered into force and torture became an extraterritorial criminal offence in the

United Kingdom. Since the Lords recognized the *jus cogens* character of the prohibition of torture, a more appropriate approach would have been to attach decisive value to the approximate date on which torture became a crime under general international law, a date which at least one of the Law Lords placed in the early 1970s. Where individual criminal responsibility for certain conduct directly derives from customary international law without depending on national laws, the only question that seems to matter within the framework of extradition is whether or not that conduct occurred before or after the date it became a crime under general international law.[42] The question of whether the conduct constitutes a crime according to the law of the requested State at the time of its commission should not be of importance with regard to war crimes and crimes against humanity. The double criminality requirement is a means of ensuring reciprocity as well as protecting the person requested against punishment for conduct that has not been criminalized by the requested State; both considerations seem to be irrelevant in the case of international crimes. It can be argued that the same is true where criminalization of internationally prohibited conduct in the requesting State is concerned, since it is also a principle of customary international law with regard to crimes under general international law that the defence that the conduct did, at the time of its (p. 1654) commission, not constitute a criminal offence according to the law of that State is not a valid defence.

Similar questions arise where national statutes of limitation according to the law of the requested State are concerned. Assuming that customary international law entails that national statutes of limitations cannot be applied to crimes under general international law,[43] these statutes should lose any relevance within the framework of extradition law too. Following this line of reasoning, the Argentinian Supreme Court decided in 1995 to allow the extradition of Priebke to Italy on charges of crimes against humanity although, at the moment of its decision, Argentinian law still applied statutes of limitation to crimes against humanity.[44]

Finally, international immunities should be briefly discussed. There is an obvious tension between, on the one hand, traditional immunities of diplomatic and other persons under international law and the principle that the official position of an individual who commits a crime under general international law does not relieve him of criminal responsibility, on the other hand. That tension was the central issue in *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*.[45] The House of Lords held that Pinochet could not claim immunity *ratione materiae* from arrest for extradition purposes in his capacity as a former Head of State. On the other hand, it also held that immunity *ratione personae* protects diplomatic agents and serving heads of State from such measures.

## B. Deportation, Expulsion, and Abduction

As has been mentioned already in the discussion of the political offence exception, a number of international instruments preclude the granting of asylum to the perpetrators of aggression, war crimes, and crimes against humanity. One may add that, in State practice, deportation, sometimes preceded by denaturalization, and expulsion have always fulfilled an additional role in securing the return of persons suspected of having committed war crimes or crimes against humanity to States that wanted to prosecute them.[46] Sometimes, the propriety of these methods became a matter of controversy, the best-known examples being the denaturalization of (p. 1655) Demjanjuk by the United States[47] and the deportation of Barbie by Bolivia.[48] As far as abduction is concerned one should, of course, mention the kidnapping of Adolf Eichmann in Argentina and his transfer to Israel, presumably by Israeli government officials. In that case, the Israel Supreme Court later held that the events did not prevent Israel from exercising criminal jurisdiction over him,[49] while Argentina and Israel settled the dispute between them after United Nations Security Council Resolution of 23 June 1960 had requested Israel to make appropriate reparation.[50]

## C. The Duty to Extradite or Prosecute

The most fundamental questions to be asked are whether and to what extent there exists a duty for States under international law to extradite alleged perpetrators of international crimes and whether there is an alternative duty for them to prosecute such persons before their own courts if, for whatever reasons, extradition does not take place. The answers to these questions are of considerable importance where the International Criminal Court is concerned, since they may influence the relationships between the Court and States that did not become Parties to its Statute.

### *1. The Duty to Extradite*

A number of treaties and other texts with regard to war crimes and crimes against humanity contain provisions on the duty of States to extradite persons suspected of having committed these crimes. One may distinguish two categories here. On the one hand, there are texts focusing on the duty of States to extradite. On the other, there are texts that leave States free in the decision on whether or not to extradite but that attach to refusal of extradition the consequence that the State refusing extradition is obligated to itself prosecute the person requested. Some texts belong to both categories.

The oldest treaty belonging to the first class of texts is the UN Convention on the Prevention and Punishment of the Crime of Genocide. Article VII, second paragraph, provides that the Parties to the Convention shall grant extradition to each other in accordance with their laws and treaties in force. Apparently, this provision (p. 1656) does not impose on the Contracting Parties more obligations than they had already assumed under other international instruments or will assume at a later date.[51] The same can be said of Article XI, second paragraph, of the UN Convention on the Suppression and Punishment of the Crime of Apartheid, which repeats the language of the Genocide Convention. More interesting and perhaps more important is Article III of the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. According to that provision, States Parties 'undertake to adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the extradition, in accordance with international law, of the persons' referred to in the Convention.[52] Another treaty to be mentioned here is the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 8 of the Convention stipulates that the offences envisaged shall be deemed to be included as extraditable offences in existing extradition treaties, that States which make extradition conditional on the existence of a treaty may consider the Convention as the legal basis for extradition, and that States which do not make extradition conditional on the existence of a treaty shall recognize the offences envisaged as extraditable offences between themselves subject to the conditions provided by the law of the requested State. Article 18 of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict and Article 10 of the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind copy the Torture Convention in these respects.

The four 1949 Geneva Conventions belong to the second class of texts. They all provide that a State Party must bring persons suspected of having committed, or to have ordered to be committed, grave breaches before its own courts, but that it may also, in accordance with its own legislation, hand such persons over for trial (p. 1657) to another State Party.[53] The same system has been adopted in Article 85 of Protocol I Additional. The approach of the Torture Convention is slightly different. Article 7 of the Convention obliges the State Party where the alleged offender is found to extradite him to another State Party or, if it does not extradite him, to submit the case to its own competent authorities for the purpose of prosecution. Finally, Article 17 of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict and Article 9 of the 1996 Draft Code also carry the obligation for the State Party where the alleged offender is found to extradite or to prosecute him.

None of the texts discussed here creates an absolute obligation for States Parties to extradite persons

suspected of having committed international crimes. Their purpose is to restrict the freedom of States to refuse extradition and they achieve that purpose in different ways. They must be clearly understood against the background of the time-honoured principle of international law that no obligation to extradite exists apart from that imposed by treaty. There is no reason to suppose that they have contributed to the emergence of a new rule of customary law entailing that an unconditional obligation to extradite that does not depend on the existence of a treaty now exists where international crimes are concerned. There is not enough State practice and *opinio juris* to warrant a different conclusion.

Nevertheless, international crimes cannot simply be equated with other crimes were extradition is concerned. The references in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and in various resolutions of the General Assembly to generally recognized principles of international law and to the purposes and principles of the Charter of the United Nations are not devoid of meaning. As has been discussed, there is no longer any justification or any need for refusing extradition for international crimes on the basis of the political offence exception. It has also appeared in the discussion of other impediments to extradition that the special character of international crimes makes it desirable to give a different application to the double criminality requirement and to approach impediments to extradition such as statutes of limitation and international immunities in a different manner. Moreover, it can perhaps be argued that two general consequences flow from the fact that all States are guardians of the international legal order and that they have, therefore, a shared responsibility for the suppression of international crimes. The first would be that States are no longer entitled to refuse extradition to other States unless extradition treaties or national extradition laws provide them with convincing reasons for so deciding. The second is that they should revise their national extradition laws in order to secure that extradition does not have to be (p. 1658) refused for a reason that would perhaps be appropriate in ordinary extradition cases but should not play a role where international crimes are concerned. In *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* the International Court of Justice attached several consequences to the fact that genocide is a crime under international law. The first is that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'. The second is 'the universal character both of the condemnation of genocide and of the cooperation required "in order to liberate man from such an odious scourge" '.[54] It is tempting to interpret this cryptic remark about the universal character of cooperation as referring to an obligation incumbent on all States not to make extradition dependent on considerations that should not matter.

Meanwhile, there may exist good reasons for not wanting to extradite the alleged offender of an international crime. One of them would be the definite risk that the requested person would, in the requesting State, be exposed to penalties forbidden by the constitution of the requested State or treatment contrary to human rights treaties. Another, more controversial, obstacle may be the fact that the person requested is a national of the requested State; in a number of legal systems the prohibition against extraditing nationals has a constitutional status. It may also be that the requested State considers itself to be in a better position to prosecute the person concerned and prefers to make use of that option. Such reasons for refusing extradition make it important to discuss the consequences of a refusal to extradite under treaty law and customary international law.

### *2. The Duty to Prosecute*

The Geneva Conventions and Protocol I Additional, the Torture Convention, the Second Protocol to the 1954 Hague Convention and the Draft Code all impose on the States Parties a duty to prosecute a person if they do not extradite him. In doing so they make Grotius's principle *aut dedere aut punire*, now often rephrased as *aut dedere aut judicare*, a rule of positive international law. In these texts, the rule covers two situations

which are rather different from each other. The first situation is the one in which an extradition request has been made but has been refused; for analytical purposes one may equate with it the situation in which no extradition request has been made because it is all too obvious that the law of the State where the alleged offender is present precludes an extradition request from being granted. Refusal of extradition carries the obligation to prosecute that person. The second situation is the one in which it appears to the State where a person is present that no other State is prosecuting him. This may, for instance, have become clear from the fact that no extradition request has been addressed to that State. Here too, the State (p. 1659) concerned is obligated to prosecute the person. With a reference to Article 17 of the Rome Statute of the International Criminal Court, one might say that, in the first situation, the duty to prosecute is activated by the fact that other States are unable genuinely to prosecute the alleged offender while, in the second situation, there seems to be an unwillingness to do so on their side. In recent years, it has been maintained by a number of authors that the principle of *aut dedere aut judicare* has become a rule of customary international law. It would have acquired the character of *jus cogens* where aggression, war crimes, genocide, and other crimes against humanity are concerned.[55] Other authors have denied the existence of such a rule or voiced doubts.[56] This debate makes it necessary to have a closer look at the system laid down in the Geneva Conventions, Protocol I Additional, the Torture Convention, the Second Protocol to the 1954 Hague Convention and the Draft Code.

In analysing these texts it is helpful to distinguish between the duty to create jurisdiction, on the one hand, and the duty to exercise that jurisdiction in a specific situation, on the other. This distinction is explicit in the Torture Convention, the Second Protocol, and the Draft Code, while it has remained implicit in the Geneva Conventions and Protocol I. In the Torture Convention, the first duty has been laid down in Article 5. Pursuant to Article 5, States Parties must establish jurisdiction on the basis of the territoriality principle, the active nationality principle, and the passive nationality principle. They must also establish jurisdiction in cases where the alleged offender is present in their territory and they do not extradite him to another State Party. The duty to prosecute individual offenders is laid down in Article 7. It arises when a person has been found on the territory of a State Party and that State does not extradite him. The same system is adopted in Articles 16 and 17 of the Second Protocol to the 1954 Hague Convention. That of the Draft Code is more simple. Article 8 of the Draft provides that each State Party shall establish its jurisdiction over the relevant crimes irrespective of where or by whom those crimes were committed. Pursuant to Article 9 of the Draft, a State Party in whose territory an alleged offender has been found must either extradite or prosecute him. The relevant provisions of the Geneva Conventions simply state that each State Party is under the obligation to search for persons alleged to have committed grave breaches and to bring them before its own courts but that it may also, if it prefers, hand such persons over for trial to another State (p. 1660) Party. However, the obligation to bring a person before a domestic court presupposes jurisdiction over that person. From this one may conclude that, in cases in which no other domestic jurisdictional basis exists already, the universality principle applies. In sum, the proposition that the rule of *aut dedere aut judicare* has become *jus cogens* contains two different elements. The first is that customary international law requires a State to establish universal jurisdiction over international crimes with regard to all persons that are present in its territory. The second is that a State must, on that jurisdictional basis or on any other basis that may be available in domestic law, prosecute such persons if it does not extradite them or extradite them if it does not prosecute them. The rule itself expresses no preference for one alternative over the other.

The question of whether or not general international law permits States to establish universal jurisdiction over war crimes and crimes against humanity has remained controversial, although perhaps less so than in the past. It is now generally held by authors that a permissive rule indeed exists.[57] In recent years, a growing number of States have established universal jurisdiction over these crimes. Several national courts have affirmed their right to do so,[58] the case of *Eichmann* being the best known example.[59] In *Prosecutor v. Anto Furundžija*, the International Criminal Tribunal for the former Yugoslavia said that it would appear to be one

of the consequences of the *jus cogens* character of the prohibition of torture 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.[60] There seem to be no serious indications that international law forbids a State to prosecure a person suspected of having committed an international crime on the basis that the person is found on its territory in the absence of a treaty authorizing the State to do so.

A quite different question is whether customary international law imposes a duty on States to establish universal jurisdiction over war crimes and crimes against humanity. The fact that States may have accepted a permissive rule in this respect (p. 1661) does not necessarily imply that they regard the rule as obligatory. The preliminary and more general question here is whether and under what conditions customary law requires alleged offenders of war crimes and crimes against humanity to be prosecuted and, if found guilty, to be punished. Not surprisingly, the debate over the question focuses almost exclusively on the responsibilities of the State on whose territory international crimes have been committed. This is not the proper place to join that particular debate.[61] Suffice it to say here that the establishment of two *ad hoc* international criminal tribunals by the Security Council strongly points at the existence of a duty incumbent on the territorial State under general international law, whatever the admitted exceptions to this duty might be. Meanwhile, where other States are concerned the answers may perhaps vary according to the specific jurisdictional basis for prosecuting an alleged offender, the degree to which a State is implicated in the crimes committed and other factors.[62]

If customary international law does impose a duty to prosecute the alleged offenders of war crimes or crimes against humanity, that duty would rest primarily with the State on whose territory these crimes have been committed. Normally, that State is in the best position effectively to prosecute the international crimes that have been committed. Moreover, more often than not the territorial State will itself have been implicated in the commission of such offences, whether actively or passively. It can be argued that this responsibility creates an obligation towards all other States to provide satisfaction by punishing the perpetrators. The obligation to prosecute the alleged offender would include an obligation to request his extradition if the person has left its territory. On the other hand, an inability genuinely to prosecute the alleged offender might sometimes result in the territorial State extraditing him to another State or surrendering him to an international criminal tribunal.

The territorial State is not necessarily the only State that may have been implicated in international crimes. It is not difficult to find examples of situations in which other States carry the primary responsibility for war crimes or crimes against humanity. In most cases, that State may well be the State whose nationality the alleged offender possesses, but one can also think of other States. The argument can be made that these States, too, have a primary duty to prosecute alleged offenders, including a duty to request their extradition if the need for such measures arises.

On the other hand, there are States not implicated in the international offences that have been committed. The situation of the State whose nationality the alleged offender possesses deserves special attention here. The prohibition against extraditing nationals, still maintained by many States, finds its main theoretical (p. 1662) justification in the conviction that prosecution of offenders by the State of their nationality should, as a matter of principle, be preferred over their extradition. It would seem that this reason for not extraditing an alleged offender to the State where he may have committed war crimes or crimes against humanity gives rise to an international duty for the State of nationality to prosecute the person itself. The same may be true for any other State refusing extradition on the grounds that it would prefer to prosecute itself the alleged offender.

Leaving apart these special situations, it is difficult to maintain that States not implicated in international offences have a primary duty to repress them. If there is a duty for them to prosecute, it would be of a

secondary nature. It would arise out of the fact that another State is unable or unwilling to fulfil what is its primary duty. If they refuse an extradition request they make it impossible for the requesting State to comply with its primary duty. If they do not receive an extradition request this must mean that another State is unwilling to comply with its duty. Two comments can be made here. A secondary duty to prosecute as a consequence of a refusal of extradition is more compelling and self-evident than a secondary duty to prosecute in the absence of an extradition request. On the other hand, since the primary duty rests with the State that has been itself implicated in war crimes or crimes against humanity, the second situation is likely to occur far more often than the first.

Undoubtedly, a rule of customary law entailing a secondary duty for States to prosecute an alleged offender on its territory if extradition does not occur would be a welcome development. It would express the conviction that the repression of war crimes and crimes against humanity is of paramount importance for the maintenance of international public order and that inaction of any member of the international community in this regard amounts to acquiescence in the violation of peremptory norms.[63] However, the difficulty with the proposition that the principle of *aut dedere aut judicare* has become a rule of customary law is to find sufficient State practice and *opinio juris* in support of it. While, in recent years, the number of States establishing universal jurisdiction over war crimes and crimes against humanity may have grown and is still growing, universal jurisdiction over international crimes is, at present, far from being a worldwide phenomenon; crimes against humanity other than genocide are the most problematic category here. Some States that have, in recent years, established universal jurisdiction over international crimes have limited it to crimes committed during World War II.[64] Moreover, these States do not seem to have been motivated by the belief that it is their duty under general international law to establish universal jurisdiction. Some national courts, while accepting that international law permits States to (p. 1663) establish universal jurisdiction, have denied an obligation to do so.[65] As far as international courts are concerned, in *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, the International Court of Justice remarked that 'the rights and obligations enshrined by the Convention are rights and obligations *erga ommes*', and that the 'obligation each State … has to prevent and punish the crime of genocide is not territorially limited by the Convention'. These remarks leave open the question of whether this obligation entails a duty for States to establish universal jurisdiction over the crime of genocide.[66] While, in *Prosecutor v. Anto Furundžija*, the International Criminal Tribunal for the former Yugoslavia discussed a number of consequences of the prohibition of torture having acquired the status of *jus cogens*, the duty to extradite or prosecute is not among them.[67] Even GA Resolution 3074 (XXVIII) states that persons suspected of having committed international crimes shall, 'as a general rule', be subject to trial in the countries in which they committed those crimes, other countries providing assistance by extraditing them. Similarly, the reference in the Preamble to the Rome Statute of the International Criminal Court to 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes' does not necessarily include States other than those which have a primary duty to prosecute.[68] However, in an *obiter* in *Prosecutor v. Tihomir Blaškić*, the Appeals Chamber of the ICTY stated that there is an obligation under customary law for States to try or extradite persons who have allegedly committed grave breaches of international humanitarian law. It referred to the United States military manual on the law of land warfare for support of its view; the fact that the Geneva Conventions have been almost universally ratified may also have influenced the Chamber.[69] Notwithstanding the opinion of the Tribunal, it is still dubious whether the principle of *aut dedere aut judicare* has already become a peremptory norm of international law with regard to all international crimes and all States. But it may well acquire that character in the future. Much will depend on the adoption and ratification of the Code of Crimes against the Peace and Security of Mankind, as well as on State practice that may develop after the entry into force of the Statute of the International Criminal Court.

# (p. 1664) IV. Surrender and Transfer under the Statutes of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda[70]

## A. The Duty to Arrest and Transfer

### *1. Nature and Scope of the Duty*

Article 29, first paragraph, of the Statute of the ICTY provides that States 'shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law'. The second paragraph specifies that States 'shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: … (d) the arrest and detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal'. Article 28 of the Statute of the ICTR is identical to Article 29. Both articles derive their binding force from the provisions of Chapter VII and Article 25 of the Charter of the United Nations. The Appeals Chamber of the ICTY has held that they 'impose an obligation on Member States of the United Nations towards all other Member States or, in other words, an obligation "*erga omnes partes*" '.[71] The binding force of both articles is also underlined in the Report of the Secretary-General containing the Statute of the ICTY, where it is said that an order by a tribunal for the surrender or transfer of persons to the custody of the Tribunal 'shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations'.[72] Important legal consequences flow from this set of provisions of the Charter and the two Statutes. Pursuant to Article 103 of the Charter, obligations of Member States under the Charter prevail over obligations they may have assumed under any other international agreement. Moreover, Member States must take all measures necessary to implement the provisions of the Statutes and they cannot invoke the provisions of internal law as justification for a failure to comply with a request or order of a tribunal. Rule 58 of the RPE of the two Tribunals summarizes the legal situation by stating that the obligations laid down in Article 29, *c.q.* 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'. All this seems (p. 1665) to imply that constitutional impediments to the handing over of persons to a tribunal are as irrelevant as other impediments in domestic law.[73] It also implies that a Member State may not invoke the provisions of human rights treaties to which it is a party in order to justify a refusal of transfer. The only, rather theoretical, situation in which transfer might be refused is that in which *jus cogens* would forbid a State to transfer a person. In all these respects transfer of persons to a tribunal is fundamentally different from extradition of persons between States.

Pursuant to Article 29, first paragraph, of the Statute of the ICTY and Article 28, first paragraph, of the Statute of the ICTR, States have an obligation to cooperate with the Tribunals in the investigation and prosecution of persons 'accused' of committing serious violations of international humanitarian law. Paragraph 2 of these articles contain an explicit duty for States to comply with requests for the surrender or the transfer of the 'accused'. They also provide for a duty to arrest and detain 'persons'. In conformity with the system of the Statutes, Rule 2 of the RPE defines the accused as 'a person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47'. At first sight, paragraphs 1 and 2, read together, seem to exclude an obligation to transfer persons who, while being regarded as suspects by a tribunal, cannot yet be considered to be accused persons within the meaning of the provisions of the Statutes and the RPE. A similar conclusion could be drawn with regard to persons who have been convicted by a final judgment of a tribunal, since they cannot any more be considered to be accused persons. However, the duty to transfer such persons on request might perhaps find its basis in the general obligation, laid down in both

articles, to comply with any request of the Tribunals. According to both provisions, that duty includes, but is not limited to, transfer of the accused. This interpretation may find support in the Report of the Secretary-General containing the Statute of the ICTY. In the Report it is said that States are under an obligation to cooperate 'in all stages of the proceedings'.[74] Pursuant to Rule 40 of the ICTY's Rules of Procedure, States must, in case of urgency, provisionally arrest a person who has not yet been accused on the request of the Prosecutor and take all necessary measures to prevent his escape, while Rule 40 *bis* envisages his transfer on the order of a judge.[75] There is no provision in the RPE on requests for the transfer of convicted persons for the purpose of enforcing a judgment. Meanwhile, many implementing laws provide for a possibility of transferring convicted persons; so do the agreements concluded between the Tribunals and the United States.

### *(p. 1666) 2. Terminology*

Articles 19 and 29 of the Statute of the ICTY and Articles 18 and 28 of the Statute of the ICTR distinguish between 'surrender' and 'transfer' of the accused. It is not clear what this distinction implies. Morris and Scharf have suggested that the term 'surrender' refers to a situation in which a person is already in custody pursuant to action taken by the national authorities under national law. The term 'transfer' would refer to the situation in which a person is taken into custody pursuant to an order of a tribunal, and, therefore, is in the constructive custody of a tribunal at the time of arrest.[76] While this may well be what the framers of the Statutes had in mind, the Rules of Procedure and Evidence show a marked preference for the term 'transfer'.[77] This may either mean that the framers of the Rules did not want to make a distinction between 'transfer' and 'surrender' or thought it highly unlikely that a person whose appearance before a tribunal is wanted would already have been deprived of his liberty at the moment of a request made by a tribunal. Whatever the correct explanation may be, in the Rules of Procedure and Evidence no particular legal consequences seem to attach to the distinction from the perspective of the Tribunals. Henceforth, I will, therefore, follow the preference of the Rules for the term 'transfer'.[78]

### *3. Specific Aspects of the Duty to Transfer*

It is interesting as well as important to explore the consequences of the obligations imposed on the Member States of the United Nations in more detail, especially since some national laws implementing the Statutes seem to be insufficiently aware of them or to refuse to accept them. In doing so I will focus on a number of circumstances that may, in extradition law and practice, cause States to refuse an extradition request. Probable cause, arrest, provisional arrest, and other procedural matters will be discussed elsewhere.[79]

A rather common requirement for extraditing persons to other States is the existence of a treaty. In some legal systems, it even has a constitutional status.[80] While States are free to conclude agreements with the Tribunals on the transfer of persons, they cannot refuse transfer in the absence of an agreement. In 1997, a United (p. 1667) States District Court denied a request of the US government for the surrender of Elizaphan Ntakirutimana to the ICTR on the grounds that the bilateral agreement concluded between the United States and the ICTR did not provide a proper treaty basis for the surrender of the accused.[81] However, a second request for the surrender of the same person was later granted by the same court and upheld by the US Court of Appeals, Fifth Circuit.[82] In the absence of a treaty, solutions might consist in amending provisions of domestic law, in considering the Charter of the United Nations a sufficient treaty basis or, possibly less convincing, in assuming that the transfer of a person to an international tribunal does not amount to extradition within the ordinary meaning of that term in domestic legislation of the requested State.[83]

Without any doubt the most common condition for extraditing a person is the double criminality requirement. Some national implementing statutes maintain that requirement where transfer of persons to the Tribunals is concerned.[84] However, Articles 29 and 28 of the Statutes of the Tribunals leave no room for

requiring that the acts alleged constitute offences according to the law of the requested State. The only question that matters is whether or not they constitute crimes within the meaning of the provisions of these Statutes and had become crimes under general international law at the time of their commission. It is for the Tribunals to make a decision on that matter, the competent national authorities having to comply with it. The only option open to them is to suggest a tribunal to reconsider its decision. Neither is it relevant whether or not national statutes of limitations would have barred prosecution of the requested person before a national court. For one thing, the ICTY has held that statutes of limitation cannot be applied to international crimes.[85] Moreover, Articles 29 and 28 of the Statutes preclude States from maintaining this condition.

As a matter of course, traditional exceptions in extradition law which attach consequences to the nature of certain acts, such as the politicial and the military offence exception, cannot serve as justifications for refusing transfer of a person to (p. 1668) a tribunal. Articles 29 and 28 of the Statutes make no mention of them. Moreover, in *Prosecutor v. Anto Furundžija*, the ICTY held that to apply the political offence exception to war crimes and crimes against humanity would, in its view, violate *jus cogens*.[86]

Probably the most painful consequence of Articles 29 and 28 for a considerable number of States is that they make no exception with regard to the transfer of nationals. Many, although not all, civil-law systems refuse to extradite their nationals as a matter of principle. In some legal systems, the prohibition on extraditing nationals has a constitutional status. There is no implementing law explicitly and unconditionally forbidding the transfer of a national to an international tribunal. This does not necessarily mean that they all permit the transfer of nationals. Some implementing laws simply apply existing legislation on extradition *mutatis mutandis* where the conditions and procedures for transfer are concerned; the somewhat unlucky consequence of this legislative technique is that it makes it impossible immediately to determine whether or not they rule out transfer of nationals.[87] Article 10 of the Swiss Federal Order permits the transfer of Swiss citizens only if a guarantee has been given that he or she will be returned to Switzerland after the proceedings.[88] The question of whether national implementing laws allow the transfer of nationals is particularly relevant in the case of Austria, Croatia, and Germany, as the national constitutions of these three States forbids extradition of citizens to other States. Article 5 of the Austrian law explictly permits the transfer of Austrian citizens.[89] The German implementing law is silent on this point. It appears from its legislative history that the German legislator did not intend to make an exception to Article 16 of the German Constitution, which rules out the extradition of citizens.[90] Meanwhile, a revision of the Constitution has now been proposed. Finally, Article 3 of the Croatian implementing law makes transfer of persons dependent on respect for the Constitution of Croatia.[91] However, in actual practice the Constitution of Yugoslavia, in combination with the absence of adequate legislation implementing the Statute of the ICTY, has caused the most serious difficulties. Repeatedly, (p. 1669) Yugoslavia has invoked inadequacy of national legislation as an excuse for not surrendering nationals. This led the Security Council to adopt Resolution 1207 (1998), in which it called upon Yugoslavia and other States to take any measures necessary under their domestic law to implement the provisions of the Statute.[92]

Another traditional impediment to extradition are immunities under national or international law. It goes without saying that immunities under national law cannot bar the transfer of suspects or accused persons to the Tribunals. The same is probably true for international immunities.

Many extradition statutes and extradition treaties contain provisions aiming to protect the basic individual rights of the person requested against (potential) incursions by the requesting State. Among them one may mention as examples the prohibition against extraditing refugees and clauses forbidding the extradition of a person if that person would have to stand trial before a 'special court', i.e. a court created for special occasions under circumstances that cast serious doubt on its independence and impartiality. It is relevant to note here that the ICTY has already discussed the manner in which it was established in *Prosecutor v. Duško Tadić*.[93] It came to the conclusion that it had been 'established by law' within the meaning of the provisions of the ICCPR

and of other human rights treaties and that its Statute provided all the necessary safeguards of a fair trial. Apart from that, Articles 29 and 28 of the Statutes of the Tribunals do not permit States to advance human rights arguments against transfer.

The same conclusion must be drawn with regard to exceptions in extradition laws and treaties that aim to protect the requested person against certain types of punishment, in particular the death penalty and, more rarely, life-long imprisonment. While the Statutes of both Tribunals do not permit the imposition of capital punishment, they do not rule out life sentences. Rule 101 of the RPE states that a convicted person may be sentenced to imprisonment up to the remainder his life.[94] What is true for these exceptions must also be true for exceptions aiming to protect a person against inhuman or degrading treatment while his sentence is being enforced.

(p. 1670) The Belgian Act implementing the provisions of the Statutes deserves special attention here. It is the only implementing law explicitly making transfer conditional on due respect for a person's rights under human rights conventions. Article 13 of the Belgian Act provides that Belgium will surrender persons to a tribunal 'in accordance with the terms' of the European Human Rights Convention.[95] However, it appears from the legislative history of the Act that the purpose of this provision is rather limited. The provision must be understood against the background of *Soering v. the United Kingdom*,[96] Under the European Convention Belgium would not be permitted to surrender a person to a tribunal if the conditions in which that person would have to serve his sentence would amount to inhuman or degrading treatment; there were worries in the Belgian parliament that this might nevertheless happen in the case of surrender of a person to the ICTR.[97] What the provision actually requires the Belgian government to do in the case of surrender is to discuss with a tribunal where that person would have to serve his sentence later.

Extradition treaties and extradition statutes usually authorize or require the competent authorities of the requested State to refuse extradition if the person requested is being prosecuted or has been tried and convicted or acquitted by the requested State for the offence for which extradition is requested. Similar provisions can be found in some implementing statutes.[98] Refusal of surrender is not permitted by Articles 29 and 28 of the Statutes. Pursuant to Articles 9 and 10 of the Statute of the ICTY and 8 and 9 of the Statute of the ICTR, it is for the Tribunal to determine whether or not a person should be tried before it notwithstanding the fact that he is being tried or has been tried for the same offence before a national court. Similar considerations apply in the case of an order of a tribunal for transfer concurring with an extradition request made by another State. Pursuant to Article 103 of the Charter and Rule 58 of the RPE, priority must be given to a tribunal's order.

It is a normal phenomenon in extradition law and practice that extradition is granted under conditions. The most common condition is that the person whose extradition has been granted shall not be proceeded against for any offence committed prior to his surrender other than that for which he was extradited without the consent of the surrendering State. Articles 29 and 28 of the Statutes do not permit States to attach similar conditions to the surrender of a person to a tribunal.[99]

## (p. 1671) B. Arrest and Transfer Proceedings

Rules 54–61 of the Rules of Procedure and Evidence of the Tribunals contain a set of provisions with regard to procedures to be followed where the issuance of and compliance with warrants for the arrest of the accused or other warrants are concerned. Additional provisions with regard to the arrest of suspects are included in Rules 40–43.[100]

In the matter of arrest warrants, the Rules distinguish between orders for the arrest and transfer of accused persons, on the one hand, and requests for the arrest and orders for the transfer of suspects, on the other.

Pursuant to Rules 47 and 61, orders for the arrest and transfer of accused persons may be made either by a judge or a Trial Chamber. Requests for the (provisional) arrest of suspects may be made by the Prosecutor on the basis of Rule 40. In addition, Rule 40 of the ICTR's RPE and Rule 40 *bis* of the RPE of both Tribunals authorize a judge to order transfer of the suspect on request of the Prosecutor; Rules 40 and 40 *bis* of the ICTY's RPE also apply to the accused. According to Rule 2 of the RPE of both Tribunals, an accused is a person against whom one or more counts in an indictment have been confirmed by a judge. Pursuant to Articles 19 and 18 of the Statutes, confirmation of an indictment implies that the judge is satisfied that a *prima facie* case has been established. Rule 47(B) indicates that this standard is met when 'there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal'. The standard has also been understood by the ICTY as requiring that 'the material facts pleaded in the indictment constitute a credible case which would (if not contradicted by the accused) be a sufficient basis to convict him of that charge'.[101] On the other hand, a suspect is defined by Rule 2 as a 'person concerning whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the Tribunal has jurisdiction. Pursuant to Rule 40 *bis*(B), orders for the transfer of the suspect may be issued by a judge if he considers that there is a 'reliable and consistent body of material' that this is the case.

All requests and orders for the arrest and/or transfer of accused persons and suspects must be complied with by the State to which they have been directed. Pursuant to Rule 61, an additional obligation to freeze the assets of the accused may be imposed on all States in the case of an international arrest warrant issued by the Trial Chamber. Although the RPE are silent on this point, the ICTY (p. 1672) accepts that such a consequential order may also be issued in the case of an arrest warrant issued pursuant to Rule 47.[102] Orders to freeze assets of the accused may serve the purpose of preventing the accused from using those assets to evade arrest.[103]

One may expect the ability and willingness of States to comply with requests and orders to arrest or transfer a person largely to depend on the information forwarded to them by a tribunal. In this respect, Rule 55(C) provides that a certified copy of the warrant for the arrest of an accused shall be transmitted, together with a certified copy of the indictment and a statement of the rights of the accused. Pursuant to Rule 47(C), the indictment shall set forth the name and particulars of the person concerned and a concise statement of the facts of the case and of the crime with which that person is charged. Rule 55 does not require that any material accompanying the indictment be provided to States. The most important consequence is that States may not require a tribunal to transmit supporting evidentiary material to them. As far as request for the provisional arrest of suspects and orders for their transfer are concerned, Rules 40 and 40 *bis* do not specify what information should be transmitted to the State that is expected to effect arrest or transfer. This system raises a number of questions pertaining to the duty of States to comply with orders and requests. In discussing these questions, one must distinguish between common-law and civil-law systems of justice.

The system laid down in the RPE causes few difficulties to most civil-law systems of justice. It is basically similar to the system they are used to in extradition cases. Normally, they trust the courts of the requesting State to have serious reasons for ordering the arrest of a person. There is, therefore, no need for the requesting State to provide the requested State with evidence supporting an arrest warrant. Only in exceptional cases in which grave doubts have arisen as to whether the person to be extradited may have committed the alleged offence will they request additional information or refuse extradition altogether. Meanwhile, a number of implementing laws adopted by European States make it possible to refuse transfer where it cannot be established that the person arrested is the person whose transfer has been requested or ordered and/or where it appears that transfer has been requested on account of offences in respect of which a tribunal has no jurisdiction.[104] These grounds for refusing transfer have been suggested by a committee of European experts in 1993. Obviously, a person should not be transferred if it appears that a tribunal has no

jurisdiction or that the person arrested is not the person requested. However, the relevant national provisions seem to ignore the (p. 1673) fact that the final decision on these matters lies with the Tribunal. Articles 29 and 28 of the Statutes leave no room for a different conclusion. Rather than refusing transfer, the competent national authorities should, therefore, start consultations with the Tribunal. This may cause the Tribunal to withdraw its request or to permit the national authorities to release a person pending a reconsideration of its request.

The Rules of Procedure and Evidence present more novelties to most common-law systems of justice.[105] Traditionally, they require that requests for the arrest and extradition of persons who have not yet been convicted be accompanied by supporting evidentiary material. Usually, the evidence must be sufficient to justify a person's arrest and his committal for trial, and arrest will be refused if the material presented does not satisfy the standard applied. The question might arise as to whether the standards in the Rules for requesting the arrest or ordering the transfer of a suspect are as exacting as domestic standards with regard to the arrest of persons within the framework of extradition proceedings.[106] Whatever the answer may be according to the law of a particular common-law system of justice, the question itself is not of any importance since the RPE have dispensed with evidentiary requirements altogether. This represents a significant departure from habitual standards of protection and legal security applied by common-law systems in extradition cases. Australia, Ireland, New Zealand, and the United Kingdom have, in their acts or orders implementing the Statutes, drawn the consequence that they will not require a tribunal to present evidentiary material in support of its requests or orders for arrest or transfer. In view of the fact that the fourth amendment to the American Constitution requires a finding of probable cause for the arrest of a person, the United States has pursued a different course. It has negotiated agreements with the two Tribunals enabling it to require of them that requests for surrender of an accused or suspect be supported by information sufficient to establish that there is a reasonable basis to believe that the person has committed a crime within their jurisdiction.[107]

## C. Failure to Execute Warrants of Arrest or Transfer

A remarkable aspect of the Rules of Procedure and Evidence is that they mention two different warrants for the arrest of the accused. The first warrant is issued by a judge after confirmation of an indictment on the basis of Rules 47 and 54.

(p. 1674) Pursuant to Rules 56 and 59 *bis* (A), it is transmitted to a State or to 'an appropriate authority' or 'international body'. It appears from Rule 61 (A) that this warrant will normally be transmitted to the authorities of the State in whose territory or under whose jurisdiction and control the person to be served with the indictment resides or was last known to be. The second arrest warrant is issued by the Trial Chamber pursuant to Rule 61. In Rule 61(D), it is called an 'international arrest warrant' in order to distinguish it from a warrant issued pursuant to Rules 47 and 54. Rule 61 (D) provides that it shall be sent to all States and that it may be accompanied by an order provisionally to freeze the assets of the accused.

The international arrest warrant of Rule 61 is meant to be an official reaction of a tribunal to the failure of a State to execute an arrest warrant issued on the basis of Rules 47 and 54. Pursuant to Rule 61, if a warrant of arrest has not been executed and personal service of the indictment has consequently not been effected, the judge who confirmed the indictment may order that the indictment be submitted to the Trial Chamber. The indictment will then be submitted in open court, together with all the evidence that was before the judge who initially confirmed the indictment. Witnesses whose statements have been submitted to the confirming judge may be called. The Trial Chamber must then determine whether or not there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment. If it reaches that conclusion, it will have the indictment read out in open court. One of the consequences of such a

determination is that an international arrest warrant is issued by the Trial Chamber. The other consequence may consist of an official certification by the Trial Chamber that the failure to effect personal service of the indictment was due in whole or in part to a failure or refusal of a State to which the initial arrest warrant was transmitted to cooperate with the Tribunal. The President of the Tribunal may then notify the Security Council that this State has failed to comply with its obligations under the Statute.

Up to the end of 1998 there have been four cases in which a Trial Chamber of the ICTY arrived at the conclusion that a State or non-State entity had failed to execute an arrest warrant and issued an international arrest warrant pursuant to Rule 61.[108] In all cases, the President of the Tribunal has notified the Security Council, in one of them repeatedly.[109] In all of them the Security Council agreed with the ICTY that Article 29 of the Statute was not complied with by the State or entity (p. 1675) concerned, but it never took further action.[110] In addition, one may note that application of Rule 61 is not the only avenue for the ICTY to inform the Security Council of failures to execute arrest warrants. Rule 7*bis* is also relevant here. It has been applied by the ICTY on two different occasions.[111] As far as the ICTR is concerned, it has never applied Rule 61.

Against the general background of current practices in the field of extradition, the international arrest warrant of Rule 61 is rather unique. Moreover, from a strictly legal point of view there is not really a need for it.[112] There is nothing in international law which prohibits the transmission of requests or orders for arrest or transfer issued pursuant to Rules 40 and 47 to any State which may be or may be come later in a position in which it could arrest an accused or a suspect. Orders for the arrest of an accused may, too, be accompanied by an order to freeze his assets. Finally, the reporting of failures to comply with requests or orders to the Security Council does not depend on the application of Rule 61. The real importance of the rule lies elsewhere. On the one hand, the use of it, or the threat of using it, might cause the State which is reluctant to execute an arrest warrant to change its mind. However, Rule 61 does not seem to have been a very effective weapon in this respect. On the other hand, considerations related to the fact that trials *in absentia* are not permitted also explain why both Tribunals have felt the need to create a special procedure in case of failures to execute arrest warrants. They cannot be discussed here.[113]

## D. Deportation, Expulsion, and Abduction

Deportation, expulsion, and other means used by the State on whose territory an accused or suspect is present to remove him have played no visible role in securing the presence of these persons before a tribunal. There seems to be hardly any need for that State to have resort to them since arrest and transfer on request of a tribunal will almost always offer a better and more effective solution. Matters are different, however, where abduction and other methods of getting hold of a person are concerned, which usually derive their efficacy from the fact that the State where a person remains is kept unaware of them. There may be a special temptation to use these methods in relation to States which have refused to comply with requests or orders for arrest or transfer issued by a tribunal. The ICTY has been confronted twice with a case in which the manner a person was arrested and (p. 1676) transferred became an issue. A mention of these cases must suffice here. In *Prosecutor v. Slavko Dokmanović* the ICTY had to decide on the legality of the luring of the accused into leaving his home in Yugoslavia and travelling to Croatia, where he was subsequently arrested by UNTAES. The luring was performed by an investigator of the ICTY's Office of the Prosecutor. Distinguishing luring from abduction, the Trial Chamber of the ICTY held that the means used to accomplish the accused's arrest neither violated principles of international law nor the sovereignty of Yugoslavia.[114] In *Prosecutor v. Stevan Todorović*, the Trial Chamber did not decide on the alleged kidnapping of the accused on the territory of Yugoslavia and his transfer to the Tuzla Air Force base in Bosnia and Herzegovina, the accused having negotiated a plea agreement with the Prosecutor which was accepted by the Trial Chamber.[115]

# V. Arrest and Surrender under the Rome Statute

## A. General Observations

### *1. The System of the Statute*

Part 9 of the Rome Statute, comprising Articles 86 to 102, is devoted to international cooperation and judicial assistance. It has regard to the surrender of persons to the Court as well as other forms of assistance during investigation and trial.[116] The assistance of States in the enforcement of judgments of the Court, which may also necessitate the surrender of persons, is dealt with in Part 10. A number of articles in Part 9 more specifically deal with surrender of persons suspected or accused of, or convicted of, crimes under the Statute: Articles 89 to 92 (p. 1677) and 101 to 102. These are not the only provisions in the Statute on surrender. Articles 58 and 59, included in the Statute's Part 5 on investigation and prosecution, are also of great importance. Generally speaking, one might say that the provisions of Part 5 deal with the Court's powers to order arrest and surrender, while those of Part 9 are mainly concerned with the execution of requests by States. However, the distinction between the two perspectives has not been rigorously maintained. For instance, Article 59 contains rules with regard to arrest proceedings in the custodial State. Finally, the provisions in Part 2 on jurisdiction and admissibility have an immediate and profound impact on the making of requests for surrender by the Court and the duty of States to comply with them. In addition to the provisions of the Statute, the Rules of Procedure and Evidence, to be adopted by the Assembly of States Parties pursuant to Article 51 of the Statute, have a role to play, albeit a very modest one, apparently. As far as surrender is concerned, only Articles 57,87, and 92 of the Statute make a reference to the Rules.[117] This is not surprising since most articles in the Statute on surrender compare to those of the average extradition treaty in their desire to be as precise as possible. Moreover, the differences in this regard between the Rome Statute and the Statutes of the two *ad hoc* Criminal Tribunals could not be more striking. In the following, I will mainly concentrate on the provisions of Part 9.

Some remarks should also be made here with regard to the referral of a situation to the Court by the Security Council pursuant to Article 13 of the Statute. The fact that the Security Council, in doing so, is acting under Chapter VII of the Charter of the United Nations has a number of important consequences for the system of surrender. The obligations arising out of Parts 5 and 9 for States in the matter of arrest and surrender thereby become obligations for all Member States of the United Nations regardless of whether or not they are Parties to the Statute. Moreover, pursuant to Article 25 of the Charter, they acquire the character of obligations *erga omnes* while, as a consequence of Article 103 of the Charter, they prevail over obligations Member States may have assumed under any other international agreement. Whether or not a referral would automatically entail that the provisions of Article 90 of the Statute with regard to competing requests cease to be applicable is less clear. To the extent that the provisions in Part 2 of the Statute attach special consequences to a referral by the Security Council or the Council itself would decide that not all provisions in Part 2 on jurisdiction and admissibility should be applied in the matter referred to the Court, the system of surrender would also be affected.[118]

### *(p. 1678) 2. 'Surrender' and 'Extradition'*

While almost until the end of the 1998 Rome Diplomatic Conference no choice had been made between the terms 'surrender', 'transfer', and 'extradition' to designate the process of bringing a person within the jurisdiction of the Court for the purpose of trying him or enforcing a sentence against him, the Conference finally pronounced itself in favour of the term 'surrender'. Perhaps the choice between 'surrender' and 'transfer' did not matter too much.[119] But it was different for the choice between 'surrender' and 'extradition'.

For the purposes of the Statute, Article 102 defines the term 'surrender' as the delivering up of a person by a State to the Court pursuant to the Statute, while the term 'extradition' means the delivering up of a person by one State to another as provided by treaty, convention, or national legislation. Article 102 has been included in the Statute in order to make clear that the handing over of a person to the International Criminal Court is fundamentally different in nature from the handing over of a person within the framework of extradition between States.

In English, as well as other languages, various expressions may designate the process of handing over a person to a different 'jurisdictional unit' for the purpose of enabling that 'unit' to try him or to enforce a sentence against him. To that end, the words 'extradition', 'rendition', 'surrender', 'transfer', or other words, may be used. National legal systems may choose different expressions for designating different processes. Thus, in the United States, the term '(interstate) rendition' is sometimes used as an alternative to the term 'extradition' where the return of a person from one state to another within the United States is concerned. In treaties, conventions, and other international agreements, there is also a certain tendency to use different expressions for different situations. While the word 'extradition' is normally used for the process culminating in the physical transfer of a person from the territory of one State to that of another State, often different expressions are, for instance, employed with regard to the delivering of persons on the basis of international agreements on the status of military forces, which does not normally involve a crossing of national borders.[120]

At the international level, no fixed and commonly accepted terminology has as yet emerged distinguishing the delivering of persons accused or convicted of having committed international crimes to the authorities of other States from delivering other persons to them. On the one hand, some texts avoid the expression 'extradition' here, and they seem to do this on purpose. Examples are the Treaty of (p. 1679) Versailles, the 1943 Moscow Declaration, and the 1949 Geneva Conventions.[121] On the other hand, other texts, such as the Genocide Convention, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and the various Resolutions adopted by the General Assembly of the United Nations during the 1960s and the 1970s, continue to make use of the term 'extradition'.[122] There is a stronger tendency to use a different terminology where the delivery of such persons to international judicial bodies is concerned. The first example here is provided by the Treaty of Versailles.[123] The example has been followed in the 1945 London Agreement establishing the Nuremberg Tribunal and the Statutes of the two *ad hoc* international criminal tribunals created by the United Nations in the 1990s.[124] The Rome Statute conforms to that practice.

Terminological debates are usually closely connected with debates on matters of substance. Several weighty arguments can be advanced as to why the handing over of a person to an international judicial body such as the two *ad hoc* Tribunals and the Rome Court should not be subjected to the same restrictions and conditions and should not be decided upon in conformity with the same procedural rules as are standard in ordinary extradition cases.[125] It is one of the merits of the Statute that it has largely succeeded in creating a special regime with regard to the delivery of persons accused or convicted of crimes under general international law without which the Court would not be able to fulfil the expectations of the community of nations. It is only proper that the Statute has underlined this fundamental choice by designating the process of delivering by the word 'surrender' instead of 'extradition'.

Meanwhile, the question remains whether the system created is acceptable to all States, or at least to a sufficient number of them. The debate that has been conducted in Rome over the proper regime for handing over persons to the Court will, of necessity, be repeated at a national level when it comes to the decision of individual States whether or not to proceed to the Statute's ratification. In this regard, questions of terminology again become important, especially in States whose national constitutions contain provisions on extraditing persons to other States. These provisions, more often than not included in chapters dealing with (p. 1680) basic individual rights, may, for instance, require that extradition takes place on the basis of a

treaty, declare that nationals may not be extradited, forbid extradition for political offences or afford those persecuted in other countries an individual right to be granted asylum. It is obvious that, in a large majority of cases, such constitutional provisions have not been adopted with the surrender of persons to international judicial bodies in mind, and that there would be little or no reason to apply them to the situation. However, it is for every State to make its own choices and decisions here. In this regard, the purpose of Article 102 is essentially political. The article is intended to make it easier for States whose national constitutions forbid the extradition of persons in certain situations to become Parties to the Statute, either by interpreting constitutional provisions narrowly or by amending them in order to eliminate constitutional barriers. In particular, constitutional prohibitions with regard to the extradition of nationals are of importance in this respect.[126] However, whether Article 102 will help States to overcome their constitutional hesitations is another matter.

## B. The Duty to Arrest and Surrender

### *1. Nature and Scope of the Duty*

Article 86 of the Statute imposes on States Parties the duty, in accordance with the provisions of the Statute, fully to cooperate with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. Article 89(1) restates that obligation where arrest and surrender are concerned. Pursuant to this provision, States Parties shall comply with requests for arrest and surrender in accordance with the provisions of Part 9 and 'the procedure under national law'. The duty to surrender includes the duty to authorize transit.[127]

The reference in Article 89 to national procedures makes clear that substantive grounds for refusing surrender which are normal in domestic extradition law do not matter here. This is also true for prohibitions against extradition which may have been included in national constitutions.[128] In this regard, there are no differences between the Rome Statute and the Statutes of the two *ad hoc* Tribunals. The fundamental difference between the duty of States to cooperate under the Statute and the duty to cooperate with the *ad hoc* Tribunals under their Statutes lies elsewhere. Since the *ad hoc* Tribunals have been established pursuant to resolutions of the Security Council the obligation for States to cooperate prevail over obligations (p. 1681) they may have assumed under any other international agreement.[129] This is not the case for the obligations arising out of the Rome Statute, at least not unless the Security Council has referred a situation to the Court. To some extent, the Rome Statute has anticipated the possibility of conflicting obligations and tried to find a solution for them. This is, for instance, the case for requests for surrender competing with extradition requests, a matter dealt with in great detail by Article 90 of the Statute. Another example is provided by Article 96, which is concerned with surrender in the case of persons protected against extradition by other international agreements, in particular diplomats or members of the military of another State. Finally, in various provisions of the Statute care has been taken to provide a consistent body of rules with regard to arrest and detention of persons by the requested State, thus reducing the possibility that the obligation for a State under the Statute to arrest and detain a person conflicts with its obligation under one or more human rights treaties to respect that person's liberty and security.[130] However, it is, of course, difficult to anticipate all conflicts which might arise. For instance, a situation of conflicting treaty obligations not anticipated by the Statute may arise if the person whose surrender is requested by the Court has previously been extradited to the requested State by another State which is not willing to give its consent to the person's surrender. In such situations, the solution must be found in the application of the principles of international law with regard to conflicting treaty obligations. In this respect, it may matter whether or not the third State whose rights would be infringed by surrender of a person to the Court is itself a party to the Statute.

### *2. States Parties*

As has been noted already, it is the fundamental achievement of the Statute that the duty of States Parties to comply with requests for surrender is not made subject to exceptions which are normal in extradition law and practice. The history of the Rome Diplomatic Conference makes clear that this result was not easily obtained.[131] In the following, I will briefly examine the implications.[132]

Where surrender of persons to the Court is concerned, a State Party is not entitled to refuse cooperation on the grounds that the conduct does not constitute a criminal offence according to domestic law. Ideally, the problem should never arise. A loyal implementation of the Statute by the States Parties in their domestic laws would seem to imply that they criminalize the conduct over which the Court has jurisdiction and do so in conformity with Articles 5 to 8 and 22 to 33 of the Statute since, as the Preamble to the Statute states, it is the duty of every State to (p. 1682) exercise its jurisdiction over those responsible for international crimes.[133] Otherwise the Court may have to exercise its jurisdiction for the reason that the State is unable or unwilling genuinely to carry out an investigation or prosecution. Be that as it may, assuming that the provisions in the Statute on the crimes within the jurisdiction of the Court and those on general principles of criminal law reflect customary international law, there is no valid reason to refuse surrender. Apart from that, Articles 86 and 89 leave no room for refusal in this respect. The only reason for refusal could conceivably be that surrender is requested for a crime that is not within the jurisdiction of the Court; that situation will be discussed below.[134]

For the same reasons, States Parties may not refuse surrender because the conduct did not, according to their domestic laws, constitute a criminal offence at the time of its commission or that a statute of limitation would apply. Individual responsibility for crimes under general international law is not affected by absence of criminalization at a national level, while customary international law might entail that statutes of limitation do not apply to these crimes.[135] Ideally, a faithful implementation of the Statute would then again imply that these questions never arise within the framework of surrender proceedings. Apart from that, Articles 22 to 24 and 29 of the Statute contain their own rules with regard to the punishability of conduct at the time it was committed and with regard to statutes of limitation. It follows from Articles 86 and 89 that comparable rules of the requested State Party do not matter here.

Standard exceptions in extradition treaties and extradition laws with regard to the duty or authorization to deliver up a person have regard to the place of commission of the offence and the absence of extraterritorial jurisdiction over the offence in a similar situation. It is obvious from the various provisions of the Statute, in particular those on complementarity, that the fact that a crime has been committed on the territory of the requested State Party or that the State Party would not be able to prosecute the alleged offender because it would not have extraterritorial jurisdiction over the crime in a similar situation cannot play a role where surrender of persons to the Court is concerned.

Articles 86 and 89 of the Statute do not permit States Parties to refuse surrender for reasons related to the nature of the offence or to the personal status of the person requested, such as his nationality or his diplomatic status. It is obvious that the political or military character of an offence should not be a reason to refuse sur(p. 1683) render.[136] No case in favour of retaining these exceptions seems to have been made during the Rome Diplomatic Conference. This was different for the nationality of the person requested. Protracted debates were conducted on the issue.[137] This should not come as a surprise. The prohibition against extraditing nationals is a marked feature of extradition law of many civil-law systems of justice and it has a constitutional status in some of them. Although it seems somewhat on the decline,[138] it is still maintained in many extradition laws and extradition treaties. At any rate, the resistance against extraditing nationals is still so strong that the prohibition has been maintained in a number of national laws implementing the Statutes of the *ad hoc* Tribunals, while it has been the main stumbling block for the ICTY in obtaining the transfer of

accused persons from Croatia and Yugoslavia.[139] During the Conference, a compromise proposal was made to permit States Parties to make surrender of a national conditional on the person being returned to them for service of any sentence imposed. The proposal added the provisos that these States must have indicated their willingness to accept sentenced persons under the Statute's provision on enforcement of sentences and that the Court agrees with the condition being made.[140] The idea of making the delivering up of a national conditional on his return after being tried is certainly not new.[141] However, the proposal was eventually dropped and no exception or restriction with regard to the duty to surrender nationals has been included in the Statute. Instead, Article 102 of the Statute now symbolically underlines the differences between surrender and extradition.[142] It can be argued that no other solution is acceptable. States Parties which traditionally hesitate to extradite nationals may prevent their surrender by making a genuine effort to prosecute and punish them for international crimes. Their national laws invariably enable them to try nationals for serious offences regardless of whether these offences were committed on their own territory or elsewhere. On the other hand, an exception with regard to the surrender of nationals would have seriously undermined the complementary function of the Court. As far as the serving of sentences imposed by the Court (p. 1684) is concerned, by making a declaration pursuant to Article 103 of the Statute, the State of nationality may influence the likelihood that its national will be able to serve a sentence on its territory. Moreover, Article 103 already takes account of the humanitarian interests that may be promoted by enforcing a sentence in the State of nationality. On the other hand, to make this a general condition for surrendering a national might again jeopardize the Court's complementary function. The role of international immunities is discussed in another part of this commentary;[143] as far as domestic immunities are concerned, Part 9 of the Statute does not permit a State Party to refuse surrender for the reason that the person requested enjoys immunity from prosecution according to its laws.

As has been discussed earlier, many extradition laws and treaties contain provisions aiming to protect the requested person against the serious risk that his or her basic individual rights will be infringed upon by the requesting State.[144] Human rights treaties are also of increasing importance here.[145] The protection afforded may have regard to the fairness of a trial, the sentences that may be imposed or the manner in which they are executed, or still other circumstances. Articles 86 and 89 of the Statute do not allow refusal of surrender for any of these reasons. Apparently, the framers of the Statute have proceeded from the assumption that, under the Statute, individual persons do not have to fear for violations of their basic rights, and it is difficult to see that they could have proceeded on the basis of a different assumption. In the various parts of the Statute, considerable care has been taken to protect the human rights of the accused and convicted person in accordance with the provisions of human rights treaties. In this regard, I have already mentioned the provisions on arrest and provisional arrest in Parts 5 and 9 of the Statute. By ruling out the death penalty the Statute eliminates one of the main objections that many States might otherwise have made against its ratification. The same is not the case for life-long sentences, but the provisions in the Statute on that penalty will perhaps be flexible enough to enable States whose national constitution forbids the imposition of a life-long sentence, and thereby also extradition to other States without a guarantee that it will not be enforced, to become parties to it.[146] Be this as it may, Articles 86 and 89 do not permit States to raise human rights objections against the surrender of persons based on national laws and national constitutions. However, the possibility cannot be excluded altogether that the duty to surrender a person may on occasion conflict with a State Party's duty under human rights conventions not to deliver up a person, however (p. 1685) remote that possibility may seem at the present moment. With an exception for situations that have been referred to the Court by the Security Council, this conflict cannot be solved by assuming that the obligations for States Parties under the Statute take precedence over obligations arising out of other treaties.

Like the Statutes of the *ad hoc* Tribunals, Articles 86 and 89 of the Statute of the International Criminal Court do not permit the requested State to refuse surrender on the grounds that the person requested is being

prosecuted or has been tried and convicted or acquitted by the requested State for the offence for which surrender is requested.[147] In the case of the *ad hoc* Tribunals, this is a consequence of the fact that, pursuant to their Statutes, the Tribunals have primacy over national courts in cases of concurrent jurisdiction. In the case of the Court, this follows from its complementary function. Once the Court has, pursuant to Article 17 of the Statute, decided that a case is admissible there is no room for refusal of surrender since the admissibility decision implies that States have shown themselves to be unwilling or unable genuinely to prosecute or punish the person requested. A different situation is the one in which the requested State is prosecuting the person requested for an offence or offences other than the one or the ones for which his surrender has been requested or is enforcing a sentence pronounced on account of them. In extradition law, this usually leads to extradition being granted but the execution of that decision being postponed. The solution chosen in Article 89 of the Statute is slightly different.[148] Pursuant to paragraph 4 of that Article, the requested State must grant the request but shall consult with the Court. The ensuing consultation will have to focus on the question of when a person should be surrendered to the Court. Finally, there is the problem of requests for surrender of the Court competing with requests made by third States for extradition for the same or other offences. Article 90 of the Statute, which is devoted to that question, will be discussed later.[149]

In extradition law, extradition is normally granted under the condition that the person whose extradition has been granted shall not be proceeded against for any offence committed prior to his surrender other than that for which he was extradited unless the State surrendering him consents. Another common condition is that the person shall not be surrendered to a third State unless the surrendering State gives his consent. Since Article 101 of the Statute offers a solution here that deviates from State practice as well as from the approach of the *ad hoc* Tribunals the matter deserves a more thorough and separate examination later.[150]

(p. 1686) Implicit in the foregoing is that a dispute between the Court and the requested State Party may easily arise. More often than not, the dispute will be over the right of the Court to request surrender rather than the duty of a State Party to comply with that request. For instance, the requested State may be of the opinion that the conduct for which surrender has been requested does not constitute a crime under the Statute or falls outside the Court's jurisdiction *ratione loci* or *temporis*. Or it might be unwilling to comply with a request because, in its opinion, the request has been made in a case which should be considered to be inadmissible. The normal way to solve disputes is for the requested State to enter into consultations with the Court in accordance with Article 97 of the Statute. Another avenue is to challenge the jurisdiction of the Court or the admissibility of a case in accordance with Article 19 of the Statute; most of the objections that the requested State could make against surrender seem to amount to such challenges. The important procedural question which arises in relation to challenges to the jurisdiction of the Court or the admissibility of a case is how they affect the duty of a State Party to comply with a request for surrender pending a determination of such challenges by the Court. I will discuss that question later.[151]

### *3. States not Parties*

Being a treaty, the Statute does not impose obligations to arrest and surrender persons on States which do not wish to become Parties to it. While various provisions in the Statute may be considered to be invitations to cooperate, it is not sure that these States will respond to them. The fact that the Statute creates surrender obligations for States Parries only may, of course, seriously hamper the efficacy of the Court. The question is whether or not the consequences of States not having become Parties to the Statute might be mitigated or eliminated by obligations arising out of other treaties with regard to extradition or surrender.

It is likely that numerous bilateral and a number of multilateral extradition treaties are in force between States that have become and States that have not become Parties to the Statute. If a State not Party to the Statute is not prepared to surrender a person to the Court, a State which is a Party to the Statute might use a

bilateral or multilateral extradition treaty as a basis for requesting the person's extradition for the purpose of trying him for a crime under the Statute or for any other crime. Would it, after having obtained the person's extradition, be entitled to surrender that person to the Court? That is highly unlikely. Virtually all extradition treaties contain provisions making re-extradition of the person surrendered to a third State subject to the consent of the State which has surrendered him. Notwithstanding Article 102 of the Statute, there is no reason to suppose that such clauses would not apply where surrender of persons to the Court is con(p. 1687) cerned. Before requesting surrender, the Court would, therefore, first have to turn to the third State in accordance with Article 98(2) of the Statute.[152] At most, the State Party to the Statute would be in a position to itself try the requested person for crimes under the Statute. Even this is far from certain, the main reason being that virtually all extradition treaties entitle the requested State to refuse extradition on the grounds that it itself possesses jurisdiction over the offence for which extradition has been requested and wants to exercise it. Moreover, even if the requested State does not have jurisdiction over the offence, there may be other provisions in the extradition treaty enabling it to refuse a request. Therefore, the most one can probably say is that extradition requests addressed by States Parties to the Statute to States not Parties may put considerable pressure on the latter States either to prosecute the requested person themselves or extradite him. It is not impossible that such pressure may cause the requested State to surrender the requested person to the Court instead.

The second category of treaties to look at here are the treaties with regard to international crimes discussed earlier within the framework of an analysis of the obligation of States to extradite or prosecute.[153] Of these treaties, the UN Convention on the Prevention and Punishment of the Crime of Genocide and the UN Convention on the Suppression and Punishment of the Crime of Apartheid envisage the establishment of an international penal tribunal which would have jurisdiction over the crimes of genocide or apartheid. However, pursuant to Article VI of the Genocide Convention and Article V of the Apartheid Convention the fact that a State is a Party to the conventions does not automatically imply that it recognizes the jurisdiction of the penal tribunal to be created. Both articles make a separate act of acceptance necessary. States not Parties to the Rome Statute need not recognize the International Criminal Court as a tribunal within the meaning of both conventions, although Article 12 of the Statute offers them that choice. As long as they have not done so, it is not possible to construe a direct obligation for them to surrender persons to the Court on the basis of the two UN conventions. The real importance of the conventions lies elsewhere. They both obligate all Parties to punish persons who have committed crimes of genocide or apartheid on their territory. It would seem that the parties to the conventions may be considered to have complied with that obligation by accepting the jurisdiction of the Court in the case at hand and surrendering the person concerned to the Court. In this sense, the two conventions may well strengthen the position of the Court, although only experience can tell whether this will really be the case.

What is the case for the two UN conventions is also true for treaties carrying the duty for States Parties either to extradite or to prosecute the alleged offender of an (p. 1688) international crime. The relevant treaties here are the four Geneva Conventions, Protocol I Additional, and the UN Torture Convention. It is widely held that the relevant provisions of the Geneva Conventions do not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties.[154] In this approach, surrender of an accused to an international court constitutes compliance with the treaty obligation to extradite or prosecute. This point of view was shared by the International Law Commission in its 1994 Draft Statute for an International Criminal Court and applied to all treaties carrying the obligation of *aut dedere aut punire*.[155] It also lies at the basis of the Rome Statute, although a provision explicitly saying so has not been maintained in the final text.[156] One way of complying with the duty to extradite or prosecute arising out of a number of treaties is to become a Party to the Rome Statute and to surrender persons to the Court on the basis of its provisions. An alternative way for States that do not wish to become Parties to the Statute is to

recognize the Court's jurisdiction in an individual case in accordance with Article 12 or to cooperate with the Court on the basis of Article 87. Thus, obligations arising out of treaties other than the Statute might again, in indirect ways, strengthen the position of the Court where surrender is concerned.

Finally, to the extent that the principle of *aut dedere aut punire* may have become a rule of customary international law it might have the same effects. There can be little doubt that customary international law imposes a primary duty on States which have themselves been implicated in international crimes to repress them. Surrender of the alleged offenders to the Court may free them from that obligation. It is, however, more open to doubt whether the obligation to extradite or prosecute has become a rule of *jus cogens* with regard to other States.[157]

## C. Arrest and Surrender Proceedings

Provisions with regard to arrest and surrender proceedings are scattered over the Statute. Articles 58 and 60 deal with the powers of the Court to order the arrest and surrender, as well as the provisional arrest, of persons. Articles 87, 89, 91, and 92 are, wholly or partially, concerned with the contents of the Court's requests for arrest and surrender and for provisional arrest, and with the transmission of these requests to States. On the other hand, provisions on the obligation of States to give effect to the Court's requests are to be found in Articles 59, 87, 88, 89, 91, and 92. Articles 87, 88, 89, and 91 are concerned with general procedural matters. Article (p. 1689) 59 deals with the arrest of persons by States on the Court's request, Article 92 with their provisional arrest. Finally, Article 55 accords rights to individual persons during an investigation, which may be of importance to them within the framework of national proceedings with regard to arrest, provisional arrest, and surrender. In the following, I will mainly concentrate on Article 91.

Pursuant to the first paragraph of Article 90, the Court may transmit a request for the arrest and surrender of a person to any State on the territory of which that person may be found. The power to request the provisional arrest of the person by that State has been granted to the Court in Article 92. Unlike the Rules of Procedure and Evidence of the ICTY and the ICTR, the Statute does not make a distinction between (ordinary) arrest warrants and so-called 'international arrest warrants'.[158] Apparently, the framers of the Statute did not want to follow the example of the *ad hoc* Tribunals in creating a special procedure in the case of refusal of States to comply with requests for arrest and surrender, designed to provide some sort of compensation for the fact that trials *in absentia* are not allowed under the Statute.

Article 91(1) of the Statute provides that the Court's requests shall be made in writing. However, in urgent cases a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in Article 87(1)(a). That channel may be the diplomatic channel or any other appropriate channel accepted by the State Party concerned. Paragraphs (2) to (4) of Article 91 are concerned with the contents of the Court's request. Here, a distinction is made between requests for the arrest and surrender of persons who may be considered to be suspects or accused, on the one hand, and for the arrest and surrender of convicted persons, on the other.

Three requirements apply to requests for the arrest and surrender of persons pursuant to an order made by the Pre-Trial Chamber under Article 58. Two of them are simple and self-evident, the third is not. Pursuant to Article 91(2), requests must, first, be supported by information describing the person sought, sufficient to identify the person, and information as to that person's possible location. Secondly, the request must be accompanied by a copy of the warrant of arrest. The third requirement, laid down in paragraph 2(c), is that a request be supported by such documents, statements, or information as may be necessary to meet the requirements for the surrender process in the requested State. Paragraph 2(c) goes on to provide that these requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less

burdensome, taking into account the distinct nature of the Court. The rather complicated character of this part of paragraph 2, an apparent compromise between (p. 1690) two radically different approaches, makes it understandable that paragraph 4 of the article obligates the requested State to provide, on the Court's request, information to the Court as to what its national requirements are and to give it advice on how to proceed.

Paragraph 2(c) is a compromise between different traditions in the field of extradition proceedings.[159] All States require that an extradition request be accompanied by a concise statement of the facts of the case and of the crime with which the requested person is charged, including, where possible, the time and location of the crime. The Court's requests will have to satisfy that requirement. Since similar requirements have already been laid down in Article 58(3), where the Court's warrants of arrest are concerned one may expect that few difficulties will arise here. However, there are traditional differences in approach between common-law and civil-law countries with regard to the question of whether extradition requests should be supported by evidence supporting the allegations against the person requested. Traditionally, common-law systems of justice require the production of such evidence while civil-law systems of justice do not. The basic compromise of Article 91 consists of respecting these differences in approach and allowing every State to stick to its own preferences. In this respect, there is a fundamental difference between the Statute and the Rules of Procedure and Evidence of the ICTY and the ICTR. As has been discussed earlier, these Rules have dispensed with evidentiary requirements altogether.[160] The choice of the Rules of Procedure and Evidence probably rests on the consideration that the international crimes over which the *ad hoc* Tribunals have jurisdiction are among the most serious crimes one can imagine and that all States have a common interest in their repression. Moreover, the argument that the *ad hoc* Tribunals should be trusted not to request the arrest and surrender of a person without solid reasons may also have played a role. On the other hand, the counterargument could be advanced that to arrest a person for international crimes and to surrender him to an international court are measures of such enormous consequences for the individual concerned that a procedural safeguard consisting in the production of evidence should not be eliminated.[161] It is not obvious that an international court would not be able to produce evidence in support of its requests or that this requirement would, in itself, seriously hinder it in its functioning. The main danger in maintaining the requirement is that it offers an opportunity for States unwilling to cooperate with an international court to delay compliance with that court's requests or to sabotage them.

(p. 1691) One may expect a number of States Parties to maintain evidentiary requirements. It is, therefore, important to know what evidentiary standard must be met in order for the Court to be able to issue an arrest warrant. A warrant for the arrest of a person may be issued before or after that person has become an accused, that is before or after the confirmation of the charges against a person by the Pre-Trial Chamber in accordance with Article 61 of the Statute. Pursuant to Article 61(5), the standard for confirmation of the charges is whether there is sufficient evidence to establish substantial grounds to believe that a person committed the crime charged. The standard for the issuance of an arrest warrant is lower. Pursuant to Article 58(1), the Pre-Trial Chamber may issue a warrant for the arrest of a person if there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.[162] It is not possible here to assess *in abstracto* whether this standard is equivalent to national evidentiary standards with regard to the arrest of persons in legal systems that require the production of evidence in support of extradition requests. Neither is it of decisive importance what the answers would be. What matters is whether or not the evidence produced by the Court in support of its request for a person's arrest and surrender in the case at hand satisfies domestic standards of the requested State. If these standards are more exacting than the one laid down in Article 58 of the Statute, the Court would need more evidence than is required by Article 58 before it could address a request for the arrest of a person to the State concerned.

In the Report of the Preparatory Committee on the Establishment of an International Court submitted to the

Rome Conference, it was provided that evidentiary standards applied by the requested State with regard to the Court's requests should in no event be more burdensome than those applicable to requests for extradition pursuant to treaties with other States.[163] The final text of Article 91(2)(c) of the Statute has retained the idea and added some new elements. Obviously, the purpose of paragraph 2(c) is to reduce the importance of evidentiary requirements. The factual supposition behind the paragraph probably is that some States, while maintaining evidentiary requirements in their domestic extradition statutes, have abolished them in treaties they have concluded with other States. The perfect theoretical example would be a State which has dropped evidentiary requirements in all extradition treaties or agreements it has concluded with other States but wants to maintain them where it is prepared to extradite a person to another State without a treaty having been concluded between them. It is possible that such States do exist and in their case paragraph 2(c) makes sense. However, another development in extradition law and practice with regard to evidentiary requirements seems to be far more important. Some common-law countries which have traditionally required the production of evidence are now (p. 1692) prepared to eliminate that requirement in their treaty relations with some States while still clinging to it in those with other States.[164] A clause in Article 91 similar to a most-favoured-nation clause could have considerably reduced the importance of evidentiary requirements here. But that is not what the literal text of paragraph 2(c) contains. Read literally, the paragraph seems to leave States which require the production of evidence in some treaties, but not in other treaties, free to determine whether or not they will apply the requirement to the Court's requests. However, it could be argued that a State which has abolished evidentiary requirements in one or more extradition treaties will not be able to explain why it is not possible to adopt with regard to the Court's request requirements that are 'less burdensome' than those in other extradition treaties, 'taking into account the distinct nature of the Court'.

Paragraph 3 of Article 91 is concerned with the contents of request for the arrest and surrender of persons who have already been convicted by the Court. There is no need to comment on its provisions.

## D. Provisional Arrest

Article 92 empowers the Court to request the provisional arrest of a person pending the presentation of the request for surrender and the documents supporting that request. Unlike the Rules of Procedure and Evidence of the ICTY and the ICTR, the Statute does not confer the power to make requests on the Prosecutor. The Court may make such requests in 'urgent cases'. In conformity with existing extradition practice these words must be understood to require that the purpose of a request for arrest and surrender will be frustrated or jeopardized if the arrest of the person would have to await the arrival of that request and the accompanying documents in the requested State. What purposes may be served by an arrest warrant is stated in Article 58(1). The likelihood or possibility that these purposes would be frustrated if the person's arrest would be delayed entitles the Court to demand his provisional arrest. Paragraph 5 of Article 58 makes explicit that provisional arrest can only be requested on the basis of an existing warrant of arrest issued by the Court pursuant to paragraph 1. In this respect, the Statute again differs from the Rules of Procedure and Evidence of the ICTY and the ICTR; Rule 40 empowers the Prosecutor to request any State to arrest a suspect and place him in custody without an arrest warrant having been issued by a chamber of the Tribunal.

Pursuant to paragraph 2 of Article 92, requests for provisional arrest shall be made by any medium capable of delivering a written record. Moreover, the paragraph (p. 1693) sums up the information that should accompany the request. The most important difference with a request for arrest and surrender is that a request for a person's provisional arrest need not be accompanied by evidence supporting the allegation that the person has committed one or more crimes. In all these respects, paragraph 2 reflects existing practices in extradition law.

Virtually all extradition treaties which enable the requesting State to make a request for the provisional arrest

of a person allow the requested State to release the person if a formal extradition request has not been received within a prescribed period. Many treaties also make his release mandatory after another period has passed. The system adopted in Rule 40 of the Rules of Procedure and Evidence of the ICTY and the ICTR is atypical: the Rule does not specify any period within which action of some sort must have been taken by the Prosecutor in furtherance of the proceedings. Paragraph 3 of Article 92 of the Statute follows current practices in extradition law. It provides that the requested State may release the person if that State has not received the request for surrender and the accompanying documents within a certain time limit. It is left to the Rules of Procedure and Evidence of the Court to determine that period; the time limit chosen in Rule 188 of the Draft Rules is sixty days. In State practice, these time limits vary considerably, geographical distances still playing an important role here. The UN Model Treaty on Extradition suggests a period of forty days,[165] the Draft Statute for an International Criminal Court of the International Law Commission envisaged a period of four weeks. Paragraph 3 of Article 92 goes on to provide that, within the time limit to be determined by the Rules of Procedure and Evidence, the person provisionally arrested may consent to his surrender if permitted by the law of the requested State. The requested State shall then proceed to surrender the person as soon as possible. Finally, paragraph 4 follows extradition practices in yet another respect. It provides that the fact that the person provisionally arrested has been released shall not prejudice his subsequent arrest and surrender if the request for surrender and the documents supporting it are delivered at a later date.

## E. Cooperation, Jurisdiction, and Admissibility

Pursuant to Article 18 of the Statute, States Parties as well as private individuals may challenge the jurisdiction of the Court or the admissibility of a case. The question to be discussed here is how a challenge affects the duty of States Parties to arrest and surrender persons pending the determination of the challenge by the Court. Paragraphs 7 to 9 of Article 18 are concerned with the suspensive effects of challenges in general. Articles 89(2), and 90(2) to (5), provide for additional rules with regard to the arrest and surrender of persons. Here, I will limit my discussion (p. 1694) of the system of the Statute to Articles 18 and 89. Article 90, which is concerned with competing requests, will be discussed later.[166]

Article 89(2) of the Statute provides that if the person whose arrest and surrender have been requested by the Court brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in Article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State must proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender until the Court makes a determination of admissibility. It follows *a contrario* from paragraph 2 that the execution of requests for arrest of the person may not be postponed.[167]

Paragraph 2 of Article 89 is only concerned with one situation in which a challenge to the admissibility of a case has been made. In this regard, it differs from Article 95, which provides that any challenge to admissibility of a case entitles the requested State to postpone the execution of requests for other forms of cooperation pending a determination by the Court. Pursuant to Article 18 of the Statute, challenges to the admissibility of a case may also be made by other persons who have been accused or for whom an arrest or a summons to appear has been issued in the same case. It may also happen that challenges have been made by a State which has jurisdiction over the case or the State from which acceptance of jurisdiction is required under Article 12. This State need not necessarily be the State to which the Court's request for arrest and surrender has been addressed. Moreover, it may happen that the challenge is not to the admissibility of the case but to the jurisdiction of the Court, or to both the jurisdiction of the Court and the admissibility of the case. Article 89 gives no answer to the question of what the obligations of States Parties are with regard to the execution of requests for arrest and surrender pending the determination of these challenges. That answer

must be found in paragraphs 7 to 9 of Article 19.

Paragraph 9 of Article 19 provides that the making of a challenge shall not affect the validity of any order or warrant issued by the Court prior to the making of the challenge. Warrants for arrest and surrender issued prior to the making of a challenge must, therefore, be executed.

On the other hand, Article 19 does not rule out any action with regard to the arrest of a person after a challenge has been made and pending its determination by the Court. While, pursuant to paragraph 7, the Prosecutor must, as a general rule, suspend the investigation pending the determination of a challenge made by a State, paragraph 8 permits him to take a limited number of initiatives with the (p. 1695) authority of the Court. One of these is to prevent the absconding of persons in respect of which the Prosecutor has already requested a warrant of arrest from the Pre-Trial Chamber under Article 58. Paragraph 8(c) adds that the Prosecutor must act '[I]n cooperation with the relevant States'. In assessing the meaning of paragraph 8 one must take into account that, pursuant to Parts 5 and 9 of the Statute, the power to order arrest and surrender of persons and to request States to execute warrants lies entirely with the Court; no powers have been given to the Prosecutor in this respect. One may conclude that, although the Prosecutor may invite or request States Parties to arrest a person in order to prevent his absconding, paragraph 8 of Article 19 does not create an obligation for States to comply with the invitation or request. It also seems to follow from paragraphs 8 and 9 that, pending the determination of a challenge, the Court may not issue a warrant for the arrest of a person in order to prevent his absconding.

## F. Competing Requests

In Article 90, the Statute addresses the problem of a request for surrender of a person to the Court competing with a request for the extradition of the same person made by another State. Article 90 is only concerned with competing requests addressed to States Parties to the Statute. It does not attempt to give rules with regard to States not Parties which face the choice of either satisfying the Court's request or giving priority to an extradition request emanating from another State. A distinction is made in the article between competing requests with regard to the same and other conduct. In all situations of competing requests, the first paragraph of Article 90 requires the State Party to notify the Court of that fact.

### *1. The Same Conduct*

It may happen that the Court's request for the surrender of a person addressed to a State Party coincides in time with the request for the extradition of the same person for the same conduct made by another State. That other State may be a Party to the Statute itself or it may not have become a Party to it. In the first situation, paragraphs 2 and 3 of Article 90 apply, in the second situation paragraphs 4 to 6.

The main rule with regard to concurrence of requests for surrender and extradition requests emanating from other States Parties is that the requested State shall give priority to requests from the Court. However, the fact that the role of the Court is complementary to that of national courts makes a detailed set of rules necessary. In this regard, paragraph 2 provides that the requested State shall give priority to the Court's request if the Court has, pursuant to Articles 18 and 19 of the Statute, made a determination that the case in respect of which surrender is sought is admissible. However, this determination must have taken into account the investigation or prosecution conducted by the requesting State in respect of the conduct to which the Court's request for surrender relates. Given the Court's (p. 1696) complementary role this is a logical restriction. Pursuant to paragraph 2, priority to the Court's request must also be given if the Court makes a similar determination after having been notified by the requested State that it has received a request for the extradition of the person. Finally, paragraph 3 is concerned with the situation in which a determination of admissibility is pending. The requested State may then make a decision on the extradition request but it must

postpone the execution of a decision to extradite the person until the Court has determined that the case is inadmissible. Paragraph 3 obligates the Court to make its determination on an expedited basis.

Pursuant to paragraphs 4 to 6, a different set of rules applies with regard to extradition requests emanating from States not Parties. The basic distinction here is whether or not the requested State Party 'is under an international obligation to extradite the person to the requesting State not Party to this Statute'. This will not be the case if no international agreement has been concluded between the two States creating reciprocal duties to extradite persons for international crimes over which the Court has jurisdiction. Extradition merely on the basis of a national statute is an example. But the formula quoted also seems to cover the situation in which an international agreement on the extradition of persons is in force between the two States but does not create an obligation to extradite the person requested in the case at hand. This may, for instance, be due to the fact that the person requested possesses the nationality of the requested State or the fact that the offence for which extradition has been requested is punishable by death under the law of the requesting State.

Paragraphs 4 and 5 are concerned with the situation in which there is no international obligation for the requested State Party to extradite the person. Pursuant to paragraph 4, the requested State must give priority to the Court's request if the Court has determined that the case is admissible. On the other hand, paragraph 5 permits the requested State to proceed to deal with the extradition request if no such determination has been made. Rather surprisingly, both paragraphs are silent on the situation in which a determination of admissibility is pending. It seems that a reasonable interpretation of the Statute would require the requested State to await the Court's decision.[168]

Paragraph 6 deals with the situation in which the requested State Party is obligated to extradite the person pursuant to an existing international obligation. It requires the requested State to make a choice between the Court's request and that of the requesting State taking all relevant factors into account. Among them, the paragraph mentions the respective dates of the requests, the interests of the requesting State (including the place of commission of the crime and the nationality of the person requested), and the possibility of subsequent surrender between the Court (p. 1697) and the requesting State. This provision raises a number of questions. The first is whether paragraph 6 may be applied at all in the relationship between the requested and the requesting State. For the requesting State, Article 90 of the Statute may appear to be a *res inter alios acta*, which cannot be invoked against it. The requesting State may well take the point of view that conflicting treaty obligations should not be decided by Article 90 of the Statute but by the ordinary rules of international law in the matter. Meanwhile, almost all extradition treaties contain provisions on concurring extradition requests which enable the requested State to make a choice between the various requests. More often than not, these provisions indicate criteria on which to base the decision; as a matter of fact, the criteria of paragraph 6 are largely inspired by these provisions.[169] This will usually enable the requested State to give priority to the Court's request, not by applying paragraph 6 directly but by taking this paragraph into account in applying provisions in extradition treaties on competing requests or by simply applying the relevant treaty provisions.[170] The requesting State might perhaps object that surrender of a person to the Court cannot be equated with extradition within the meaning of an extradition treaty, and it might even point at Article 102 of the Statute for support of its view. However, notwithstanding Article 102, surrender of a person to the Court and extradition of a person to another State have in common that the person is removed from the jurisdiction of the requested State to another jurisdiction for the purpose of standing trial for a criminal offence or of serving a sentence on account of that offence. For the application of extradition treaties this is all that matters. While, therefore, the conclusion may be that most existing extradition treaties do not create serious problems where the surrender of persons to the Court is concerned, matters are different with regard to other types of international agreements which may necessitate the requested State to hand over a person, agreements on the status of military forces in particular. They usually provide for the exclusive or primary jurisdiction of the sending State over criminal offences committed by a member of its forces, in particular

offences committed in the performance of official duty, coupled with the obligation of the receiving State to hand over that member to the competent authorities of the sending State.[171] Moreover, international immunities may also play a role here.[172]

(p. 1698) It may happen that the Court rules a case to be inadmissible following a notification of the requested State that it has received a request for surrender from the Court as well as an extradition request from another State. Pursuant to paragraph 8 of Article 90, the requested State Party must notify the Court of any subsequent refusal to extradite the person to that State. The *ratio* of this provision probably is that the Court may have declared a case inadmissible for the very reason that the State requesting extradition is investigating or prosecuting the case. Refusal of extradition places that State in a position in which it is no longer able effectively to prosecute the person requested. This may cause the Court to revise its admissibility decision.[173]

### *2. Other Conduct*

The second situation envisaged by Article 90 is that in which the Court's request coincides in time with an extradition request for conduct other than that for which the Court seeks the person's surrender. Here, paragraph 7 simply distinguishes between the situation in which there is an international obligation for the requested State Party to extradite the person and that in which such an obligation does not exist. In the latter case, priority must be given to the Court's request. In the first case, it is up to the requested State to make a choice on the basis of criteria similar to those of paragraph 6. Surprisingly, the requested State may also make that choice in a situation in which the Court's request concerns a case that has been declared admissible and the extradition request emanates from another State Party. Finally, paragraph 8 applies.

## G. Speciality

In extradition practice, extradition is normally granted under the condition that the requested person will not be detained, tried, or punished by the requesting State for any offence committed prior to his surrender other than that with regard to which the requested State has consented to his extradition. This is known as the rule of speciality, or specialty. The purpose of the rule is to enforce other rules of extradition law. Limitations and restrictions laid down in extradition treaties or extradition statutes would make little sense if the requesting State, after having obtained a person's surrender, would be able to detain, try, or punish the person for offences for which his extradition has been refused or for offences for which his extradition had not been requested. The rule of speciality does not prevent the requesting State from legally altering the charge for which the person was extradited in the course of proceedings, provided that the offence under the new legal description is based on the same set of facts contained in the extradition requests and its supporting documents. Finally, the rule is not absolute in the sense that the (p. 1699) requested State may, after the person's surrender, at the request of the other State consent to the person being detained, tried, or punished for offences other than that for which his extradition has been granted.

In the relationship between the two *ad hoc* Tribunals and the Member States of the United Nations the rule of speciality does not apply. There is no mention of the rule in the Statutes of the Tribunals. Moreover, in *Prosecutor v. Kovačević*, the Appeals Chamber of the ICTY held that there is no reason to apply the rule given the fact that the fundamental relations between the requested and requesting State in extradition law have no counterpart in the arrangements relating to the International Tribunal.[174] The decision is perfectly logical. Since, under the Statutes of the *ad hoc* Tribunals, States cannot refuse transfer of a suspect or accused for any reason whatsoever, the rule of speciality makes no sense in the relationship between the Tribunals and States. It cannot serve any legitimate purpose.

The Rome Statute does not follow the example of the *ad hoc* Tribunals but State practice in the field of

extradition. Article 101(1) of the Statute provides that a person surrendered to the Court shall not be proceeded against, punished, or detained for any conduct committed prior to surrender other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered. Pursuant to paragraph 2, the Court may request a waiver of the requirement of paragraph 1 from the State which surrendered the person. If necessary, the Court shall provide additional information in accordance with Article 91. Finally, States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so. Clearly, an obligation to provide a waiver has not been imposed on the States Parties.

A provision on the speciality rule was already included in the Draft Statute for an International Criminal Court of the International Law Commission. In the structure of the Draft, ratification of the Statute by a State did not automatically imply that that State accepted the Court's jurisdiction. Article 22 of the Draft made it possible for States to ratify the Statute without accepting the Court's jurisdiction or to accept its jurisdiction over some crimes but not over others, the crime of genocide being the sole exception. Pursuant to Article 53 of the Draft, an unconditional obligation to transfer a person to the Court only existed to the extent a State had accepted the Court's jurisdiction. In this structure, the rule of speciality had a function similar to the one it fulfils in extradition law. The rule, laid down in Article 55 of the Draft, prevented the Court from trying a person for crimes with respect to which the State having transferred him did not accept the Court's jurisdiction.

(p. 1700) One of the fundamental differences between the International Law Commission's Draft and the Rome Statute is that the Statute does not make a distinction between ratifying it and accepting the Court's jurisdiction. Ratification of the Statute automatically implies acceptance of the Court's jurisdiction over all offences under the Statute. Given this fact, the question is what sensible purpose the speciality rule could still serve in the relationship between the Court and States Parties. I believe the answer is: none.[175] As has been discussed, under the Statute States Parties have assumed an unconditional obligation to surrender persons to the Court. In this respect, the legal situation is no different from that under the Statutes of the *ad hoc* Tribunals. It is, of course, possible that 'the investigation of a person who has been surrendered to the Court for a specific crime [leads] to discovery of evidence that the surrendered person has also committed another crime or that the evidence for the crime for which the person was surrendered, while insufficient for conviction, is sufficient for a lesser crime'.[176] However, the rule of speciality does not forbid the conviction for a lesser offence if that conviction is based on the same set of facts. More importantly, there cannot be any justification at all for applying the rule of speciality in the situation in which a State would have been obligated to surrender the person had the Court been in a position to request his surrender for a crime for which it wants to try the person in addition to the crime with respect to which it has already obtained the person's surrender. It may, of course, be that the State Party objects to the person being tried for a new offence, for instance because it is of the opinion that the case is inadmissible. However, the proper way for a State Party to submit its objections to the Court in that event is to challenge the jurisdiction of the Court or the admissibility of the case in accordance with Article 19 of the Statute. There is, therefore, no need for the speciality rule in the relations between States Parties and the Court. The fact that the rule has nevertheless been incorporated in the Statute can only frustrate the efficacy of the Court, since it indirectly undermines the obligation of States Parties to surrender persons to the Court and provides them with an opportunity to block the prosecution of crimes without good reason. One wonders why Article 101 has been included in the Statute. Perhaps this is not only due to the absence of a clear conception of what the rule of speciality is about. It may also be that the drafters of the Statute have overlooked the fact that the rule had a distinct and legitimate purpose in the International Law Commission's Draft which it no longer has in the Rome Statute.

(p. 1701) Matters are different with regard to States not Parties. Article 101 also applies to the relationship between these States and the Court. A State not Party which has accepted the jurisdiction of the Court in individual cases on the basis of Article 12 of the Statute or which is prepared to cooperate with the Court on

the basis of Article 87 may well object to the person surrendered being tried for offences which are not covered by the agreement on the basis of which it is prepared to surrender persons to the Court. However, this could also be spelled out in the agreement between that State and the Court. There is no special need to include a provision in the Statute itself with regard to the matter.

It is normal for extradition treaties and extradition statutes to contain provisions forbidding the requested State to re-extradite the person requested to a third State without the consent of the State which has extradited him. Article 101 of the Statute is silent on the matter.[177] Apparently, it is not within the mandate of the Court to provide assistance to third States in trying offences other than crimes under the Statute. Meanwhile, Rule 185, paragraph 1, of the Draft Rules of Procedure and Evidence of July 2000 provides that a person who has been surrendered to the Court and is subsequently released from custody shall, as a rule, not be transferred to a State which has requested his or her extradition unless the original surrendering State consents. In addition, paragraph 2 of the same Rule allows the person's transfer to a State whose investigation or prosecution has formed the basis of a successful challenge to admissibility, unless the State that originally surrendered the person requests his or her return. Thus, transfer of a person to a third State for the purpose of being prosecuted or punished by that State still depends on the consent of the surrendering State. However, as is apparent from Article 108 of the Statute, the same is not the case for extradition of a person to a third State by a State that has enforced a sentence of the Court and on whose territory the sentenced person remains after having served that sentence.

## H. An Assessment

At the end of the discussion of Articles 89 to 92 and 101 to 102 of the Statute, it may be useful to evaluate the system of arrest and surrender and briefly to assess its strengths and weaknesses.

As far as matters of substance are concerned, I have already noted that the major achievement of the Statute is that the duty of States Parties to surrender persons to the Court has not been made subject to any of the limitations and exceptions which are common in extradition law. In this regard, there are no fundamental differences with the legal situation under the Statutes of the *ad hoc* Tribunals.

(p. 1702) Basically, by ratifying the Statute a State voluntarily accepts the same obligations as are imposed on it by the resolutions of the Security Council creating the *ad hoc* Tribunals. There is, however, one major and regrettable exception. The rule of speciality should not have been included in the Statute. An imperfection of lesser importance in Article 90 of the Statute is that it offers States Parties too much discretion in the choice, of whether they will surrender a person to the Court or try him for conduct other than the crime with regard to which the Court has requested his surrender. Apart from these points, the basic and inevitable weakness of the Rome Statute with regard to arrest and surrender does not lie in its contents but in the fact that it is a treaty. By definition, it cannot impose obligations with regard to surrender on States which do not wish to become parties to it. As has been shown, obligations arising out of other treaties for States not Parties to the Statute may put some pressure on them to deliver up persons to the Court, but it remains to be seen how strong this effect will be. The unwillingness of a number of States to ratify the Statute may, moreover, have negative consequences for the ability of other States willing to ratify it to surrender persons to the Court, as is apparent from the provisions in the Statute on competing requests.

Procedural matters in the field of surrender are only partially the subject of this contribution to the Commentary. The main issue here is the problem of evidentiary requirements. The Statute differs fundamentally from the Rules of Procedure and Evidence of the *ad hoc* Tribunals in that it leaves States Parties free to require that a request for arrest and surrender be supported by evidentiary material. Without any doubt, this will complicate the work of the Court. But I am not convinced that there cannot be any reasonable justification for maintaining the requirement where surrender of persons to the Court is

concerned. The main drawback of the system of the Statute probably is that some States Parties may use the requirement as a means to frustrate cooperation with the Court. Another major difference between the Statute and the Rules of Procedure and Evidence lies in the respective rules with regard to provisional arrest. From the point of view of protecting basic rights of individual persons, the system of the Statute is definitely superior to that of Rule 40 of the Rules of Procedure and Evidence. Finally, a short remark should be made with regard to the effects of challenges to the jurisdiction of the Court or to the admissibility of a case on the obligation to arrest and surrender persons. One may argue that Article 19 of the Statute puts too rigorous restrictions on the authority of the Court to request cooperation pending the determination of a challenge. In my opinion, it would have been preferable to grant the Court more discretionary powers here.

### *(p. 1703) Select Bibliography*

GENERAL

J. W. Garner, 'Punishment of Offenders against the Laws and Customs of War', 14 *AJIL* (1920) 70; Find it in your Library
*History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948); Find it in your Library
L. C. Green, 'Political Offences, War Crimes and Extradition', 11 *ICLQ* (1962) 329; Find it in your Library
C. Van den Wyngaert, *The Political Offence Exception to Extradition* (1980); Find it in your Library
W. Schwengler, *Völkerrecht, Versailler Vertrag und Auslieferungsfrage: Die Strafverfolgung wegen Kriegsverbrechen als Problem des Friedensschlusses 1919/20* (1982); Find it in your Library
T. Stein, *Die Auslieferungsausnahme bei politischen Delikten* (1983); Find it in your Library
M. C. Bassiouni, and E. M. Wise, *Aut Dedere aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995); Find it in your Library
G. Gilbert, *Transnational Fugitive Offenders in International Law* (1998). Find it in your Library
ICTY AND ICTR

K. S. Gallant, 'Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition', 5 *Criminal Law Forum* (1994) 557; Find it in your Library
V. Morris, and M. Scharf (eds.), *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995); Find it in your Library
M. C. Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996). Find it in your Library
ICC

M. C. Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (1998); Find it in your Library
C. Kress, 'Penalties, Enforcement and Cooperation in the International Criminal Court Statute (Parts VII, IX, X)', 6 *European Journal of Crime, Criminal Law and Criminal Justice* (1999) 442; Find it in your Library
P. Mochochoko, 'International Cooperation and Judicial Assistance', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results* (1999) 305; Find it in your Library
W. A. Schabas, 'Follow-up to Rome: Preparing for Entry into Force of the International Criminal Court Statute', 20 *HRLJ*(1999) 157.(p. 1704) Find it in your Library

## Footnotes:

[1] See generally R. Bierzanek, 'War Crimes: History and Definitions', in M. C. Bassiouni (ed.), *International Criminal Law*, Volume III. *Enforcement* (1999) 89–95 Find it in your Library. See also J. W. Garner, 'Punishment of Offenders Against the Laws and Customs of War', 14 *AJIL* (1920) 70–94 Find it in your Library; *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) 32–52, 236–242 Find it in your Library; W. Schwengler, *Völkerrecht, Versailler Vertrag und Auslieferungsfrage: Die Strafverfolgung wegen Kriegsverbrechen als Problem des Friedensschlusses* 1919–20 (1982) Find it in your Library.

[2] Bierzanek, *supra* note 1, at 89 Find it in your Library.

[3] Cf. Arts. 173–176 of the Treaty of Saint-Germain, Arts. 118–120 of the Treaty of Neuilly, Arts. 228–230 of the Treaty of Versailles, and Arts. 226–230 of the Treaty of Sèvres.

[4] Special provisions with regard to the surrender of persons responsible for 'the massacres committed during the continuation of the state of war on territory which formed part of the Turkish Empire on August 1, 1914' were included in Art. 230 of the Treaty of Sèvres.

[5] Cf. esp. Schwengler, *supra* note 1, at 125–232 Find it in your Library.

[6] *History of the United Nations War Crimes Commission*, *supra* note 1, at 48 Find it in your Library. It appears that, of the list of forty-five names, twelve persons stood trial, of which six were convicted and six acquitted. For an analysis of the Leipzig trials, see *'German War Trials ', Report of Proceedings before the Supreme Court of Leipzig* (1921); C. Mullins, *The Leipzig Trials* (1921) Find it in your Library.

[7] For the text of the diplomatic notes, see A. Mérignhac, 'De la responsabilité pénale des actes criminels commis au cours de la guerre 1914–1918', 47 *Revue de Droit International et de Législation Comparée* (1920) 34, at 37–45 Find it in your Library. An analysis of the legal situation from the perspective of Dutch law is provided by D. Simons, 'L'Extradition de l'ex-Empereur d'Allemagne et la Hollande', 46 *Journal du Droit International*(1919) 953–962 Find it in your Library. See also D. Simons, 'Eene vraag van uirlevering', *Weekblad van het Recht*(1918) no. 10332 Find it in your Library, and 'De vraag van de uitlevering', *Weekblad van het Recht*(1919) no. 10427 Find it in your Library.

[8] Cf. Bierzanek, *supra* note 1, at 37 Find it in your Library; *History of the United Nations War Crimes Commission, supra* note 1, at 51–52 Find it in your Library.

[9] *History of the United Nations War Crimes Commission, supra* note 1, at 52 Find it in your Library.

[10] See generally Bierzanek, *supra* note 1, at 96–101 Find it in your Library; *History of the United Nations War Crimes Commission, supra* note 1, at 292–434 Find it in your Library. See also M. W. Mouton, *Oorlogsmisdrijven en het internationale recht*(1947) 141–202, 295–316 Find it in your Library.

[11] See *History of the United Nations War Crimes Commission, supra* note 1, at 392–399 Find it in your Library.

[12] *History of the United Nations War Crimes Commission, supra* note 1, at 419–427 Find it in your Library.

[13] Art. 5 of the Treaty with Bulgaria, Art. 9 of the Treaty with Finland, Art. 6 of the Treaty with Hungary, Art. 45 of the Treaty with Italy, Art. 6 of the Treaty with Roumenia.

[14] See Arts. III–V.

[15] Cf. *History of the United Nations War Crimes Commission, supra* note 1, at 419–427 Find it in your Library; L. C. Green, 'Political Offences, War Crimes and Extradition', 11 *ICLQ* (1962) 346–347 Find it in your Library; C. Van den Wyngaert, *The Political Offence Exception to Extradition* (1980), 142–147 Find it in your Library. An example is provided by the escape of seven convicted war criminals from a Durch prison in 1953. German courts refused their surrender because of their nationality. One of them was later returned by the

British authorities in Germany, while the return of two others was refused.

[16] Cf. *History of the United Nations War Crimes Commission, supra* note 1, at 427–434 Find it in your Library; M. R. Garcia-Mora, 'War Crimes and the Principle of Non-extradition of Political Offenders', 9 *Wayne Law Review* (1963) 269 Find it in your Library; M. R. Garcia-Mora, 'Crimes against Humanity and the Principle of Nonextradition of Political Offenders', 62 *Michigan Law Review* (1964) 927–959 Find it in your Library; Green, *supra* note 15, at 342–347 Find it in your Library; R. G. Neumann, 'Neutral States and the Extradition of War Criminals', 45 *AJIL* (1951) 495–508 Find it in your Library; Van den Wyngaert, *supra* note 15, at 142–147 Find it in your Library.

[17] 1 *Yearbook of the UN* (1946–1947) 66 Find it in your Library.

[18] 2 *Yearbook of the UN* (1947–1948) 222 Find it in your Library.

[19] Both UN resolutions have been the subject of judicial decisions. In 1957, the US Court of Appeals held that the resolutions had not sufficient force of law to modify long-standing judicial interpretation of provisions in extradition treaties with regard to political offences; *Karadzole v. Artukovic*, 247 F.2d 198, 204–205 (9th Cir.). On the other hand, on 6 October 1983, the French Cour de Cassation invoked Resolution 3(I) in ruling that the expulsion of Barbie from Bolivia to France did not amount to disguised extradition contrary to French law; *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, 78 ILR (1988) 125, 131. A similar ruling was given by the Buenos Aires Court of First Instance in the case of *Jan Durcansky*; see Green, *supra* note 15, at 347 Find it in your Library.

[20] A rare and limited exception can be found in Arts. 80 and 80a of the German Penal Code.

[21] On extradition and political crimes, see generally M. C. Bassiouni, *International Extradition: United States Law and Practice*(1996) Find it in your Library; G. Gilbert, *Transnational Fugitive Offenders in International Law* (1998) Find it in your Library; T. Stein, *Die Auslieferungsausnahme bei politischen Delikten* (1983) Find it in your Library; Van den Wyngaert, *supra* note 15 Find it in your Library.

[22] Already in 1880 and 1892 the Institut de Droit International recommended that acts of violence committed during civil wars or civil uprisings should nor be regarded as political offences if they amounted to acts of odious barbarity or vandalism forbidden by the laws of war (Resolutions adopted at the 1880 Oxford session and the 1892 Geneva session; cf. Van den Wyngaert, *supra* note 15, at 142 Find it in your Library). The point of view expressed by the Institut was developed further in the case law of the courts in many States, while it was sometimes incorporated in national extradition statutes in as many words (cf. Art. 5 of the French Extradition Act of 1927). As has been discussed already, during World War II the Allied governments made it clear to neutral States that they did not expect them to refuse extradition of persons accused of war crimes on the ground that the acts alleged amounted to political offences.

[23] Cf. esp. Garcia-Mora, *supra* note 16, at 289–290 Find it in your Library; Green, *supra* note 15, at 341–344 Find it in your Library; Van den Wyngaert, *supra* note 15, at 144–146 Find it in your Library.

[24] Not surprisingly, this is different for offences such as treason, espionage, and collaboration with the enemy. See the authors mentioned in the previous note.

[25] 247 F.2d 198 (9th Cir. 1957). In 1960, a basically similar approach was adopted by the Buenos Aires Court of First Instance, refusing the extradition of *Jan Durcansky* to Czechoslovakia on a charge of having participated in mass murders of civilians during World War II. See Bassiouni, *supra* note 21, at 574–575 Find it in your Library; Green, *supra* note 15, at 347 Find it in your Library.

[26] BGE 92 I 108, 72 ILR (1987) 606.

[27] 39 ILR (1966) 433.

**28** 62 *AJIL* (1968) 784 Find it in your Library.

**29** 628 F.1370 (C.D. Cal. 1986).

**30** 784 F.2d 1354 (9th Cir. 1986). See also *Quinn v. Robinson*, a case involving a member of the Irish Republican Army, in which the Court of Appeals had already retreated from its approach in *Karadzole v. Artukovic*; 783 F.2d 776 (9th Cir. 1986).

**31** 612 F.Supp. 544 (N.D. Ohio 1985), *affirmed,* 776 F.2d 571 (6th Cir. 1985), *cert. denied,* 475 US 1016 (1986).

**32** See *Re Gross, ex parte Treasury Solicitor* [1986] 3 All ER 804, 55 ILR (1979) 550, and *R v. Wilson, ex parte Witness T.*, 86 ILR (1991) 169, discussed by Gilbert, *supra* note 21, at 392–393 Find it in your Library.

**33** Cf. Gilbert, *supra* note 21 Find it in your Library, referring as an example to *R and Federal Republic of Germany v. Rauca*, 88 ILR (1992) 279.

**34** S. Glaser, *Droit International Pénal Conventionnel*, Vol. II (1978) 206, 214–215 Find it in your Library; Stein, *supra* note 21, at 127–128 Find it in your Library.

**35** Explanatory Report on the Additional Protocol to the European Convention on Extradition, Council of Europe, Strasbourg, 1975, at 9. The Protocol entered into force on 20 August 1979.

**36** GA Res. 2583 (XXIV), 24 *Yearbook of the UN*(1969) 549 Find it in your Library; GA Res. 2712 (XXV), 25 *Yearbook of the UN*(1970) 572–573 Find it in your Library; GA Res. 2840 (XXVI), 26 *Yearbook of the UN* (1971) 440 Find it in your Library; GA Res. 3074 (XXVIII), 28 *Yearbook of the UN*(1973) 572 Find it in your Library.

**37** Other international instruments prohibit the granting of a special status to persons suspected of having committed crimes against the peace, war crimes, or crimes against humanity. Of particular importance in this regard are Art. 1.F of the 1951 UN Convention relating to the Status of Refugees and Art. 1.F of the 1954 UN Convention relating to the Status of Stateless Persons. Art. 1, second paragraph, of the 1967 UN Declaration on Territorial Asylum provides that the right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity. The granting of asylum to such persons is, moreover, condemned by GA Res. 3074 (XXVIII).

**38** Gilbert, *supra* note 21, at 395 Find it in your Library.

**39** *Prosecutor v. Anto Furundžija*, Appeals Chamber, 10 December 1998, IT-95-17/1-T, para. 157; 38 *ILM* (1999) 317, 349–350.

**40** ECHR, 7 July 1989, Series A, No. 161, and ECHR, 15 November 1996,108 ILR (1998) 385.

**41** [1999] 2 WLR 825–927.

**42** For similar criticism, see M. Cosnard, 'Quelques observations sur les décisons de la Chambre des Lords du 25 novembre 1998 et du 24 mars 1999 dans l'affaire Pinochet', 103 *RGDIP* (1999) 309, at 327 Find it in your Library.

**43** Cf. the judgment of the ICTY in *Prosecutor v. Anto Furundžija*, *supra* note 39, at 350, and that of the French Court of Cassation of 26 January 1984, in *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, 78 ILR (1988) 125, at 135. See however Ch. 22 above.

**44** See J. A. Consigli, 'The Priebke Extradition Case before the Argentine Supreme Court', 1 *YIHL* (1998) 341 Find it in your Library.

**45** See *supra* note 41.

**46** See Bassiouni, *supra* note 21, at 167–199 Find it in your Library; Gilbert, *supra* note 21, at 396–401 Find it in your Library; S. A. Williams, 'Laudable Principles Lacking Application: The Prosecution of War Criminals in Canada', in T. L. H. McCormack and G. J. Simpson (eds.), *The Law of War Crimes: National and Lnternational Approaches* (1997) 163–164 Find it in your Library.

**47** See Bassiouni, *supra* note 21, 192–195 Find it in your Library.

**48** See the Judgment of the French Court of Cassation, mentioned *supra* note 19. Barbie's complaint with the European Commission of Human Rights was declared inadmissible; *Klaus Altmann (Barbie) v. France*, Application 10689/83, 37 Decisions and Reports (1984) 225. Another complaint declared inadmissible by the European Commission is *P. N. Menten v. the Netherlands*, Application 9433/81, *Nederlandse Jurisprudentie* (1982) no. 142 (deportation of a person suspected of war crimes from Switzerland to The Netherlands).

**49** *Attorney General of the Government of Israel v. Adolf Eichmann*, 36 ILR (1968) 277.

**50** 14 *Yearbook of the UN* (1960), 198 Find it in your Library. For a discussion of the case, see J. E. S. Fawcett, 'The Eichmann Case', 38 *BYIL* (1962) 181 Find it in your Library; H. Silving, 'In Re Eichmann: A Dilemma of Law and Morality', 55 *AJIL* (1961) 307 Find it in your Library.

**51** For a different opinion, see M. R. Garcia-Mora, 'Crimes against Humanity and the Principle of Nonextradition of Political Offenders', 62 *Michigan Law Review* (1964) 927, at 959 Find it in your Library.

**52** Somewhat similar provisions may be found in several resolutions on the punishment of war criminals and persons committing crimes against humanity adopted by the General Assembly of the United Nations during the years 1969–1973. Thus, Res. 2583 (XXIV) calls upon all States concerned to take the necessary measures for the extradition of war criminals and persons guilty of crimes against humanity, while in Res. 2721 (XXV) it is said that all States should take measures in accordance with recognized principles of international law to arrest such persons and extradite them to the countries where they have committed these crimes. Res. 2840 (XXVI) again urges States to take measures to ensure the extradition of persons suspected of war crimes or crimes against humanity, adding that a refusal to cooperate in the arrest, extradition, trial, and punishment of these persons is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law. Finally, Res. 3074 (XXXVIII) declares that States shall assist each other in arresting and bringing to trial perpetrators of war crimes or crimes against humanity and that States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to their arrest, extradition, and punishment. For the text of these resolutions, see *supra* note 36.

**53** Art. 49 of the First, Art. 50 of the Second, Art. 129 of the Third, and Art. 146 of the Fourth Convention.

**54** International Court of Justice, 28 May 1951, *ICJ Reports 1951*, p. 23.

**55** The most important proponents of the rule's existence are M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd rev. edn., 1999), 217–221 Find it in your Library, and J. J. Paust, 'Universality and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals', 11 *Houston Journal of International Law* (1989) 337 Find it in your Library.

**56** Among them are Gilbert, *supra* note 21, at 320–322 Find it in your Library; L. S. Sunga, *The Emerging System of International Criminal Law* (1997) 250–256 Find it in your Library. For a discussion of arguments *pro* and *contra*, see M. C. Bassiouni and E. M. Wise, *Aut Dedere aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995) Find it in your Library.

**57** Among the many authors are I. A. Brownlie, *Principles of Public International Law* (1998) 308 Find it in your Library; T. Meron, *War Crimes Law Comes of Age* (1998) 254–256 Find it in your Library; K. C. Randall, 'Universal Jurisdiction Under International Law', 66 *Texas Law Review* (1988) 785 Find it in your

Library. See also American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987) Vol. I, para. 404. An author representing a different current is M. Henzelin, *Le principe de l'universalité en droit pénal international* (2000) 429–435 Find it in your Library.

**58** Cf. *Demjanjuk v. Petrovski*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 US 1016; *Polyukhovich v. Commonwealth of Australia*, 91 ILR (1993) 1; *Regina v. Finta*, 104 ILR (1997) 284: *Munyeshyaka*, Cour de Cassation, chambre criminelle, 6 January 1998, 102 *RGDIP* (1998) 825; *In Re Pinochet*, Audiencia Nacional Spain, 93 *AJIL* (1999) 690–696. For a recent discussion of these and other decisions see Henzelin, *supra* note 57, 404–422 Find it in your Library.

**59** See *supra* note 49.

**60** *Supra* note 39, para. 156. In its judgment of 14 February 2002 in *Case Concerning the Arrest Warrant of 11 April 2000*, the ICJ did not pronounce itself on the matter.

**61** For an overview, see Ch. 18.3 above.

**62** Cf. Bassiouni and Wise, *supra* note 56, at 54 Find it in your Library.

**63** Cf. Bassiouni and Wise, *supra* note 56, at 52 Find it in your Library.

**64** For example, Australia, Canada, and the United Kingdom.

**65** *Polyukhovic v. Commonwealth of Australia, supra* note 58, at 34–39 (Judge Brennan); *Regina v. Finta, supra* note 57, at 300 (Judge La Forest).

**66** International Court of Justice, 11 July 1996, para. 31, 105 ILR (1999) 1, at 29.

**67** *Supra* note 39, para. 156.

**68** Para. 6 of the Preamble. See also Art. 18(1), of the Statute, referring to States not Parties which would 'normally exercise jurisdiction'. For discussions of the meaning of para. 6, see T. Neroni Slade and R. S. Clark, 'Preamble and Final Clauses', in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results* (1999) 421, at 427 Find it in your Library; O. Triffterer, 'Preamble', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*(1999) 12–13 Find it in your Library.

**69** *Prosecutor v. Tihomir Blaškić*, Appeals Chamber, 29 October 1997, IT-95-14-AR 108 *bis*, para. 29, 110 ILR (1998) 458. See also Henzelin, *supra* note 57, at 376 Find it in your Library.

**70** See generally M. C. Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoskvia* (1996) Find it in your Library; V. Morris and M. P. Scharf (eds.), *An Insider's Guide to the International Criminal Tribunal for the Former Yugoskvia* (1995) Find it in your Library. Cf. also the Annual Reports ofthe Tribunals submitted to the General Assembly and the Security Council of the United Nations and the various Yearbooks of the ICTY published by the United Nations.

**71** *Prosecutor v. Tihomir Blaškić*, *supra* note 69, para. 26.

**72** S/25704 (1993), para. 126.

**73** Doubts are voiced by Bassiouni and Manikas, *supra* note 70, at 779 Find it in your Library.

**74** S/25704 (1993), para. 125.

**75** Basically, Rules 40 and 40 *bis* of the ICTR's RPE adopt the same approach. In the agreements concluded between the USA and the Tribunals, the USA agrees to surrender persons who have been indicted. In case of urgency, however, provisional arrest may be requested.

**76** Morris and Scharf, *supra* note 70, Vol. I, p. 207 Find it in your Library.

[77] The term 'surrender' is used only in Rule 58 in relation to the obligations of States. It is, moreover, used in Rule 60 with regard to the voluntary appearance of the accused before the Tribunal.

[78] Another terminological problem concerns the distinction between requests and orders in Arts. 29 and 28. Since it is irrelevant for the duty of States to cooperate whether a request has been made or an order has been issued by a tribunal, I will refrain from discussing the matter.

[79] See *infra*, IV.B and Ch. 30.3 above.

[80] e.g. The Netherlands. For a discussion of the constitutional status of the requirement in the United States, see K. J. Harris and R. Kushen, 'Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda; Squaring International Legal Obligations with the United States Constitution', 7 *Criminal Law Forum* (1996) 561 Find it in your Library, and *infra* notes 81 and 82.

[81] *In the matter of Surrender of Elizaphan Ntakirutimana*, US District Court for the Southern District of Texas, Laredo Division, 1 *YIHL* (1998) 607. For comments, see J. J. Paust, 'The Freeing of Ntakirutimana in the United States and Extradition to the International Criminal Court for Rwanda', 1 *YIHL* (1998) 205 Find it in your Library; G. Sluiter, 'To Cooperate or not to Cooperate? The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal', 11 *Leiden Journal of International Law* (1998) 383 Find it in your Library. For the text of the Agreement with the ICTY, see *Yearbook 1994* of the ICTY, 190 Find it in your Library.

[82] *Elizaphan Ntakirutimana v. Janet Reno, Madeleine Albright and Juan Garza*, 184 F.3d 419 (5th Cir. 1999), 1999 US App. LEXIS 18253. See also M. Coombs, *In re Surrender of Ntakirutimana*, 94 *AJIL* (2000) 171.

[83] The second solution, suggested by Paust, *supra* note 81, at 206–207 Find it in your Library, has been preferred in The Netherlands.

[84] France, Italy, Switzerland. For the text and a translation of these and other implementing laws, see the first three Yearbooks of the ICTY.

[85] *Prosecutor v. Anto Furundžija*, *supra* note 39, para. 157.

[86] *Supra* note 39, para. 157.

[87] e.g. the implementing laws of Denmark, Finland, and Norway. Actually, none of these laws excludes the transfer of nationals.

[88] See *Yearbook 1995* of the ICTY 328 Find it in your Library. The experts of the Member States of the Council of Europe went less far. In their view, when transferring a national a Member State could suggest to the Tribunal to order enforcement of a sentence against a convicted national in the State of his nationality.

[89] See *Yearbook 1996* of the ICTY 235 Find it in your Library.

[90] Cf. W. Schomburg and O. Lagodny, *Internationale Rechtshilfe in Strafsachen* (1998) 1191 Find it in your Library.

[91] See *Yearbook 1996* of the ICTY 249 Find it in your Library. A number of Croatian nationals have surrendered themselves to the ICTY; see the fifth Annual Report of the ICTY, A/53/219, para. 113. For Croatia's attitude with regard to the surrender of persons, see also *infra*, IV.C, on the consequences of failure to execute a warrant of arrest.

[92] On the absence of implementing legislation in Yugoslavia, see I. Josipović, 'Implementing Legislation for the Application of the Law on the International Criminal Tribunal for the Former Yugoslavia and Criteria for its Evaluation', 1 *YIHL* (1998) 35, at 53–56 Find it in your Library.

**93** Appeals Chamber, 2 October 1995, IT-94-1-AR72, Judicial Reports/Recueils Judiciaires 1994–1995, Vol. I, p. 353, paras. 41–48.

**94** In Art. 24 of the Statute of the ICTY it is provided that in imposing penalties regard must be had to the general practice regarding prison sentences in the courts of the former Yugoslavia. Art. 23 of the Statute of the ICTR contains a similar reference with regard to Rwanda. For the interpretation of these provisions, see Morris and Scharf, *supra* note 70, Vol. I, p. 275 Find it in your Library, and *Prosecutor v. Duško Tadić*, Sentencing Judgment of the Trial Chamber of the ICTY of 11 November 1999, IT-94-1-T *bis*-R117, confirmed by the Appeals Chamber in its decision of 26 January 2000, paras. 70–74.

**95** *Yearbook 1996* of the ICTY 247 Find it in your Library. In the original French and Dutch texts: 'Dans le respect de' and 'Met eerbiediging van'; cf. *Belgisch Staatsblad/Moniteur Belge* (1996) 10260.

**96** See *supra* note 40.

**97** For the parliamentary debate, see Belgische Senaat/Sénat de Belgique 1995–1996, 1-247/3, 81–89.

**98** Bosnia and Herzegovina, Croatia, Italy.

**99** Cf. the decision of the Appeals Chamber of the ICTY of 2 July 1998, in *Prosecutor v. Kovačević*, IT-97-24-AR73, with regard to the specialty rule.

**100** For irregularities in arrest and transfer proceedings and their consequences, see *Jean-Bosco Barayagwiza v. The Prosecutor*, Appeals Chamber of the ICTR, 3 November 1999 and 31 March 2000, ICTR-97-19-AR72.

**101** Cf. *Prosecutor v. Slobodan Milošević, Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić and Vlajko Stojiljković*, Decision on Review of Indictment and Application for Consequential Orders of 24 May 1999, IT-99-37, para. 4.

**102** Cf. ibid., paras. 26–29. Such orders are based on Arts. 19 and 18 of the Statutes.

**103** They may also serve the purpose of returning any property or proceeds to their rightful owners pursuant to Arts. 24 and 23 of the Statutes.

**104** Austria, Belgium, Croatia, France, Germany, Italy, the Netherlands, Switzerland, the United Kingdom.

**105** Cf. K. S. Gallant, 'Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition', 5 *Criminal Law Forum* (1994) 557 Find it in your Library. See also Bassiouni and Manikas, *supra* note 70, at 874 Find it in your Library; R. Kushen and K. J. Harris, 'Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda', 90 *AJIL* (1996) 510 Find it in your Library; Harris and Kushen, *supra* note 80, at 596–603 Find it in your Library; Morris and Scharf, *supra* note 70, Vol. I, at 202 Find it in your Library.

**106** For a critique, see Gallant, *supra* note 105, at 584 Find it in your Library.

**107** See *supra* note 80. For problems with regard to the showing of probable cause in the case of *Ntakirutimana*, see the case law and publications referred to in notes 81 and 82.

**108** *Prosecutor v. Dragan Nikolić*, IT-95-13-R61, Judicial Reports/Recueils Judiciaires, Vol. II, p. 739, 108 ILR(1998) 21; *Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin*, IT-95-13-R61, 108 ILR (1998) 53; *Prosecutor v. Radovan Karadžić and Ratko Mladić*, IT-95-5-R61 and IT-95-18-R61, 108 ILR (1998) 85; *Prosecutor v. Ivica Rajić*, 95-12-R61, 108 ILR (1998) 141.

**109** See S/1995/910 (*Nikolić*); S/1996/319, S/1998/839, and S/1998/990 (*Mrkšić and others*), *Yearbook 1996* of the ICTY 212 Find it in your Library; S/1996/556 (*Karadžić and Mladić*), *Yearbook 1996* of the ICTY 214 Find it in your Library; 5/1996/763 (*Rajić*).

[110] See S/RES/1019 (1995) (*Nikolić*); S/PRST/23 and S/RES/1207 (1998) (*Mrkšić and others*); S/PRST/34 (*Karadžić and Mladić*); S/PRST/1996/39 (*Rajić*).

[111] See S/1996/319 (*Mladić and Šljivančanin*), *Yearbook 1996* of the ICTY 213 Find it in your Library; S/1999/912 (*Mladen Naletilić*). For a more detailed analysis see D. A. Mundis, 'Reporting Non-Compliance: Rule 7*bis*', in R. May et al. (eds.), *Essays on ICTY Procedure and Evidence* (2001) 421–438 Find it in your Library.

[112] In the same sense HM. M. Niang, 'Le Tribunal pénal international pour le Rwanda: Et si la contumace était possible?', 103 *RGDIP* (1999) 379 Find it in your Library.

[113] For a brief discussion, see *Prosecutor v. Rajić, supra* note 108, paras. 2–3.

[114] *Prosecutor v. Mile Mrkšić, Miroslav Radić, Veselin Šljivančanin, and Slavko Dokmanović*, Decision on the Motion for Release by the Accused Slavko Dokmanović of 22 October 1997, IT-95-13a-PT, 111 ILR (1998) 459. Leave to appeal was refused by the Appeals Chamber on 11 November 1997, IT-95-13a-AR 72. For an analysis, see M. P. Scharf, 'The Prosecutor v. Slavko Dokmanović: Irregular Rendition and the ICTY', 11 *Leiden Journal of International Law* (1998) 369 Find it in your Library, arguing at 378 that, since Yugoslavia has consistently refused to comply with orders of the ICTY, NATO, or UN forces may be justified in conducting law enforcement activities in Yugoslavia territory notwithstanding the general prohibition against such conduct under international law. See also S. Lamb, 'The Power of Arrest of the International Criminal Tribunal for the Former Yugoslavia', 70 *BYIL* (1999) 165 Find it in your Library.

[115] For the accused's complaint see *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, Simon Zarić*, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, Trial Chamber, 18 October 2000, IT-95-9-T, and *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, Simo Zarić*, Decision and Scheduling Order, Appeals Chamber, 8 November 2000, IT-95-9-A. See also S. Lamb, 'Illegal Arrest and the Jurisdiction of the ICTY', in May *et al.* (eds.), *supra* note 111, 27–41 Find it in your Library.

[116] In the Statute, the term 'persons' refers to suspects, accused persons, and convicted persons. See A/CONF.183/2/Add. 1 (1998); M. C. Bassiouni, *The Statute of the International Criminal Court* (1998) 189 Find it in your Library.

[117] See Rules 99, 176–189, 195–197 of the Draft Rules of Procedure and Evidence of 12 July 2000.

[118] For a discussion of such question see Ch. 15 above.

[119] 'Transfer' was the expression preferred by the International Law Commission in its 1994 Draft Statute. In Part 10 of the Statute, the term 'transfer' is now used in relation to persons serving a sentence of imprisonment imposed by the Court.

[120] Cf. e.g. Art. VII(5)(a) of the 1951 NATO Status of Forces Agreement, which uses the expression 'handing over'.

[121] Art. 228 of the Versailles Treaty and the Geneva Conventions designate the process as the 'handing over' of persons. The Moscow Declaration speaks of sending them back, Art. IV of the Allied Control Council Law No. 10 of their delivery.

[122] See also the 1991 and 1996 Draft Codes of Crimes against the Peace and Security of Mankind, drawn up by the International Law Commission.

[123] Pursuant to its Art. 227, the former German emperor would have to be 'surrendered' by The Netherlands. However, the German text of Art. 227 uses the word '*ausliefern*'.

[124] In Art. 3 of the London Agreement, the Signatories agreed to 'make available' war criminals who were to

be tried by the International Military Tribunal.

[125] For a discussion, see Ch. 39 above.

[126] For the debate on that issue during the Diplomatic Conference, see C. Kress, 'Art. 102', in Triffterer (ed.), *supra* note 68, 1157–1158 Find it in your Library; P. Mochochoko, 'International Cooperation and Judicial Assistance', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results* (1999) 305, 309–310 Find it in your Library.

[127] Art. 89(3).

[128] Cf. Mochochoko, *supra* note 126, at 308–309 Find it in your Library.

[129] See *supra*, IV.A.1.

[130] For the weaknesses of the RPE of the *ad hoc* Tribunals in this respect, see Ch. 30.3 above.

[131] For an analysis of the negotiations, see Mochochoko, *supra* note 126, at 308–310 Find it in your Library.

[132] For the situation under the Statutes of the *ad hoc* Tribunals, see *supra*, IV.A.3.

[133] See W. A. Schabas, 'Follow up to Rome: Preparing for Entry Into Force of the International Criminal Court Statute', 20 *HRLJ* (1999) 157, at 157 and 160 Find it in your Library.

[134] See *infra*, V.E.

[135] See *supra*, III.A.2.

[136] Cf. *supra*, III.A.1.

[137] For the debate, see Kress, *supra* note 126, at 452 Find it in your Library; Mochochoko, *supra* note 126, at 311–312 Find it in your Library; Schabas, *supra* note 133, at 158 Find it in your Library.

[138] See e.g. Art. 6 of the Extradition Treaty between The Netherlands and the United States of June 24, 1980, TIAS 10733; Art. 7 of the Convention relating to extradition between the Member States of the European Union of September 27, 1996, Official Journal of the European Communities, 1996 C313/11.

[139] See *supra*, IV.A.3.

[140] Proposal submitted by Denmark, Norway, Sweden, and Switzerland, A/CONF.183/C.1/WGIC/L.18.

[141] Cf. the Swiss Federal Order implementing the Statutes of the *ad hoc* Tribunals, discussed *supra*, III.C.2. For a discussion of the merits of a compromise solution in extradition law, see B. Swart, 'Human Rights and the Abolition of Traditional Principles', in A. Eser and O. Lagodny (eds.), *Principles and Procedures for a New Transnational Criminal Law* (1992) 505 Find it in your Library.

[142] See *supra*, V.A.2.

[143] See Ch. 42 below.

[144] See *supra*, III.A.1 and IV.A.III.

[145] See *supra*, III.A.1. Cf. also the Belgian law discussed, *supra*, IV.A.III.

[146] For example, Portugal has made a reservation to the 1957 European Convention on Extradition to the effect that it will not extradite persons 'in connection with an offence punishable by a life-long sentence or detention order'. On the system of the Statute, see Chs. 43–45 below.

[147] See *supra*, IV.A.3.

[148] See also C. Kress and K. Prost, 'Art. 89', in Triffterer (ed.), *Supra* note 68, 1079 Find it in your Library.

[149] See *infra*, V.F.

[150] See *infra*, V.G.

[151] See *infra*, V.E.

[152] See also K. Prost and A. Schlunck, 'Art. 98', in Triffterer (ed.), *supra* note 68 1132–1133 Find it in your Library.

[153] See *supra* I, III.C.2.

[154] Cf. e.g. J. S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary* (1960) Vol. III, p. 624 Find it in your Library.

[155] Report of the International Law Commission on the work of its 46th session, A/49/10, 134.

[156] See Report of the Preparatory Committee on the establishment of an International Criminal Court, A/CONF.183/2, reprinted in Bassiouni, *supra* note 116, at 191 Find it in your Library (Draft Article 87).

[157] See *supra*, III.C.2.

[158] See *supra*, IV.C.

[159] Cf. K. Prost, 'Art. 91', in Triffterer (ed.), *supra* note 68, 1092 Find it in your Library.

[160] See *supra*, IV.B.

[161] See GA Res. 170(II) of 31 October 1947, discussed *supra*, I.B, which is, however, concerned with extradition between States.

[162] For a discussion of this standard, see Ch. 30.1 above. See also *supra*, IV.B.

[163] Draft Art. 88, Report, p. 166, reproduced in Bassiouni, *supra* note 116, at 192 Find it in your Library.

[164] An example is provided by the United Kingdom which does not require the production of evidence in its extradition relations with other European States on the basis of the European Convention on Extradition.

[165] GA Res. 45/116.

[166] See *infra*, V.F.

[167] On the situation pending an appeal, see Kress and Prost, *supra* note 148, at 1075 Find it in your Library.

[168] Cf. K. Prost, 'Art. 90', in Triffterer (ed.), *supra* note 68, 1087 Find it in your Library.

[169] The criteria of para. 6 are, for instance, almost identical to those of Art. 17 of the 1957 European Convention on Extradition.

[170] In the same sense B. Swart and G. Sluiter, 'The International Criminal Court and International Criminal Co-operation', in H. A. M. Von Hebel, J. G. Lammers, and J. Schukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999) 93, at 110 Find it in your Library.

[171] See also M. Bergsmo, 'The Jurisdictional Régime of the International Criminal Court (Part II, Articles 11–19)', 6 *European Journal of Crime, Criminal Law and Criminal Justice* (1999) 245, at 350–351 Find it in your Library; Swart and Sluiter, *supra* note 170, at 110 Find it in your Library.

[172] See Ch. 40 above.

[173] See also Prost, *supra* note 168, at 1089 Find it in your Library.

[174] *Prosecutor v. Kovačević*, IT-97-24-AR73, Decision of 2 July 1998 stating reasons for the Appeals Chamber's order of 29 May 1998. See also *supra*, IV.B.

[175] The same conclusion is reached by P. Wilkitzki, 'Art. 101', in Triffterer (ed.), *supra* note 68, 1148–1149 Find it in your Library.

[176] M. H. Arsanjani, 'Reflections on the Jurisdiction and Trigger-Mechanism of the International Criminal Court', in H. A. M. Von Hebel, J. G. Lammers, and J. Schukking (eds.), *Reflections on the International Criminal Court: Esssays in Honour of Adriaan Bos* (1999) 57, at 73 Find it in your Library.

[177] A provision to that effect was included in Draft Art. 92 of the Report of the Preparatory Committee on the Establishment of an International Criminal Court submitted to the Rome Conference. See Bassiouni, *supra* note 116, at 198 Find it in your Library.

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# ASSEMBLY OF THE AFRICAN UNION
## Thirteenth Ordinary Session
## 1 – 3 July 2009
## Sirte, Great Socialist People's Libyan Arab Jamahiriya

**Assembly/AU/Dec. 243-267 (XIII) Rev.1**
**Assembly/AU/Decl.1- 5(XIII)**

# DECISIONS AND DECLARATIONS

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

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# DECISION ON THE ABUSE OF THE PRINCIPLE OF UNIVERSAL JURISDICTION
## Doc. Assembly/AU/11(XIII)

**The Assembly,**

1. **TAKES NOTE** of the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.199(XI) adopted by the Assembly in Sharm El-Sheikh, Egypt in July 2008 as well as Decision Assembly/AU/Dec.213 (XII) on the Abuse of the Principle of Universal Jurisdiction adopted in Addis Ababa, Ethiopia in February 2009;

2. **ENDORSES** the recommendations of the Executive Council;

3. **REITERATES** its appeal to the Chairperson of the African Union to follow-up on this matter with a view to ensuring that it is exhaustively discussed at the level of the United Nations Security Council and the General Assembly, as well as the European Union;

4. **REITRATES** its previous positions articulated in Decisions Assembly/Dec.199(XI) and Assembly/Dec.213(XII) adopted in Sharm El Sheikh and Addis Ababa in July 2008 and February 2009 respectively to the effect that there has been blatant abuse of the Principle of Universal Jurisdiction particularly by some non-African States and **EXPRESSES** its deep concern that indictments have continued to be issued in some European States against African leaders and personalities. To this end, it **CALLS FOR** immediate termination of all pending indictments;

5. **FURTHER REITERATES** its conviction on the need for an international regulatory body with competence to review and/or handle complaints or appeals arising out of abuse of the Principle of Universal Jurisdiction by individual States;

6. **CALLS UPON** all concerned States to respect International Law and particularly the immunity of state officials when applying the Principle of Universal Jurisdiction;

7. **EXPRESSES APPRECIATION** to the Chairperson of the African Union and the Chairperson of the Commission for efforts made so far towards ensuring that this matter is exhaustively discussed at the level of the United Nations General Assembly and with the European Union, respectively;

8. **REQUESTS** the Commission to follow up on this matter and to report to the Assembly on progress made in the implementation of this Decision, in January/February 2010.

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

**DECISION ON THE APPOINTMENT OF MEMBERS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (ACHPR)**
**Doc. EX.CL/533 (XV)**

**The Assembly,**

1. **TAKES NOTE** of the election of Members of the African Commission on Human and Peoples' Rights (ACHPR) conducted by the Executive Council;

2. **DECIDES** to appoint for a term of six (6) years, the following persons as members of the African Commission on Human and Peoples' Rights (ACHPR) as elected by the Fifteenth Ordinary Session of the Executive Council held in Sirte, Libyan Arab Jamahiriya in June 2009:

| Names | Country |
|---|---|
| Mr. Mohammed FAYEK | Egypt |
| Ms. Zainabo KAYITESI | Rwanda |
| Mr. Mohamed Béchir KHALFALLAH | Tunisia |

**DECISION ON THE MEETING OF AFRICAN STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)**
**Doc. Assembly/AU/13(XIII)**

**The Assembly,**

1. **TAKES NOTE** of the recommendations of the Executive Council on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC);

2. **EXPRESSES ITS DEEP CONCERN** at the indictment issued by the Pre-Trial Chamber of the ICC against President Omar Hassan Ahmed El Bashir of the Republic of The Sudan;

3. **NOTES WITH GRAVE CONCERN** the unfortunate consequences that the indictment has had on the delicate peace processes underway in The Sudan and the fact that it continues to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur;

4. **REITERATES** the unflinching commitment of Member States to combating impunity and promoting democracy, rule of law and good governance throughout the continent, in conformity with the Constitutive Act of the African Union;

5. **REQUESTS** the Commission to ensure the early implementation of Decision Assembly/Dec.213(XII), adopted in February 2009 mandating the Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights to examine the implications of the Court being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity;

6. **ENCOURAGES** Member States to initiate programmes of cooperation and capacity building to enhance the capacity of legal personnel in their respective countries regarding the drafting and safety of model legislation dealing with serious crimes of international concern, training of members of the police and the judiciary, and the strengthening of cooperation amongst judicial and investigative agencies;

7. **FURTHER TAKES NOTE** that any party affected by the indictment has the right of legal recourse to the processes provided for in the Rome Statute regarding the appeal process and the issue of immunity;

**8.** **REQUESTS** the Commission to convene a preparatory meeting of African States Parties at expert and ministerial levels (Foreign Affairs and Justice) but open to other Member States at the end of 2009 to prepare fully for the Review Conference of States Parties scheduled for Kampala, Uganda in May 2010, to address among others, the following issues:

i.) Article 13 of the Rome Statute granting power to the UN Security Council to refer cases to the ICC;

ii.) Article 16 of the Rome Statute granting power to the UN Security Council to defer cases for one (1) year;

iii.) Procedures of the ICC;

iv.) Clarification on the Immunities of officials whose States are not party to the Statute;

v.) Comparative analysis of the implications of the practical application of Articles 27 and 98 of the Rome Statute;

vi.) The possibility of obtaining regional inputs in the process of assessing the evidence collected and in determining whether or not to proceed with prosecution; particularly against senior state officials; and

vii.) Any other areas of concern to African States Parties.

**9.** **DEEPLY REGRETS** that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of the ICC, has neither been heard nor acted upon, and in this regard, **REITERATES ITS REQUEST** to the UN Security Council;

**10.** **DECIDES** that in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan ;[*]

**11.** **EXPRESSES CONCERN OVER** the conduct of the ICC Prosecutor and **FURTHER DECIDES** that the preparatory meeting of African States Parties to the Rome Statute of the ICC scheduled for late 2009 should prepare, *inter alia,*

[*] Reservation entered by Chad

guidelines and a code of conduct for exercise of discretionary powers by the ICC Prosecutor relating particularly to the powers of the prosecutor to initiate cases at his own discretion under Article 15 of the Rome Statute;

**12.** **UNDERSCORES** that the African Union and its Member States reserve the right to take any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent;

**13.** **FINALLY REQUESTS** the Commission to follow-up on the implementation of this Decision and submit a report to the next Ordinary Session of the Assembly through the Executive Council in January / February 2010 and in this regard **AUTHORIZES** expenditure for necessary actions from arrears of contributions.

# DECISION ON THE HISSENE HABRE CASE
## Doc. Assembly/AU/12 (XIII) Rev.1

**The Assembly,**

1. **TAKES NOTE** of the Progress Report of the Commission on the Implementation of Assembly Decision Assembly/AU/Dec.240(XII) adopted by the Assembly in Addis Ababa, Ethiopia, in February 2009 on the Hissene Habre Case;

2. **ALSO TAKES NOTE** of the final estimated budget for the trial;

3. **EXPRESSES** its regret that in spite of its previous Assembly decision calling on all Member States of the African Union (AU) to make voluntary contributions to the budget of the Hissene Habre case, there has been no positive reactions from Member States;

4. **REITERATES** its appeal to all Member States to contribute to the budget of the trial and extend the necessary support to the Government of Senegal in the execution of the AU mandate to prosecute and try Hissene Habre;

5. **DECIDES** that the AU should make a token contribution to the budget of the trial for a sum to be determined following consultations between the Commission and the Permanent Representatives Committee (PRC);

6. **REQUESTS** the Government of Senegal and the Commission in collaboration with the Partners, particularly the European Union to consider the possibility of organizing a donors' conference as soon as possible;

7. **INVITES** all partner countries and institutions to support this process and participate in the Donors Round Table that will be organized in this regard in Dakar, Senegal during the last quarter of 2009;

8. **REQUESTS** the Commission to closely monitor the implementation of this Decision and to report to the next ordinary session of the Assembly in February 2010; and in this regard, **AUTHORIZES** expenditure for necessary actions from arrears of contributions.

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

**DECISION ON THE AFRICAN UNION COMMISSION STRATEGIC PLAN 2009-2012**
**Doc. Assembly /AU/3(XIII)**

**The Assembly,**

1. **ENDORSES** the recommendations of the Executive Council as contained in its Decision EX.CL./Dec. 481(XIV) adopted at its Fifteenth Ordinary Session in Sirte, Libyan Arab Jamahiriya in June 2009;

2. **ADOPTS** the Strategic Plan 2009-2012;

3. **REQUESTS** the Commission and the other organs in collaboration with Member States, the Regional Economic Communities as well as key partners and stakeholders, including civil society and the private sector to work in synergy in order to implement the 2009-2012 Strategic Plan**;**

4. **REQUESTS** the Commission to draw up appropriate support structures, programs, projects and budgets to ensure efficient and effective implementation of the Strategic Plan 2009-2012.

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

# DECISION ON THE ACCESSION OF THE AFRICAN UNION TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (UNFCCC) AND THE KYOTO PROTOCOL

**The Assembly,**

1. **TAKES NOTE** of the Concept Note on the justifications for the African Union Accession to the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol;

2. **ALSO TAKES NOTE** of the recommendation of the Executive Council as contained in Decision EX.CL/Dec. 501 (XV) adopted in Sirte, Libyan Arab Jamahiriya in June 2009;

3. **AUTHORIZES** the African Union to accede to United Nations Framework Convention on Climate Change and the Kyoto Protocol and **REQUESTS** the Commission to take all necessary measures to expedite the process of accession and to report to the next ordinary session of the Executive Council in January/February 2010.

**REPORT ON THE ELECTION OF MEMBERS OF THE AFRICAN UNION COMMISSION ON INTERNATIONAL LAW**
**Doc.EX.CL/534(XV)**

**The Assembly,**

1. **TAKES NOTE** of the results of the elections conducted by the Executive Council;

2. **DECIDES** to appoint the persons listed hereunder as members of the African Union Commission on International Law as elected by the Fifteenth Ordinary Session of the Executive Council in Sirte, Libyan Arab Jamahiriya:

| Names | Country | Term of Office |
|---|---|---|
| Mr. Rafaa Ben ACHOUR | Tunisia | 3 years |
| Mr. Ebenezer APPREKU | Ghana | 5 years |
| Mr. Nkurunziza DONATIEN | Burundi | 3 years |
| Mr. Minelik Alemu GETAHUN | Ethiopia | 5 years |
| Mr. Filali KAMEL | Algeria | 5 years |
| Ms. Lilian Bokeeye MAHIRI-ZAJA | Kenya | 3 years |
| Mr. Adelardus KILANGI | Tanzania | 5 years |
| Mr. Kholisani SOLO | Botswana | 3 years |
| Mr. Blaise TCHIKAYA | Congo | 5 years |
| Mr. Atanazio Kayafa TEMBO | Malawi | 3 years |
| Mr. Cheikh Tidiane THIAM | Senegal | 5 years |

**DECISION ON THE PROCLAMATION OF 2010 "INTERNATIONAL YOUTH YEAR"**
**Doc. Assembly/AUI15 (XIII) Add.1**

**The Assembly,**

1. **RECOGNISES** the primordial role of the youth and the need for their participation in forging the future of humankind;

2. **RECALLS** the African Youth Charter adopted on 20 June 2006 by the Seventh Ordinary Session of the Assembly held in Banjul, The Gambia;

3. **ALSO RECALLS** the Strategic Framework of Action of the 2004 New Partnership for Africa's Development (NEPAD) Youth Programme which aims at youth capacity building and development;

4. **COMMENDS** Member States and the Commission for the activities undertaken as part of the celebration of the African Youth Year, and the efforts deployed towards the entry into force of the African Youth Charter;

5. **ALSO COMMENDS** His Excellency Zine El Abidine BEN ALI, President of the Republic of Tunisia, for his proposal to proclaim 2010 "International Youth Year" and to hold during the said year, under the auspices of the United Nations and with the assistance of the relevant international organizations, a World Youth Congress to be attended by youth from across the world to discuss issues of interest to the youth, and which should lead to the adoption of an International Pact that would establish the unequivocal attachment of the youth of the world to common universal values;

6. **REQUESTS** all Member States and the African Group in New York to give their firm support to efforts geared towards the adoption of a draft resolution proclaiming 2010 "International Youth Year" to be submitted to the Sixty-Fourth Session of the United Nations (UN) General Assembly in September 2009;

7. **APPEALS** to all Member States of the UN and other international organizations to support this initiative and contribute to its adoption when it is tabled before the UN General Assembly;

8. **REQUESTS** that the Commission follows up on the implementation of this decision and report to the Ordinary Session of the Assembly in 2011.

# DECISION ON THE AFRICAN INVESTMENT BANK
# Doc. EX.CL./514 (XV)

**The Assembly,**

1. **TAKES NOTE** of the recommendations of the Second African Union (AU) Commission – United Nations Economic Commission for Africa (UNECA) Joint Conference of African Ministers of Economy, Finance and Planning on the Draft Statutes of the African Investment Bank (AIB), held in Cairo, Egypt in June 2009;

2. **ALSO TAKES NOTE** of the recommendations of the Executive Council on the draft Statutes of AIB, as contained in its decision EX.CL/Dec. 504 (XV) adopted in Sirte, Libyan Arab Jamahiriya, on 1 July 2009;

3. **REQUESTS** the Commission, in consultation with Member States' experts and other stakeholders, to elaborate the planned annexes to the Statutes and present same for consideration and validation at a meeting of legal and financial experts to be organized before October 2009, prior to submission for adoption by the Extraordinary Conference of African Ministers of Economy, Finance and Planning due to take place in November 2009 and thereafter to the next Ordinary Session of the Assembly in January/February 2010 through the Executive Council;

4. **ADOPTS** the Statutes of the African Investment Bank and **CALLS ON** Member States to ratify the Protocol of the African Investment Bank and the Statutes annexed to it.

# DECISION ON THE REPORT OF THE PEACE AND SECURITY COUNCIL ON ITS ACTIVITIES AND THE STATE OF PEACE AND SECURITY IN AFRICA
## Doc. Assembly/AU/6(XIII)

**The Assembly,**

**1.** **TAKES NOTE** of the Report of the Peace and Security Council (PSC) on its activities and the state of peace and security in Africa, including the report of the Panel of the Wise;

**2.** **WELCOMES** the efforts deployed by the current Chairperson of the Union, Brother Leader Muammar Qaddafi, PSC, the Panel of the Wise and other concerned actors to promote peace, security and stability in Africa, as well as the progress achieved in the establishment of the African Peace and Security Architecture, and **EXTENDS ITS FULL SUPPORT** to these efforts. The Assembly **ENCOURAGES** all the concerned parties to intensify their efforts to resolve the crisis and conflict situations in the continent and to consolidate peace where it has been made. The Assembly **ALSO REQUESTS** the Commission to continue to support the on-going processes and mobilize international community assistance to this end;

**3.** **ALSO WELCOMES** the progress achieved in the implementation of the Agreements concluded in 2006 between the Government of Burundi and Palipehutu-FNL. In this regard, the Assembly **CONGRATULATES** the Burundian parties for their political will, as well as the Regional Initiative and the South African Facilitation, for their unwavering support to the peace process. The Assembly **EXPRESSES GRATITUDE** to the international community for its support and **URGES** all concerned actors to invest all efforts to ensure that the 2010 elections are conducted in a peaceful, fair and transparent atmosphere, thus resulting in definitive end to the crisis in Burundi;

**4.** **WELCOMES** the conclusion, on 23 March 2009, of the Goma Agreements between the Government of the Democratic Republic of Congo (DRC), on the one hand, and the National Congress for the Defence of the People (CNDP) and the armed Congolese groups operating in North and South Kivu, on the other. The Assembly **INVITES** the parties to these Agreements to implement them without delay, and **EXPRESSES SATISFACTION** at the restoration of trust and confidence amongst the countries of the region in general, and between the DRC and Rwanda, in particular;

5. **NOTES WITH SATISFACTION** the successful conduct and the outcomes of the Inclusive Political Dialogue (DPI), which took place in Bangui, Central African Republic, from 8 to 20 December 2008, as well as the measures taken to implement the recommendations thereof. At the same time, the Assembly **EXPRESSES ITS SERIOUS CONCERN** at the resurgence of armed attacks and highway banditry, as well as the proliferation of political/military groups in the country. The Assembly **STRONGLY CONDEMNS** these attacks and **CALLS UPON** the concerned armed groups to put an immediate end to their attacks and join the political process, and thus consolidate peace and stability in CAR. The Assembly **APPEALS** to Member States and the international community to provide the financial and technical assistance required to facilitate the effective implementation of the recommendations of the DPI and the socio-economic recovery of CAR;

6. **WELCOMES** the signing of the Agreement of Good Will and Confidence Building for the Settlement of the Problem of Darfur between the Government of The Sudan and the Justice and Equality Movement, and **ENCOURAGES** them to continue the current talks aimed at finding practical ways and means to implement this important instrument for the Darfur peace process, in order to pave the way for discussions on the framework agreement and the cessation of hostilities and, ultimately, discussions on substantive issues. The Assembly **CALLS ON** all the parties to recommit themselves to dialogue and to refrain from any action likely to further complicate the situation;

7. **REITERATES** its strong support for the on-going work of the AU High-Level Panel on Darfur led by Thabo Mbeki, former President of South Africa, aimed at finding a balanced way to address concomitantly the questions of peace, justice and reconciliation, and **URGES** all the Sudanese stakeholders to assume an active role in the proceedings of the Panel. The Assembly **LOOKS FORWARD** to the recommendations of the Panel and is confident that they will greatly assist the on-going efforts to bring about lasting peace and reconciliation in Darfur;

8. **UNDERSCORES** the need for renewed efforts in promoting relations of good neighbourliness and trust between The Sudan and Chad and **CALLS FOR** the scrupulous implementation of the Agreements concluded between the two countries. The Assembly **ENCOURAGES** the efforts deployed to facilitate the normalisation of the relations between Chad and The Sudan, and **URGES** the co-Chairs of the Contact Group to resume its functioning, and thereby conclude

the excellent work that it set in motion within the context of the Dakar Agreement;

**9.** **SUPPORTS** the decisions of the PSC on the unconstitutional changes of Government that occurred in Mauritania, Guinea and Madagascar. The Assembly **WELCOMES** the signing, on 4 June 2009, of a Framework Agreement for a way out of the crisis in Mauritania, **PAYS TRIBUTE** to President Sidi Ould Cheikh Abdallahi for his high sense of the general interest, particularly his voluntary decision to hand over his presidential mandate to the people of Mauritania, thus making a historic contribution to the crisis exit process in the country, **CALLS UPON** the concerned parties to implement their commitments in good faith and in strict compliance with African Union principles on unconstitutional changes of Government and **URGES** AU partners to lend their full support to AU's decisions on this issue. The Assembly **LOOKS FORWARD** to the holding of free, fair and transparent presidential elections, in accordance with the Dakar Framework Agreement;

**10.** **EXPRESSES SATISFACTION** at the efforts deployed by the Economic Community of West African States (ECOWAS) and the AU Commission, as well as by the Chair of the Union, and at the invaluable role being played by the International Contact Group on Guinea, **INVITES** the authorities emanating from the coup d'état to respect their commitments and to bring the transition process to a successful conclusion in keeping with the roadmap agreed by the Guinean parties, and **REQUESTS** AU Member States and the international community to provide the financial and technical assistance needed to prepare and organize the legislative and presidential elections that should conclude the transition;

**11.** **EXPRESSES ITS SERIOUS CONCERN** at the lack of progress in restoring constitutional legality in Madagascar, **SUPPORTS** the elements for a way out of the crisis, as articulated by the International Contact Group on Madagascar at its meeting held in Addis Ababa on 30 April 2009, and **ENCOURAGES** the Chairperson of the Commission to pursue and redouble his efforts to achieve a speedy return to constitutional order, in close consultation with the Southern Africa Development Community (SADC), as well as the United Nations, the Organisation of Francophonie (OIF) and the EU. The Assembly **WELCOMES** the appointment by SADC of former President Joaquim Chissano as its Special Envoy for Madagascar and **LOOKS FORWARD** to the outcome of the planned meeting of the Contact Group on Madagascar before the end of July 2009 to review the situation and mobilize further support for the efforts aimed at ensuring a speedy return to constitutional order;

**12.** **CONDEMNS** in the strongest possible terms the spiral of violence which resulted in the assassination of the President of Guinea Bissau João Bernardo "Nino" Vieira, and his Chief of Army Staff, General Batista Tagme Na Wai, in March 2009, and more recently on 5 June 2009, the assassination of Baciro Dabo, candidate for the presidential election scheduled for 28 June 2009, and of Helder Proença, former Defence Minister. The Assembly **URGES** the armed and security forces to refrain from all interference in political issues, **SUPPORTS** the efforts deployed by the Chairperson of the Commission, including through his Special Envoy for Guinea Bissau, Mr. João Bernardo de Miranda, to backstop the process of stabilization in the country, and **ENCOURAGES** him to pursue these efforts and intensify coordination with ECOWAS and the United Nations so as to achieve a speedy resolution of the crisis in Guinea Bissau;

**13.** **WELCOMES** the progress achieved in Côte d'Ivoire in the implementation of the Ouagadougou Political Agreement (APO) and the Agreements Supplementary to APO, including the presidential decree of 14 May 2009 on the convening of the Electoral College and setting the date for the first round of the presidential election on 29 November 2009. The Assembly **URGES** the Ivorian parties to continue to demonstrate the political will required to create a climate propitious for the presidential elections and to deploy all efforts to honour their commitments. The Assembly **ENCOURAGES** Member States of the African Union and the international community at large to pursue and intensify their support for Côte d'Ivoire;

**14.** **WELCOMES** the significant progress made by President Sheikh Sharif Ahmed in the political process in Somalia, and **URGES** all Somali stakeholders yet to commit to the dialogue, to do so and join the peace process. The Assembly **STRONGLY CONDEMNS** the recent spate of attacks on the Transitional Federal Government of Somalia (TFG) and the civilian population by armed groups and foreign elements bent on undermining the reconciliation process and regional stability, **DEMANDS** that they put an end to such attacks which are tantamount to attempts at unconstitutional change of Government, **EXPRESSES ITS FULL SUPPORT** for the TFG as the legitimate authority in Somalia, and **URGES** the countries of the region, other Member States and the international community as a whole to provide all the necessary support to the TFG to enable it face up to the situation. In particular, the Assembly **EXPRESSES SUPPORT** to the efforts being deployed by IGAD to ensure the viability of the TFG;

**15.** **URGES** AU Member States to provide the necessary military and police personnel to enable AMISOM to reach its authorized strength, **PAYS TRIBUTE** to AMISOM and the Troop Contributing Countries, namely: Burundi and Uganda; **REQUESTS** Member States which have promised to provide troops for AMISOM to honour these promises as soon as possible and **EXPRESSES GRATITUDE** to all the Member States and partners providing support to AMISOM;

**16.** **CALLS ON** the United Nations Security Council, in line with the AU PSC and IGAD communiqués, to take immediate measures, including the imposition of a no-fly zone and blockade of sea ports, to prevent the entry of foreign elements into Somalia, as well as flights and shipments carrying weapons and ammunitions to armed groups inside Somalia which are carrying out attacks against the TFG, the civilian population and AMISOM, and also to impose sanctions against all those foreign actors, both within and outside the region, especially Eritrea, providing support to the armed groups engaged in destabilization activities in Somalia, attacks against the TFG, the civilian population and AMISOM, as well as against the Somali individuals and entities working towards undermining the peace and reconciliation efforts and regional stability;*

**17.** **TAKES NOTE** of the Report of the Commission on the border crisis between Djibouti and Eritrea, as well as the negative evolution of the crisis, as described to the Assembly, **EXPRESSES GRAVE CONCERN** at the total absence of progress regarding the implementation by Eritrea of the successive decisions taken at the 11th and 12th Ordinary Sessions of the Assembly, held respectively in July 2008 and February 2009, as well as resolution 1862 of the UN Security Council regarding the border dispute between Djibouti and Eritrea. The Assembly, once again, **RE-AFFIRMS** its different decisions and resolutions mentioned above and **URGES** Eritrea to urgently and fully comply with the repeated demands of the AU and the international community on the border crisis between Eritrea and Djibouti;

**18.** **EXPRESSES ITS SERIOUS CONCERN** at the mounting insecurity in the maritime spaces around Africa, and Somalia in particular, and **STRONGLY CONDEMNS** all illegal activities in these regions, including piracy, illegal fishing and dumping of toxic waste. The Assembly **WELCOMES** the initiatives undertaken by the Commission to develop a comprehensive and coherent strategy to combat these scourges and **REQUESTS** it to submit reports thereon to the competent organs of the African Union, on a regular basis;

**19.** **WELCOMES** the Report of the Panel established by the AU and the UN to make concrete recommendations on how the UN could support AU-led peace support operations, **UNDERLINES** the need for continued efforts to ensure predictable, sustainable and flexible funding for AU-led peace support operations and **ENCOURAGES** the Commission to continue working closely with the UN Secretariat to follow up on the issue;

**20.** **REITERATES** the need for continued support by the UN to the efforts being deployed by Africa towards the promotion of peace, security and stability. In this respect, the Assembly **STRESSES** the primary responsibility of the UN Security Council in the maintenance of international peace and security.

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*Reservation Entered by Eritrea

# DECISION ON THE PREVENTION OF UNCONSTITUTIONAL CHANGES OF GOVERNMENT AND STRENGTHENING THE CAPACITY OF THE AFRICAN UNION TO MANAGE SUCH SITUATIONS

**Doc. Assembly/AU/7(XIII)**

**The Assembly,**

1. **TAKES NOTE** of the Interim Report the Chairperson of the Commission on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the African Union (AU) to manage such situations, submitted pursuant to Decision Assembly/AU/Dec.220(XII) on the Resurgence of the Scourge of Coups d'état, adopted during the Twelfth Ordinary Session of the Assembly held in Addis Ababa, Ethiopia from 1 to 4 February 2009;

2. **REQUESTS** the Chairperson of the Commission to initiate consultations with the Regional Economic Communities (RECs), the Pan-African Parliament (PAP), the Economic, Social and Cultural Council (ECOSOCC) and other relevant AU organs and institutions on the ways and means of strengthening the capacity of the AU to deal with the scourge of unconstitutional changes of Government and submit, in light of these consultations, as well as relevant international experiences, a final report together with comprehensive recommendations on the matter, to its next Ordinary Session in January/February 2010;

3. **REITERATES**, in the meantime, AU's strong commitment to the provisions of Articles 4(p) and 30 of the Constitutive Act of the African Union, the Protocol Relating to the Establishment of the Peace and Security Council (PSC), the July 1999 Algiers Decision and the July 2000 Lomé Declaration on Unconstitutional Changes of Government. In this respect, the Assembly **URGES** all Member States that have not yet done so to take the necessary steps to sign/ratify the African Charter on Democracy, Elections and Governance adopted by the Eighth Ordinary Session of the Assembly held in Addis Ababa, Ethiopia on 30 January 2007 in order to strengthen the capacity of the AU to deal with the scourge of unconstitutional changes of Government.

# DECISION ON THE REPORT OF THE PANEL OF THE WISE ON STRENGTHENING THE ROLE OF THE AFRICAN UNION IN THE PREVENTION, MANAGEMENT AND RESOLUTION OF ELECTION-RELATED DISPUTES AND VIOLENT CONFLICTS IN AFRICA

**Doc. Assembly/AU/6(XIII) Annex II**

**The Assembly,**

1. **TAKES NOTE** of the Report of the Panel of the Wise on Strengthening the Role of the African Union in the Prevention, Management and Resolution of Election-related Disputes and Violent Conflicts in Africa;

2. **COMMENDS** the Panel of the Wise for having chosen, as part of its thematic reflection for the year 2008 an issue relevant to conflict prevention and peace building in Africa, the problem of election-related disputes and conflicts. The Assembly **CONSIDERS** the report of the Panel as a significant contribution to the implementation of Decision Assembly/AU/Dec.187(X), in which the Tenth Ordinary Session of the Assembly, held in Addis Ababa from 31 January to 2 February 2008, stressed the need to initiate a collective reflection on the challenges linked to the disputes and tensions that often characterize electoral processes in Africa, including the strengthening of African capacity at the national, regional and continental levels to observe and monitor elections;

3. **REQUESTS** the Commission to take all necessary steps to implement the recommendations of the Panel and to report to it regularly on the progress made in this respect.

**DECISION ON THE AFRICAN UNION ACCESSION TO THE UNITED NATIONS CONVENTION TO COMBAT DESERTIFICATION (UNCCD)**
**Doc.EX.CL/512(XV) Add.3**

The Assembly,

1. **RECOGNIZES** the importance of the United Nations Convention to Combat Desertification (UNCCD) in those countries experiencing serious drought and/or desertification, particularly in Africa for the livelihoods of millions of Africans affected by land degradation, desertification and drought;

2. **TAKES NOTE** of the proposal by H.E. President Idriss Deby Itno of the Republic of Chad calling on the African Union to accede to UNCCD;

3. **ALSO TAKES NOTE** of the recommendation of the Executive Council as contained in Decision EX.CL/Dec. 515(XV) adopted in Sirte, Libyan Arab Jamahiriya in June 2009;

4. **AUTHORIZES** the African Union to accede to the United Nations Convention to Combat Desertification (UNCCD).

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

# DECISION TO COMBAT THE PAYMENT OF RANSOM TO TERRORIST GROUPS

**The Assembly,**

1. **EXPRESSES GRAVE CONCERN over the** growing phenomenon of piracy, hostage taking and the resultant demands for ransom;

2. **CONSIDERS** that the payment of ransom constitutes one of the main methods of financing international terrorism;

3. **RECALLS** Resolution 1373 of the United Nations (UN) Security Council on the Financing of Terrorists and Combating Terrorism, as well as Resolution 1267 on the Financing of the Activities of Terrorist Groups;

4. **ALSO RECALLS** the International Convention for the Suppression of the Financing of Terrorism, the International Convention against the Taking of Hostages, the OAU Convention and its Protocol on the Prevention and Combating of Terrorism, and the Algiers Plan of Action for the Prevention and Combating of Terrorism;

5. **REAFFIRMS** its determination to combat terrorism as a threat to international peace and security, and to strive to curb all sources of financing this phenomenon;

6. **ALSO REAFFIRMS** the urgent necessity to consolidate the existing legal arsenal to combat terrorism and to adopt restrictive legal measures to combat the payment of ransom to terrorist groups;

7. **STRONGLY CONDEMNS** the payment of ransom to terrorist groups for hostages to be freed;

8. **REQUESTS** the international community to consider the payment of ransom to terrorist groups a crime;

9. **REQUESTS** the Security Council to adopt a restrictive resolution against the payment of ransom in order to consolidate legal provisions put in place, particularly by resolutions 1373 and 1267, as well as international and African conventions;

10. **FURTHER REQUESTS** the United Nations General Assembly to include this issue in its agenda and to initiate negotiations with a view to elaborating a supplementary protocol to the International Convention for the Suppression of the Financing of Terrorism or to the International Convention against the Taking of Hostages which prohibits the payment of ransom to terrorist groups;

**11.** **ALSO REQUESTS** the Commission to follow up on the implementation of this Decision and to report to the Assembly in June/July 2010.

# DECISION ON THE AFRICAN COMMON POSITION ON CLIMATE CHANGE INCLUDING THE MODALITIES OF THE REPRESENTATION OF AFRICA TO THE WORLD SUMMIT ON CLIMATE CHANGE

**DOC. EX.CL/ 525(XV)**

**The Assembly,**

1. **TAKES NOTE** of the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec. 236(XII) adopted by the Twelfth Ordinary Session of the Assembly in Addis Ababa, Ethiopia in February 2009;

2. **APPROVES** the recommendations of the Executive Council on the African common position on climate change including the modalities of the representation of Africa at the World Summit on climate change scheduled for Copenhagen, Denmark, in December 2009, as contained in its Decision EX.CL/500(XV) adopted in Sirte, Libyan Arab Jamahiriya;

3. **URGES** Member States to vigorously champion the African Common Position on Climate Change;

4. **CALLS UPON** Member States to take note of the schedule of the United Nations Framework Convention on Climate Change (UNFCCC) negotiations and other important meetings towards the Conference of Parties (COP 15) and ensure active participation of the delegated African Negotiators and Experts and that the African common position on climate change is taken into account;

5. **WELCOMES** the offer by H.E President Blaise Compaoré of Burkina Faso to host a World Forum on sustainable development under the theme "Climate Change: Opportunities for Sustainable Development?" scheduled for Ouagadougou Burkina Faso, from 19 to 22 October 2009 as an important step towards preparations for the Copenhagen Summit;

6. **CALLS ON** Africa's development partners to support Africa in its efforts towards implementation of this Decision;

7. **REQUESTS** the Commission to take all the necessary measures to implement this Decision and to report to the Assembly, on a regular basis;

# DECISION ON THE ESTABLISHMENT OF AN AFRICAN DEFENCE COUNCIL
## Doc. Assembly/AU/15(XIII) Add.2

**The Assembly,**

1. **EXPRESSES** its appreciation for the proposal of the Great Socialist People's Libyan Arab Jamahiriya to establish an African Defence Council;

2. **TAKES NOTE** of the importance of the functions of the African Defence Council in predicting possible external threats to the countries and peoples of the continent and alerting them to such threats;

3. **DECIDES** to include the functions of the African Defence Council into the African Union Authority.

# DECISION ON THE ESTABLISHMENT OF THE AFRICAN AGENCY FOR THE PROTECTION OF TERRITORIAL AND ECONOMIC WATERS OF AFRICAN COUNTRIES

**Doc. Assembly/AU/15(XIII) Add.4**

**The Assembly,**

1. **EXPRESSES** its appreciation for the proposal by the Great Socialist People's Libyan Arab Jamahiriya on the establishment of an African Agency to protect regional waters and the economies of African countries;

2. **UNDERSCORES** the need for Africa to have an effective instrument to help countries of the continent to protect its own regional waters and economies and to put an end to the illegal exploitation of the resources and organizing the process of its exploitation for the interest of its own inhabitants;

3. **DECIDES** to include the functions of the African Agency to protect regional waters and the economies of African countries into the functions of the African Union Authority.

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

# DECISION ON THE PREPARATION OF THE G8 SUMMIT
# Doc.EX.CL/508(XV)

**The Assembly,**

1. **WELCOMES** the invitation extended to the Chairperson of the African Union by the current Chairman of the G8 to participate in the July 2009 Summit of the G8 to be held in l'Aquila, Italy;

2. **MANDATES** the Chairperson of the African Union to speak before the G8 Summit on behalf of the Heads of State and Government of the African Union.

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

**DECISION ON THE PREPARATION OF THE G8 SUMMIT**
**Doc.EX.CL/508(XV)**

**The Assembly,**

1. **TAKES NOTE** of the Report of the Chairperson of the Heads of State and Government Implementation Committee of the New Partnership for Africa's Development (NEPAD) (HSGIC) on the preparation of the G8 Summit scheduled for l'Aquila, Italy in July 2009;

2. **REQUESTS** the Chairperson of HSGIC to ensure:

   i. leadership in the G8 process, on behalf of NEPAD; and

   ii. monitoring of the implementation of the commitments of previous G8 Summits and keep Member States regularly informed;

3. **ALSO REQUESTS** the Commission to elaborate, as soon as possible, for the attention of Member States, an exhaustive report on the implementation of the G8 commitments;

4. **FURTHER REQUESTS** the Commission to submit a report on the implementation of this Decision to the next Ordinary Session of the Assembly scheduled for January/February 2010, through the Executive Council.

# DECISION ON THE SITUATION IN ZIMBABWE

**The Assembly**,

1. **WELCOMES** the Report presented by President Jacob Zuma of South Africa, in his capacity as Chairperson of the Southern Africa Development Community (SADC), on efforts being deployed to support the implementation of the Global Political Agreement (GPA) signed by the Zimbabwean parties in Harare in September 2008;

2. **FURTHER WELCOMES** progress made in the implementation of the GPA and **URGES** the Zimbabwean parties to continue to display the necessary political will and determination to ensure the successful conclusion of the on-going efforts;

3. **MAKES ONCE AGAIN AN URGENT APPEAL** to all the concerned members of the international community for the immediate lifting of the sanctions imposed on Zimbabwe in order to facilitate the implementation of the GPA, as well as the socio-economic recovery of the country, and alleviate the suffering of the population;

4. **APPEALS** to Member States and the larger international community to provide the necessary assistance to the Zimbabwean Government, and **REQUESTS** the Commission, working closely with SADC, to pursue the efforts being deployed to that end, as well as those aimed at the immediate lifting of the sanctions imposed on Zimbabwe. In this respect, the Assembly **COMMENDS** SADC and its Member States for the steps taken in support of the implementation of the GPA and the socio-economic recovery of Zimbabwe.

# DECISION ON THE TRANSFORMATION OF THE AFRICAN UNION COMMISSION INTO THE AFRICAN UNION AUTHORITY

## DOC. ASSEMBLY/ AU/4(XIII)

**The Assembly,**

1. **TAKES NOTE** of the Conclusions of the Twelfth Extraordinary Session of the Executive Council on the Modalities for the Implementation of Decision Assembly/AU/Dec.233 (XIII) on the transformation of the African Union Commission into the African Union Authority;

2. **ENDORSES** the said recommendations as amended and adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Libyan Arab Jamahiriya;

3. **REQUESTS** the Commission to take all necessary measures to prepare the following:

   i.) the legal instruments for amendments to the Constitutive Act, the Rules of Procedure of the Assembly, the Executive Council, the Peace and Security Council, the Permanent Representatives Committee (PRC), and the Statutes of the Commission related to the Creation of the African Union (AU) Authority, and in this regard, **REQUESTS** the Commission to convene a meeting of Government Experts to consider them;

   ii.) the structure of the new AU Authority, taking into account the mandate given to the Authority, in collaboration with the PRC;

   iii.) the financial implications of the transformation of the Commission into the AU Authority, in collaboration with the PRC.

4. **FURTHER REQUESTS** the Commission to report on the implementation of this Decision and to submit the necessary legal instruments to the Assembly through the Executive Council at its Ordinary Session in June/July 2010 for consideration, adoption and subsequent ratification by Member States, and in this regard **AUTHORIZES** the expenditures for the necessary actions from arrears of contributions.

**DECISION ON THE REPORT OF HEADS OF STATE AND GOVERNMENT IMPLEMENTATION COMMITTEE ON NEPAD**
**Doc. ASSEMBLY/AU/13 (XIII)**

**The Assembly,**

1. **TAKES NOTE WITH APPRECIATION** of the Report by the Chairperson of the New Partnership for Africa's Development (NEPAD) Heads of State and Government Implementation Committee (HSGIC), H.E. Meles Zenawi Prime Minister of the Federal Democratic Republic of Ethiopia;

2. **ENDORSES** the conclusions of the Twenty-First NEPAD HSGIC Summit;

3. **COMMENDS** the review of the African Union (AU)/NEPAD Action plan 2010-2015 undertaken jointly by the Commission, NEPAD Secretariat, the African Development Bank and the United Nations (UN) Economic Commission for Africa and **ENDORSES** the flagship programmes and projects outlined in the Plan as a means of advancing regional and continental integration;

4. **TAKES NOTE** of Africa's preparations and engagement with G8 Partners towards the G8/Africa Outreach scheduled for L'Aquila, Italy on 9 and 10 July 2009 including the programme for the L'Aquila Summit provided to guide the participation of African Leaders and the four thematic areas for discussion;

5. **WELCOMES** progress made in the dialogue between the G8 African representatives and the African side towards ensuring appropriate follow up and implementation of G8 Summit decisions on Africa and **URGES** the continuation of this dialogue for future G8 Summits, along with concrete concerns identified by Africa, through such systematic approach;

6. **TAKES NOTE** of the efforts to reform the Africa Partnership Forum (APF) and **URGES** stronger commitment by Development Partners to making APF more effective and responsive to African concerns and interests.

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

# DECISION ON MEMBER STATES CONTRIBUTIONS

**The Assembly,**

1. **TAKES NOTE** of the recommendations of the Executive Council on Member States' contributions;

2. **CALLS ON** Member States to pay their contributions in a timely manner;

3. **REQUESTS** the Commission to reduce the number of missions it undertakes in light of the global financial crisis;

4. **ALSO REQUESTS** the Commission to hold discussions with the Republic of Seychelles to work out a plan for the rescheduling of its arrears of contribution;

5. **FURTHER REQUESTS** the Commission to undertake consultations with all Member States affected by sanctions so as to find an acceptable solution with regard to payment of their arrears;

6. **DECIDE**S that the temporary exemptions granted to Burundi and Sierra Leone from sanctions be maintained so long as they honour their agreed payment schedule and **URGES** these Member States to continue to comply with the agreed rescheduling plan;

7. **REQUESTS** the Commission to draw up an exhaustive inventory on the status of partners' contributions to enable Member States to be appraised of the exact status of such contributions, the programmes financed and the amounts thereof;

8. **ALSO REQUESTS** the Executive Council to review the scale of the assessment of contributions by Member States in conformity with its Decision Ex/CL/Dec.223(VII) adopted by the Seventh Ordinary Session of the Executive Council in Sirte, Libyan Arab Jamahiriya in July 2005;

9. **DECIDES** to impose sanctions on the following Member States in accordance with Article 126 (a) of the Financial Rules and Regulations of the African Union:

    i.) Eritrea

    ii.) Democratic Republic of Congo

    iii.) Seychelles

# DECISION ON THE HOLDING OF A SPECIAL SESSION ON CONSIDERATION AND RESOLUTION OF CONFLICTS IN AFRICA

**The Assembly,**

1. **TAKES NOTE** of the invitation by Brother Leader Muammar El-Gaddafi on the holding of a Special Session of the Assembly of the Union in Tripoli, Libyan Arab Jamahiriya on 31 August 2009 on the margins of the celebrations marking the 40th Anniversary of the Libyan Revolution;

2. **ACCEPTS** with appreciation the invitation to this Special Session, which will be devoted to the consideration and resolution of conflicts in Africa.

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

**DECISION ON THE NEW AFRICAN UNION FLAG**
**DOC/ ASSEMBLY/AU/10(XII)**

**The Assembly,**

1. **TAKES NOTE** of the Report of the Commission on the new African Union Flag;

2. **EXPRESSES** its appreciation to the Panel of Experts that conducted the selection process, as well as all the participants in the competition;

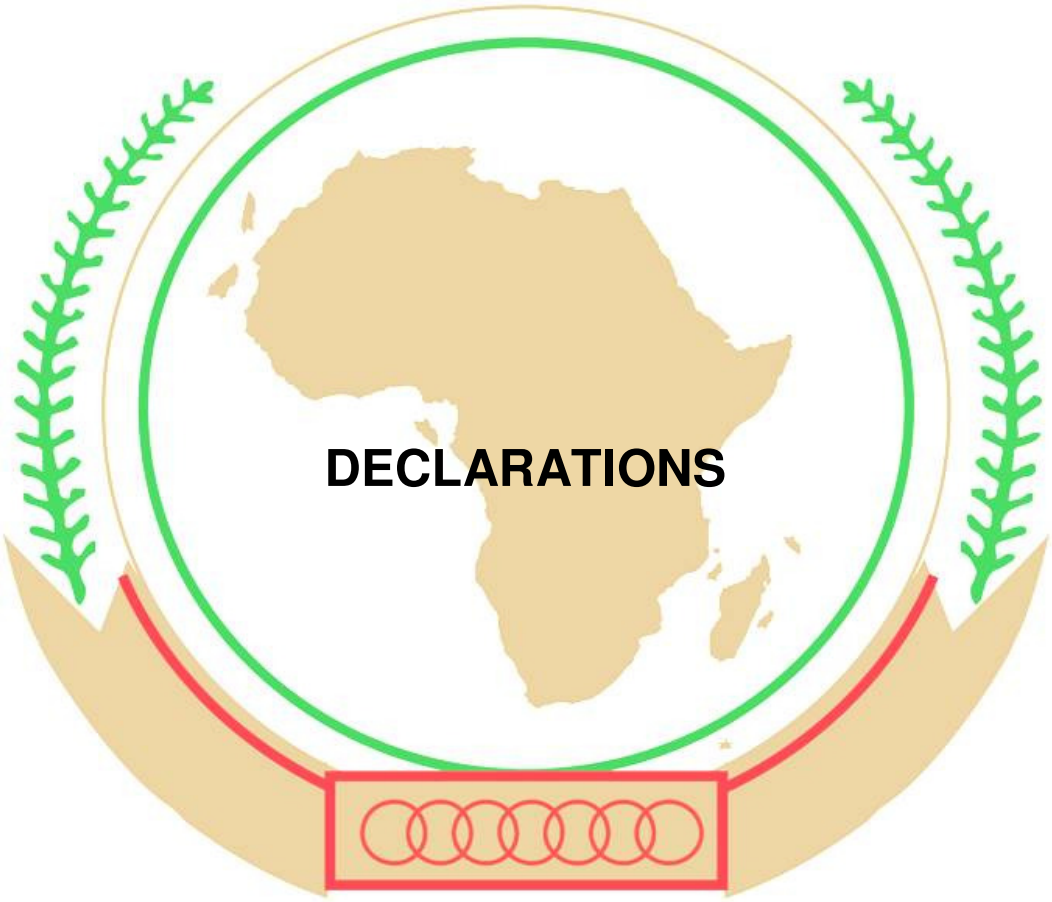
3. **DECIDES** to adopt proposal No. **3B** by Ato Yadessa Zewge Bojia of Ethiopia as the new flag of the African Union and warmly congratulates him, and **DECIDES** to award him the cash prize of United States Dollars ten thousand (US$ 10,000);

4. **REQUESTS** the Commission to take all necessary measures to reproduce the new flag with all the islands represented, distribute it to all Member States and popularise it among partner countries and other parts of the world;

5. **FURTHER REQUEST** the Commission to take the necessary measures for the registration of the new flag with the World Intellectual Property Organization (WIPO) and **DIRECTS** that all the financial implications for the above activities be met from arrears of contributions;

6. **DECIDES** that the new flag will be launched officially during the next Ordinary Session of the Assembly in January/February 2010.

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009



# DECLARATIONS

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

# DECLARATION ON LAND ISSUES AND CHALLENGES IN AFRICA

**WE**, the Heads of States and Government of the African Union, meeting at our Thirteenth Ordinary Session in Sirte, Libyan Arab Jamahiriya, from 1 to 3 July 2009;

**REAFFIRMING** the commitments we have made to poverty eradication with the view to raising the living standards of our peoples and the wellbeing of our future generations;

**RECOGNISING** the centrality of land to sustainable socio-economic growth, development and the security of the social, economic and cultural livelihoods of our people;

**AWARE** of the rich heritage of Africa's land and related resources especially its unique natural eco-systems;

**FURTHER AWARE** of the diversity and complexity of the systems under which land and related resources are held, managed and used;

**NOTING** the diversity of issues and challenges facing access to, use and management of land resources; and the threat relating to land and related resources including those arising from changes in the global, political and economic environment;

**CONSCIOUS** of the need for strong systems of land governance rooted in principles of sustainability in an effort to ensure preservation, protection and renewability of Africa's land and related resources;

**FURTHER NOTING** the steady progress which our countries have made in the initiation, review, revision or comprehensive development of land policies and their implementation in order to ensure that their various land sectors play an important role in development;

**WELCOMING** the joint initiative taken by the African Union Commission, the United Nations Economic Commission for Africa (UNECA) and the African Development Bank (AfDB) with support from development partner organisations, in drafting a continental framework and guidelines on land policy development and implementation for use as a resource by AU Member States in their efforts to improve the performance of their various land sectors;

**ACKNOWLEDGING** the comprehensive consultations and discussions that have been conducted and the experts inputs made in the course of the preparation of the continental Framework and Guidelines on Land Policy in the five regions of Africa;

**CONSIDERING** the Report of the African Union Joint Conference of Ministers responsible for Agriculture, Land and Livestock held in Addis Ababa, Ethiopiafrom 22 to 24 April 2009, and the recommendations therein endorsed by the Executive Council;

**UNDERTAKE TO**:

1. prioritise, initiate and lead land policy development and implementation processes in our countries, notwithstanding the extent of multi-stakeholder contribution to such processes involving also civil society, private sector;

2. support the emergence of the institutional framework required for the effective development and implementation of land policy and implementation;

3. allocate adequate budgetary resources for land policy development and implementation processes, including the monitoring of progress.

**RESOLVE TO**:

1. ensure that land laws provide for equitable access to land and related resources among all land users including the youth and other landless and vulnerable groups such as displaced persons;

2. strengthen security of land tenure for women which require special attention.

**REQUESTS** the Commission in collaboration with the Regional Economic Communities, UNECA, AfDB and other partners to:

1. to work towards the establishment of an appropriate institutional framework to provide coordination of follow up activities and facilitate mutual learning by Member States as they develop/review their land policies in accordance with the Framework and Guidelines;

2. take measures for the establishment of a fund to support follow up activities to promote land policy development and implementation;

3. undertake measures for the establishment of mechanisms for progress tracking and periodic reporting by Member States on progress achieved.

**INVITES** the Regional Economic Communities to:

1. convene periodic regional platforms to facilitate experience sharing, lessons learnt and dissemination of best practices in land policy formulation, implementation and monitoring based on members states experiences;

2. appropriately capture and address issues of land policies within their respective common agricultural policy framework.

**URGES** Member States to:

1. review their land sectors with a view to developing comprehensive policies which take into account their peculiar needs;

2. build adequate human, financial, technical capacities to support land policy development and implementation;

3. take note of the steps outlined in the Framework and Guidelines on Land Policy in Africa for their land policy development and implementation strategies.

**REQUESTS** the Commission, in collaboration with UNECA and AfDB, to carry out studies on the establishment of an appropriate institutional framework that can support Member States in their efforts towards reviewing, developing and implementing land policies including mechanisms for progress tracking and reporting, as well as for the establishment of an African Fund for Land Policy, and report thereon to the ordinary session of the Assembly in June/July 2010.

# SIRTE DECLARATION ON INVESTING IN AGRICULTURE FOR ECONOMIC GROWTH AND FOOD SECURITY
## Doc. ASSEMBLY/AU/12 (VIII)

**WE**, the Heads of State and Government of the African Union, meeting at our Thirteenth Ordinary Session in Sirte, Libyan Arab Jamahiriya from 1 to 3 July 2009,

**RECALLING** within the context of the theme of the Thirteenth AU Summit, Africa's collective responsibility and commitment to advance Africa's Agriculture with the Comprehensive Africa Agriculture Development Programme (CAADP) as its framework for bringing about the required institutional and policy reforms, capacity development and increased investments thereby enhanced agricultural performance with direct impact on food security and socio-economic growth;

**COMMENDING** Member States advancing in embracing CAADP implementation and the facilitating support being provided by the Commission, the NEPAD Secretariat, Regional Economic Communities and development partners;

**WELCOMING** the strong support to and alignment with the CAADP agenda by a growing number of bilateral and multilateral development agencies;

**AWARE** and **CONCERNED** that hunger is a drain on economic development; a threat to global security; a barrier to human dignity and to the improvement of the standard of living of the people, and therefore every effort at national, regional, continental including at global levels should be made as a matter of urgency to achieve the Millennium Development Goal (MDG) target on reducing hunger in Africa;

**ACKNOWLEDGING** the importance of proactive measures and interventions to increase financing for Africa's Agriculture and continue to improve sector policies for accelerated economic growth and the attainment of the continent's food security targets;

**AWARE** that smallholder friendly value-chain development and access to markets and to financial services should be key elements to enhancing financial sustainability and growth of the agriculture sectors and related wealth creation;

**MINDFUL** of the fact that climate variability and climate change is and will be key factor to the agricultural development agenda and that it is imperative for Africa at all levels to raise productivity and improve resilience in agricultural systems;

**NOTING** that land degradation undermines food-security; increases the vulnerability of African economies to climate variability and change while, on the other hand sustainable

agricultural land management approaches can raise productivity and improve Africa's resilience to climate hazards;

**ACKNOWLEDGING** the potential contribution to investment financing through remittances (estimated at US$17 billion/year and which could raise to US$45 billion/year), knowledge, skills and related networks that could be realized by facilitating and harnessing increased participation of Africa's diaspora in Africa's development agenda;

**NOTING** the importance to identify most vulnerable sections of society including women, children and the physically challenged and ensure that their special needs to participate in economic activities are embraced and supported in agricultural development strategies and investment programmes;

**WELCOMING** the commitment of the United Nations High Level Task Force (UN-HLTF) to join other bilateral and multilateral agencies to strengthen CAADP and to operationalise the Global Plan of Action on Food Security (GPAFS) through CAADP in Africa;

**CONSIDERING** the Report of the African Union Joint Conference of Ministers responsible for Agriculture, Land and Livestock held in Addis Ababa, Ethiopia, from 22 to 24 April, 2009, and the recommendations therein endorsed by the Executive Council;

**RECALLING** and **RELATING** to past rural economy and agricultural development AU Summit decisions and declarations,

**UNDERTAKE TO:**

1. Meet our individual and collective responsibilities and commitments to provide necessary leadership on comprehensive and Africa-wide approaches to address the root causes of poverty and hunger, and accelerate progress towards achieving the growth and budgetary targets set out in the CAADP Agenda and Framework;

2. Support relevant policy and institutional reforms that will stimulate and facilitate accelerated expansion of agriculture related market opportunities by modernizing domestic and regional trading systems, removing obstacles to trans-border trades, and increasing access by smallholder farmers to inputs and the necessary commercial infrastructure and technical skills to fully integrate them into the growing value chains;

3. Develop and implement continental and regional level strategies that embrace climate change mitigation and adaptation measures as integral components in our agriculture development agendas and ensure that Africa's positions and interests are recognized in the global dialogue on climate change, starting with the forthcoming Post-Kyoto protocol negotiations;

4. Expand investments in specially targeted social protection policies and measures through predictable public support best suited for the local circumstances with special focus on most vulnerable and poor sections of society including gender programmes;

**REQUEST** the Commission, the NEPAD Secretariat and the Regional Economic Communities (RECs) to:

5. Continue to mobilise the necessary technical expertise and financial resources to support capacity development and related policy reforms to accelerate CAADP implementation in all Member States, including the signing country CAADP Compacts indicating the policy measures, investment programs, and required funding to achieve the six percent ( 6%) growth and ten percent (10% ) budget share targets for the agricultural sector;

6. Create the tools and instruments to mobilize expertise and build capacity to support, within the CAADP Framework, agricultural and other national planning entities to:

   i. Support countries build capacity in project preparation;

   ii. Integrate and strengthen the use of tools to improve transparency of spending through Periodic Public Expenditure Reviews, Public Expenditure Tracking Surveys, and output/results-based budgeting;

   iii. reform and strengthen spending patterns, service delivery modalities, and budget execution in general to improve efficiency and effectiveness of spending in the agricultural sector.

7. Undertake major initiatives within the context of CAADP to modernize regional trading systems and promote regional integration by:

   i. Establishing regional commodity exchanges to facilitate trade;

   ii. Setting up mechanisms to monitor and enforce the application of regional trade arrangements and policies;

iii. Building regional and country level capacities for quality management and certification services;

iv. Strengthening capacity in international trade advocacy and negotiations skills.

**8.** Facilitate the creation of Agricultural investment and enterprise development platforms in member states and the organization of Agribusiness joint venture fairs to:

i. promote the required public-private partnerships and business to business alliances to accelerate the development of competitive value chains and raise market shares in domestic, regional, and foreign export markets;

ii. foster commercial bank financing for all segments of the agribusiness value chain, in particular support the expansion of financial services to the rural areas.

**9.** Accelerate the emergence of cost competitive input procurement and delivery systems by:

i. fast tracking the implementation of the African Fertiliser Financing Mechanism, in particular making the required contributions to bridge the US$ 2.5 million gap for its immediate operationalisation;

ii. scaling up ongoing regional seeds alliances to ensure broad access by smallholder farmers.

**10.** Facilitate increased investment in Agriculture Research and Development (ARD) and support to strengthening Africa's scientific and technical information and knowledge base, including:

i. the creation of centres of excellence for Agricultural Research and Development along the value chain of strategic agricultural commodities and animal resource products;

ii. the establishment, in rural areas, of vocational training and workforce development systems to upgrade smallholder farming skills, raise long

term competitiveness, and encourage the youth to participate in the agriculture sector.

**11.** Establish a "South to South Forum for Agricultural Development in Africa" and expand engagement with the Diaspora through Commission's Citizens and Diaspora Directorate (CIDO) to unlock additional sources of technology and investment financing in African agriculture;

**12.** Develop an African Agricultural-based climate change mitigation and adaptation framework providing strategic guidance and tools to national and regional level initiatives along programmatic approaches on technology transfer, knowledge management and financing to scale up adoption of sustainable land and agricultural water management;

**13.** Rally expert input and scientific knowledge to advance the recognition and integration of carbon sequestration on agricultural landscapes and carbon financing in global climate change mitigation and adaptation measures through the Post-Kyoto negotiations and other global and regional dialogue;

**14.** Establish an inter-Ministerial mechanism bringing together Ministries of Agriculture, Environment, and Water to advance inter-sectoral approach in addressing the climate change agenda;

**15.** Facilitate analytical support to member states on integration of gender in agriculture development agenda.

**URGE** Member States to:

**16.** Recommit to the Maputo Declaration of allocating at least ten (10) percent of their annual national budgets to the agriculture sector by 2015 to articulate the important role of agriculture in national development strategies for adequate resource allocation;

**17.** Scale up efforts to accelerate the implementation of the CAADP agenda at the country level, in particular the organization of country roundtables and the signing of CAADP compacts.

**CALL UPON** International Development Partners, and regional and non-regional stakeholders to:

**18.** Harmonise and align their investment support to African Agriculture through and along national and regional CAADP priorities, and in particular, join member

governments in mobilizing the necessary funding to meet the resource requirements of the priority investment programs identified in the regional and country CAADP compacts,

**19.** Ensure that agriculture financing initiatives are enhanced through African institutions and made accessible at country level.

**REQUEST** the Commission and the NEPAD Secretariat, in collaboration with the African Development Bank and other partners, to work with member states on the implementation of the actions contained in this Declaration and report on progress to the Ordinary Session of the Assembly in June/July 2010.

**ALSO REQUESTS** Regional and non-regional stakeholders to ensure that the African Development Bank and other African financial institutions have the necessary resources to deliver the requested assistance.

# DECLARATION ON THE CONFEDERATIONS CUP AND THE PREPARATIONS TOWARDS THE 2010 FIFA WORLD CUP

**WE,** the Heads of State and Government at the Meeting of our Thirteenth Ordinary Session in Sirte, Great Libyan Arab Jamahiriya, from 1 to 3 July 2009;

**RECALLING** the declaration we made at our January 2007 Summit, in Addis Ababa, Ethiopia to declare the ushering of the 2010 FIFA world Cup as an African Event;

**APPRECIATING** the briefing by South Africa on its excellent hosting of a safe and secure 2009 FIFA Confederations Cup whose participation included South Africa as the host, Italy as the 2006 World Cup Champions, Spain as the Euro 2008 Champions, USA as the 2007 COCACAF Gold Cup Champions, Brazil as the 2007 Copa America Champions, Iraq as the 2007 AFC Asian Cup Champions, Egypt as the 2008 African Cup of Nations Champions and New Zealand as the 2008 OFC Nation Cup Champions;

**FURTHER APPRECIATING AND AFFIRMING** South Africa's state of readiness to host a memorable 2010 FIFA World Cup, for the first time in the history of the African Continent, which is a legitimate recognition of Africa's contribution to the advancement of world sports;

**PURSUANT** to our commitment to ensuring the success of the 2010 World Cup tournament on our Continent;

**RECOGNIZING** the role of sport in the promotion of peace, solidarity, social cohesion and sustainable socio-economic development;

**FURTHER RECOGNIZING** the supportive role of sports in Africa's effort to achieve the Millennium Development Goals;

We therefore:

**CONGRATULATE** South Africa for its successful hosting of the Confederations Cup;

**REQUEST** the Commission to cooperate with South Africa's Local Organizing Committee of the World Cup to ensure the effective implementation and follow up of the Africa Legacy programme including the establishment of a web link and to report on the progress of the preparations to the next Ordinary Session of the Assembly in January/February 2010;

**REAFFIRM** our commitment to make 2010 World Cup a truly Africa World Cup, by committing our countries to the full and substantive involvement in the preparations leading to the 2010 World cup;

**COMMIT** ourselves to provide all round support to the Government and people of South Africa in their efforts to organize the 2010 World Cup tournament successfully and efficiently;

**URGE** FIFA, CAF and the rest of the FIFA Regional Associations, the International Sporting Community, the African Diaspora and friends of Africa to provide the necessary support to South Africa in its preparations for the epic 2010 World Cup;

**REQUEST** South Africa to update the Assembly on the final preparations of hosting the world Cup at its next Ordinary Session in January/February 2010.

# DECLARATION ON THE CELEBRATION OF THE 100TH BIRTHDAY ANNIVERSARY OF KWAME NKRUMAH

**WE**, the Heads of State and Government meeting at our Thirteenth Ordinary Session in Sirte, Libyan Arab Jamahiriya from 1 to 3 July 2009, hereby **CALL ON** all Member States to celebrate on 21 September 2009, the 100th Birthday Anniversary of President Kwame Nkrumah of Ghana, an advocate of Pan-Africanism who played a vital role in the establishment of our Continental Organization and the liberation of the Continent.

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

# DECLARATION OF THE ASSEMBLY OF THE UNION ON THE COUP D'ÉTAT IN HONDURAS

**WE** the Heads of State and Government of the Assembly of the Union meeting at our Thirteenth Ordinary Session, held in Sirte, Great Libyan Arab Jamahiriya, from 1 to 3 July 2009 were briefed on the situation in Honduras.

**STRESSING** that Africa, which continues to suffer from the scourge of unconstitutional changes of government and maintains a strong partnership, based on shared values, with Latin America and the Caribbean, has a keen interest in the early resolution of the crisis, as well as on the respect of legality and democratic principles.

**NOTING** that the coup d'état that took place in that country on 28 June 2009 was a clear violation of the provisions of the Inter-American Democratic Charter, **STRESSES** the need to ensure the restoration of constitutional order and the respect for legality and democratic norms.

**WELCOMES** the unanimous rejection by the region of this unconstitutional change of government and **EXPRESSES** its full support to the efforts being undertaken by the Organization of American States (OAS).

**CONDEMNS** the coup d'état that took place and that led to the overthrow of the democratically-elected President Jose Manuel Zelaya.

**CALLS ON** all the political and social actors of Honduras to embark on a constructive dialogue to peacefully resolve the problems facing their country, with the view to strengthening democracy and the rule of law in the country.

AFRICAN UNION

الاتحاد الأفريقي

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# ASSEMBLY OF THE AFRICAN UNION
## Fourteenth Ordinary Session
## 31 January – 2 February 2010
## Addis Ababa, ETHIOPIA

**Assembly/AU/Dec.268 – 288 (XIV)**
**Assembly/AU/Decl.1-3 (XIV)**
**Assembly/AU/Res. 1-2 (XIV)**

# DECISIONS, DECLARATIONS AND RESOLUTIONS

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

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| 2. | Assembly/AU/Dec.269(XIV) | Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacities of the African Union to Manage such Situations - Doc. Assembly/AU/4(XIV) | 5 |
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# DECISION ON THE REPORT OF THE PEACE AND SECURITY COUNCIL ON ITS ACTIVITIES AND THE STATE OF PEACE AND SECURITY IN AFRICA Doc. Assembly/AU/3(XVI)

**The Assembly,**

1. **TAKES NOTE** of the Report of the Peace and Security Council on its Activities and the State of Peace and Security in Africa;

2. **RECALLS** the Tripoli Declaration on the Elimination of Conflict and the Promotion of Sustainable Peace in Africa [SP/ASSEMBLY/PS/DECL (1)] and the Plan of Action [SP/ASSEMBLY/PS/MAP], adopted at its Special Session held in Tripoli, Great Libyan Arab Jamahiriya, on 31 August 2009;

3. **WELCOMES** efforts by the African Union (AU) and the Regional Economic Communities (RECs), with the support of the international community, for the effective establishment of the continental Peace and Security Architecture, as well as for the prevention and resolution of conflicts and the consolidation of peace. The Assembly **NOTES WITH SATISFACTION** the progress made in this regard and **URGES** all stakeholders to persevere in their efforts and work towards the effective implementation of the Tripoli Plan of Action;

4. **EXPRESSES CONCERN** over the impasse in the implementation of the Maputo Agreement of 8 and 9 August 2009, and the additional Act of Addis Ababa of 6 November 2009, for the return to constitutional order in Madagascar. The Assembly **NOTES** the crisis-exit proposals presented to the Malagasy Parties by the Chairperson of the Commission on 20 and 21 January 2010 in Antananarivo. The Assembly **ALSO URGES** the AU and the Southern African Development Community (SADC) to continue to work together with relevant continental, regional and international institutions in assisting the negotiation process in Madagascar;

5. **REITERATES** the importance of SADC in continuing to lead the mediation process in the country, given its regional responsibilities and comparative advantages, as well as the role of H.E. Joaquin Chissano, former President of Mozambique, as facilitator. **REQUESTS** the Peace and Security Council (PSC) to meet at the appropriate time to review the situation and take steps required, on the basis of the relevant AU instruments;

6. **WELCOMES** the continuing efforts to consolidate the national reconciliation process in The Comoros and the promotion of stability, including the holding of elections to the National Assembly and to the Councils of the three autonomous islands on 6 and 20 December 2009, and **ENCOURAGES** the Comorian parties, particularly the Union authorities, to pursue a consensual approach in the implementation of institutional reforms introduced by the new Constitution adopted by referendum on May 17 2009, in order to preserve the achievements made;

7. **REAFFIRMS** the AU's full support to the Transitional Federal Government (TFG) of Somalia and its efforts towards the implementation of the Djibouti Peace Process; **REITERATES ITS STRONG CONDEMNATION** of the continued attacks and other terrorist acts being perpetrated against the TFG, the Somali people and the African Union Mission in Somalia (AMISOM) by the armed groups bent on undermining the peace and reconciliation process, as well as the actions of Al Shabaab to deny the needy population access to humanitarian aid and services;

8. **WELCOMES** the adoption, by the United Nations (UN) Security Council on 23 December 2009, of resolution 1907(2009), which imposes sanctions on Eritrea, namely an arms embargo, travel restrictions and a freeze on the assets of political and military leaders for, among other things, providing political, financial, and logistical support to armed groups engaged in undermining peace and reconciliation in Somalia and regional stability;

9. **STRESSES** the need to pursue vigorously the effective implementation of Resolution 1907 (2009); **CALLS UPON** the UN Security Council Sanctions Committee to urgently designate the relevant Eritrean military and political leaders and other persons and entities as required, to allow for an effective sanctions regime to be implemented, and **URGES** the Security Council to speedily act on its earlier request for the imposition of a no-fly zone and the blockade of sea ports to prevent the entry into Somalia of foreign elements and the supply of logistical and other support to the insurgency;

10. **REITERATES ITS APPRECIATION** to the Troop Contributing (namely, Burundi and Uganda) and Police Contributing Countries to AMISOM, and **WELCOMES** the pledge by Djibouti to contribute forces to AMISOM, as well as the pledge by Burundi and Uganda to each deploy one additional battalion, and **REITERATES ITS CALL** to Member States to provide the troops required for AMISOM to reach its authorized strength. The Assembly **STRESSES** the need for predictable, reliable and timely provision of resources to the AU by all partners, and **REITERATES ITS CALL** to the Security Council to take the necessary steps for the United Nations to play a role commensurate with the gravity and complexity of the situation on the ground;

11. **EXPRESSES CONCERN** at the continued impasse in the peace process between Ethiopia and Eritrea and **REITERATES** the readiness of the AU to assist the two countries to overcome, through dialogue the current stalemate, normalize their relations and lay the foundation for a comprehensive and durable peace between them;

12. **REITERATES** its earlier decisions on the relations between Djibouti and Eritrea, and its grave concern at the total absence of progress regarding the implementation by Eritrea of these decisions, as well as of resolution 1862 (2009) and 1907 (2009), and **URGES** Eritrea to urgently and fully comply with the demands contained therein;

13. **WELCOMES** the remarkable progress in the peace process in Burundi, and **URGES** all Burundian parties to continue their efforts, including working to create conditions conducive to the organization and holding of general elections between May and September 2010. The Assembly **ALSO WELCOMES** the improved security situation in eastern Democratic Republic of Congo (DRC) and the continuing efforts to consolidate peace in the country and to strengthen relations between the DRC and Rwanda. The Assembly **REITERATES ITS CALL** to the international community to provide the support required for post-conflict reconstruction and peace building in Burundi and DRC, and in this respect, **WELCOMES** the Multidisciplinary Assessment Mission deployed by the AU Commission to these two countries within the framework of monitoring the implementation of relevant decisions of the PSC and the Tripoli Plan of Action;

14. **NOTES** that The Sudan will hold national elections in April 2010 and the referendum on self determination for Southern Sudan in January 2011; **REITERATES** its full support to The Sudan and hails the steps taken thus far to ensure free and fair elections. The Assembly **FURTHER NOTES** with satisfaction the progress made in the humanitarian and security situation in Darfur and **CALLS FOR** the intensification of efforts so as to reach a lasting political settlement to allow Darfurians to participate fully in the upcoming elections;

15. **ALSO NOTES** the need to intensify current initiatives to assist the people of The Sudan to achieve lasting peace and stability. In this regard, the Assembly **URGES** Member States, the Commission and international partners to support and cooperate with these initiatives, including the AU Ministerial Committee on Post-Conflict Reconstruction and Development (PCRD) in The Sudan.

16. **WELCOMES** the report of the AU High Level Panel on Darfur (AUPD), and the recommendations contained therein, which provide a clear and sound Road Map for achieving peace, justice, reconciliation and healing in Darfur, and thereby contribute to the overall objective of promoting sustainable peace and stability in The Sudan, **ENDORSES** the communiqué adopted in this respect by the PSC at its

207th meeting held in Abuja, Nigeria, on 29 October 2009, and **REITERATES** that the AUPD recommendations shall be the basis of AU engagement in Darfur and its interaction with its international partners. The Assembly **EXPRESSES ITS FULL SUPPORT** to the AU High Level Implementation Panel (AUHIP) on Sudan and **STRESSES** the need for all stakeholders to extend full cooperation to the Panel in the discharge of its mandate. In this context, the Assembly **REITERATES** the AU's support to the efforts of the Joint AU/UN Mediation and the facilitation provided by Qatar. The Assembly EXPRESSES its appreciation to all African countries, such as Libya, that are contributing to the search for peace in Darfur, in particular the process of unification of the Darfurian movements;

17. **ALSO WELCOMES** the appointment of Professor Ibrahim Gambari as the AU/UN Joint Special Representative and the Head of the United Nations-African Union Mission in Darfur (UNAMID);

18. **FURTHER WELCOMES** the progress made towards appeasement and normalization of relations between Chad and The Sudan, through the signing in N'Djamena, on 15 January 2010, of the Agreement on Normalization between Chad and the Sudan, as well as the Additional Protocol on the Securitization of Borders, and **ENCOURAGES** the two countries to maintain dialogue and implement the commitments made;

19. **NOTES WITH SATISFACTION** the significant progress made in the implementation of the recommendations of the Inclusive Political Dialogue in the Central African Republic (CAR) and **URGES** the Central African stakeholders to persevere in their efforts, particularly by providing the necessary cooperation towards the implementation of the disarmament, demobilization and reintegration programme (DDR) and working towards the establishment of conditions conducive to the holding of the free, fair and transparent legislation and presidential elections slated for April and May this year. The Assembly **APPEALS ONCE AGAIN** to the international community to lend the necessary support for the consolidation of peace, including the implementation of the Programme for the Reform of the Security Sector (RSS), and the socio-economic recovery of the CAR;

20. **URGES** the Ivorian parties to redouble efforts to successfully complete the peace and reconciliation process in their country, including the holding, within the set timeframe, of legislative and presidential elections which will conclude the process aimed at bringing the crisis to an end;

21. **TAKES NOTE** of the ongoing mediation process in Niger and **COMMENDS** the efforts of General Abdulsalami Abubakar, former Head of State of Nigeria and Mediator on the Inter-Nigerien Dialogue. The Assembly **CALLS ON** all parties to fully cooperate with the Mediator, in particular during the upcoming meeting scheduled to be held in Niamey, Niger, on 4 February 2010;

22. **NOTES WITH SATISFACTION** the continued progress being made towards post-conflict reconstruction and peace-building in Liberia, and **URGES** the international community to continue to provide the necessary support to the ongoing efforts. The Assembly **COMMENDS** the Government of Liberia for initiating a process to formulate the best strategy for implementing the final report of the Truth and Reconciliation Commission (TRC);

23. **REITERATES THE FIRM CONDEMNATION** by the African Union of the deliberate massacres and acts of violence perpetrated by elements of the Guinean armed and security forces against unarmed civilians in the Conakry Stadium on 28 September 2009, and **STRESSES** the need to bring to justice the authors of these massacres and those who ordered them, in conformity with the AU principles on combating impunity. The Assembly **WELCOMES** the signing in Ouagadougou, on 15 January 2010, of the Joint Ouagadougou Declaration, under the aegis of President Blaise Compaoré, in his capacity as Mediator of the Guinean crisis, which marks a significant step in the process for the return to constitutional order and the resolution of the crisis in Guinea, in accordance with the relevant AU and ECOWAS decisions. The Assembly **PLEDGES** the commitment of the AU to mobilize support required for the implementation of the Ouagadougou Declaration, and **EXPRESSES ITS APPRECIATION** to President Blaise Compaoré of Burkina Faso for his efforts towards resolving the crisis;

24. **COMMENDS** the work of the International Contact Group (ICG), under the co-chairmanship of ECOWAS and AU, for its ongoing efforts aimed at resolving the crisis in Guinea. In that regard, the Assembly **TAKES NOTE** of the outcome of the most recent meeting of the ICG, held on 26 January 2010, in particular its invitation to the AU, ECOWAS and all AU partners to review the sanctions imposed on Guinea, in the course of the crisis, in light of recent positive developments in that country;

25. **COMMENDS** the return of Mauritania to constitutional order, and the mediation role played by the President of the Republic of Senegal, H.E. Abdoulaye Wade, with the support of the international community, through the International Contact Group on Mauritania under the leadership of the AU. The Assembly **ENCOURAGES** the holding, during the first half of 2010, of a meeting with bilateral and multilateral partners for the purpose of mobilizing financial and economic support for Mauritania, and **FURTHER ENCOURAGES** the Mauritanian parties to fully implement the Dakar Agreement;

26. **NOTES WITH SATISFACTION** the progress made in the process for the stabilization of Guinea Bissau since the presidential elections of June-July 2009, and **REQUESTS** the Chairperson of the Commission, in close collaboration with ECOWAS, to continue to work towards the implementation of the provisions of the Tripoli Plan of Action on Guinea Bissau, particularly those on the reconstruction and reform of the security sector, through the deployment of a joint AU-ECOWAS

Stabilization Mission. The Assembly **URGES** the bilateral and multilateral partners to participate in the Donors Roundtable for Guinea Bissau, scheduled to be held during the first half of 2010, and **APPEALS** to the international community to provide the necessary assistance to the country in the fight against drug trafficking;

**27.** **WELCOMES** the entry into force, on 15 July 2009, of the African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba), and **LOOKS FORWARD** to the Conference of the States' Parties to the Treaty, scheduled to take place in Addis Ababa, in April 2010, to establish the African Commission on Nuclear Energy. The Assembly **ALSO WELCOMES** the entry into force, in December 2009, of the Non-Aggression and Common Defence Pact, and **ENCOURAGES** the Commission to take all steps required for the implementation of the Pact. The Assembly **NOTES** that these two instruments enrich the AU normative framework for the structural prevention of conflicts;

**28.** **REQUESTS** the Peace and Security Council, in close collaboration with the Chairperson of the Commission, to spare no effort, within the framework of the Year of Peace and Security, to significantly advance the different peace processes in the Continent and to take the necessary initiatives for more dynamic action in the area of conflict prevention and post-conflict reconstruction.

# DECISION ON THE PREVENTION OF UNCONSTITUTIONAL CHANGES OF GOVERNMENT AND STRENGTHENING THE CAPACITY OF THE AFRICAN UNION TO MANAGE SUCH SITUATIONS
**Doc. Assembly/AU/4(XVI)**

**The Assembly,**

1. **TAKES NOTE** of the Report of the Chairperson of the Commission on the Prevention of Unconstitutional Changes of Government and the Strengthening of the Capacity of the African Union (AU) to Manage such Situations;

2. **RECALLS** its previous decisions on the issue of Unconstitutional Changes of Government, particularly Decisions Assembly/AU/Dec. 220(XII) and Assembly/AU/Dec. 253 (XIII) adopted at its Twelfth and Thirteenth Ordinary Sessions held, respectively, in Addis Ababa, from 1 to 4 February 2009, and in Sirte from 1 to 4 July 2009, as well as the Tripoli Declaration on the Elimination of Conflicts in Africa and the Promotion of Sustainable Peace, especially paragraph 8 thereof, adopted by the Special Session of the Assembly of the Union held in Tripoli, Great Libyan Arab Jamahiriya, on 31 August 2009;

3. **REITERATES** the African Union's total rejection of Unconstitutional Changes of Government, and its determination to put a definitive end to this scourge which undermines the progress achieved in the ongoing democratization processes in the Continent and constitutes a threat to peace and security in Africa. To this end, the Assembly **REAFFIRMS** the importance of the Algiers Decisions of July 1999, the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government of the OAU held in Lomé, Togo, from 10 to 12 July 2000, as well as the relevant provisions of the Constitutive Act of the African Union and the Protocol Relating to the Establishment of the Peace and Security Council;

4. **TAKES NOTE** of the initiatives taken by the Commission to follow up on Decision Assembly/AU/Dec. 253 (XIII), including the consultations with the various stakeholders to seek their views on the issue, including the strengthening of coordination with the AU, and the conclusions of the Peace and Security Council Retreat held in Ezulwini, Swaziland, from 17 to 19 December 2009;

**5.** **CONSIDERS** that AU is endowed with the instruments required to tackle the scourge of unconstitutional change of Government and that the objective should be to promote the effective implementation of these instruments by, where necessary, refining, enriching and updating them, rather than elaborating new instruments. The Assembly **ALSO EMPHASIZES**, in conformity with the relevant AU instruments, the need for a comprehensive approach to the issue of unconstitutional changes of Government based on zero tolerance for *coups d' Etat* but also for violations of democratic standards, the persistence and reoccurrence of which could result in unconstitutional changes;

**6.** **ENDORSES** the recommendations contained in the Report of the Chairperson of the Commission and, more specifically, agrees on the following measures:

**i)** **Enhancing the effectiveness of AU response to unconstitutional changes and modalities for accompanying transitions:**

**a)** **REITERATES** its appeal to all the Member States concerned to take, without delay, the measures required of them to become parties to the African Charter on Democracy, Elections and Governance, which considerably strengthens the provisions regarding unconstitutional changes of Government, and **REQUESTS** the Commission, working closely with the relevant structures of the Union, particularly the Pan-African Parliament, to pursue and step up its efforts at raising the awareness of all the concerned stakeholders to speed up the entry into force of the Charter;

**b)** **DECIDES** that, in cases of unconstitutional changes of Government, in addition to the suspension of the country concerned, the following measures shall apply:

**a.** non-participation of the perpetrators of the unconstitutional change in the elections held to restore constitutional order;

**b.** implementation of sanctions against any Member State that is proved to have instigated or supported an unconstitutional change in another State;

**c.** implementation by the Assembly of other sanctions, including punitive economic sanctions.

c) **DECIDES ALSO** that Member States should, upon the occurrence of an unconstitutional change of Government, not recognize the *de facto* authorities; and **CALLS ON** all non-African international bodies, including the United Nations and its General Assembly, to refrain from granting accreditation to such authorities, thus strengthening the automatic suspension measures taken by the AU against those countries in which unconstitutional changes of Government have taken place;

ii) **Revitalization of the mechanism for structural prevention of Unconstitutional Changes of Government**

a) **UNDERSCORES STRONGLY** the importance of the signing and ratification by Member States that have not already done so, of the AU Charter on Democracy, Elections and Governance, and of adhering to the principles of good neighbourliness and non-subversion. With respect to good governance and the rule of law in particular, the Assembly **REITERATES** the need for Member States to uphold the rule of law and abide by their own Constitutions, especially with regard to constitutional reforms, bearing in mind that failure to respect these provisions could lead to situations of tension which, in turn, could trigger political crisis;

(b) **REQUESTS** the Peace and Security Council, pursuant to the provisions of Article 7(m) of the Protocol Relating to the Establishment of the PSC, which stipulates that this body, in collaboration with the Chairperson of the Commission, shall "follow-up, within the framework of its conflict prevention responsibilities, the progress towards the promotion of democratic practices, good governance, the rule of law, protection of human rights and fundamental freedoms, respect for the sanctity of human life by Member States", to examine regularly progress made in the democratisation processes, on the basis of a report prepared by an independent Rapporteur to be appointed by the Chairperson of the Commission, who will be given the necessary support in terms of personnel and expertise. The Assembly **DECIDES** that, for 2010, Year of Peace and Security in Africa, this review shall be effected by a meeting of PSC at ministerial level;

(c) **REQUESTS** the Commission to redouble its efforts to ensure the follow-up and effective implementation of the recommendations made by the Panel of the Wise in its Report on the Strengthening of the Role of the African Union in the Prevention, Management and Resolution of Elections-related tensions and violent conflicts in Africa as endorsed by the Thirteenth Ordinary Session of the Assembly of the Union [Document Assembly/AU/6(XIII)

Rev.1], considering the fact that differences concerning the conduct of an electoral process contribute to the occurrence of an unconstitutional change of Government;

**(d)** **UNDERSCORES** the need to build AU's proactive capacity, through a much more dynamic direct preventive action. In that connection, the Assembly **ENCOURAGES** the Chairperson of the Commission to make full use of the powers conferred on him by the provisions of Article 10 (2b) of the Protocol establishing the PSC and to work, as necessary, with the Panel of the Wise and other eminent African personalities to diffuse tensions and resolve crises which could lead to unconstitutional changes of Government. The Assembly **UNDERSCORES** the obligation on the part of Member States to provide all the assistance and cooperation required to that end.

**(iii)** **Coordination at regional and international levels**

**a)** **REITERATES** the primacy of the Union's responsibility in the promotion of peace, security and stability in the continent, in accordance with the Protocol relating to the Establishing of the PSC, and **DECIDES**, therefore, that whenever the AU takes a decision on an unconstitutional change of Government, it must do so in close consultation with the Regional Mechanisms for Conflict Prevention, Management and Resolution as provided for under Article 16 of the above referred Protocol. The Regional Mechanisms must conform with the decision thus taken and, in particular, refrain from admitting States suspended from participating in the AU activities. The Assembly **FURTHER DECIDES** that, in discharging its mandate, the PSC should take into account the fundamental role of the RECs and their rules and practices governing unconstitutional changes of government;

**b)** **REQUESTS** AU partners, both bilateral and multilateral, including the UN and the European Union, to strongly support the decisions taken by the AU in situations of unconstitutional change of government and to refrain from any action which could undermine the efforts of the AU and send conflicting signals to the perpetrators of unconstitutional changes;

**c)** **RECOGNISES** the important role played by International Contact Groups in mobilizing the support of AU partners and the international community as a whole to AU positions on unconstitutional changes of Government, and **ENCOURAGES** the Commission to establish, as and when necessary, such Groups under AU leadership, in order to mobilize the broadest support

possible for decisions taken by the Union in accordance with the relevant instruments of the AU;

7. **REQUESTS** the Chairperson of the Commission to take all necessary measures to follow-up and implement this Decision and to report regularly on efforts deployed to this end.

**DECISION ON THE REPORT OF THE SECOND MEETING OF STATES PARTIES TO THE ROME STATUTE ON THE INTERNATIONAL CRIMINAL COURT (ICC)**
**DOC. Assembly/AU/8(XIV)**

**The Assembly,**

1. **TAKES NOTE** of the Report of the Ministerial Preparatory Meeting on the Rome Statute of the International Criminal Court (ICC) held in Addis Ababa, Ethiopia on 6 November 2009 in conformity with Decision Assembly/AU/Dec.245(XIII) adopted in Sirte, Great Libyan Arab Jamahiraya, in July 2009, to prepare for the Review Conference of States Parties scheduled for Kampala, Uganda in May-June 2010;

2. **ENDORSES** the recommendations contained therein, and in particular the following:

   I) Proposal for amendment to Article 16 of the Rome Statute;

   II) Proposal for retention of Article 13 as is;

   III) Procedural issues: Guidelines for the exercise of prosecutorial discretion by the ICC Prosecutor;

   IV) Immunities of Officials whose States are not parties to the Rome Statute: the relationship between articles 27 and 98; and

   V) Proposals regarding the crime of aggression.

3. **REITERATES** its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union;

4. **ALSO TAKES NOTE** of the Report of the Commission on the 8th Assembly of States Parties of the ICC (ASP) held in The Hague, Netherlands from 16 to 26 November 2009 and the outcome of the ASP meeting.

5. **WELCOMES** the submission by the Republic of South Africa, on behalf of the African States Parties to the Rome Statute of the ICC of a proposal which consisted of an amendment to Article 16 of the Rome Statute in order to allow the United Nations (UN) General Assembly to defer cases for one (1) year in cases where the UN Security Council would have failed to take a decision within a specified time frame.

6. **UNDERSCORES** the need for African States Parties to speak with one voice to ensure that the interests of Africa are safeguarded;

7. **WELCOMES** Resolution ICC-ASP/8/Res.6 on the Review Conference that establishes a Working Group of the ASP for the purpose of considering, as from its Ninth Session, amendments to the Rome Statute including among others the proposal for amendment to Article 16 of the Rome Statute together with the proposals from other States Parties or group of States Parties;

8. **TAKES NOTE** of the fact that the other proposals made by the Second Meeting of the African States Parties to the Rome Statute will not be considered during the Review Conference and **REQUESTS** accordingly, the African States Parties to raise the issue of the immunities of Officials whose States are not parties to the Rome Statute (the relationship between articles 27 and 98 under the topic "Cooperation" at the level of the Working Group of New York of the Bureau of ASP as well as during the stocktaking exercise of the Review Conference;

9. **ALSO TAKES NOTE** of the fact that there was no debate on the crime of aggression during the 8th ASP;

10. **DEEPLY REGRETS** that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, has not been acted upon, and in this regard, **REITERATES** its request to the UN Security Council;

11. **URGES** the African States Parties to the Rome Statute to follow-up on the concerns raised by Member States;

12. **TAKES NOTE** of the Review Conference of States Parties to the International Criminal Court scheduled to be held in Kampala, Uganda from 31 May to 11 June 2010, and **CALLS UPON** African Member States Parties to attend and effectively participate in the Conference;

13. **REQUESTS** the African Group in New York and the African Members of the Bureau of ASP, to follow-up on the implementation of this Decision in collaboration with the Commission and to ensure that the concerns raised by the Assembly of the Union and its Member States are properly addressed through consultations with other Regional Groups with a view to finding a durable solution and to report to the Assembly through the Commission on actions taken;

14. **ALSO REQUESTS** the Commission to follow-up on the implementation of this Decision and to report to the next Ordinary Session of the Assembly through the Executive Council in July 2010.

# DECISION ON THE ABUSE OF THE PRINCIPLE OF UNIVERSAL JURISDICTION
## Doc. EX.CL/540(XVI)

**The Assembly,**

1. **TAKES NOTE** of the recommendations of the Executive Council on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.243 (XIII) adopted in Sirte, Great Libyan Arab Jamahiriya in July 2009;

2. **ALSO TAKES NOTE** of United Nations General Assembly (UNGA) Resolution A/RES/64/L117 on the Scope and Application of the Principle of Universal Jurisdiction adopted on 16 December 2009 by the United Nations (UN) General Assembly and **INVITES** all Member States to submit to the UN Secretary General, before 30 April 2010, information and observations on the scope and application of the principle of universal jurisdiction, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice;

3. **REITERATES** its previous positions articulated in decisions Assembly/Dec.199(XI), Assembly/Dec.213(XII) and Assembly/Dec.243 (XIII) adopted in Sharm el Sheikh, Addis Ababa and Sirte in July 2008, February 2009 and July 2009 respectively to the effect that there has been blatant abuse of the Principle of Universal Jurisdiction particularly by some non-African States and **REITERATES** its call for immediate termination of all pending indictments;

4. **FURTHER REITERATES** its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union;

5. **URGES** the European Union (EU) and its Member States to extend the necessary cooperation to the African Union to facilitate the search for a durable solution to the abuse of the Principle of Universal Jurisdiction;

6. **ALSO REITERATES** its conviction of the need for an international regulatory body with competence to review and/or handle complaints or appeals arising out of abuse of the Principle of Universal Jurisdiction by individual States;

7. **CALLS UPON** all concerned States, particularly European States, to respect international law and particularly the immunity of state officials when applying the Principle of Universal Jurisdiction;

8. **EXPRESSES APPRECIATION** to the Chairperson of the African Union and the Chairperson of the Commission for efforts made so far towards ensuring that this matter is exhaustively discussed at the level of the United Nations;

9. **URGES** Member States affected by the abuse of the Principle of Universal Jurisdiction by non-African States to respond to the request made by the Chairperson of the Union and to communicate to the Commission the list and details of pending cases in non-African States against African personalities;

10. **REQUESTS** the African Group in New York to follow-up on the implementation of this Decision in collaboration with the Commission and to ensure that the concerns raised by the African Union and its Member States are properly addressed with a view to finding a durable solution and to report to the Assembly through the Commission on actions taken;

11. **ALSO REQUESTS** the Commission to follow-up on this matter with a view to ensuring that a definitive solution to this problem is reached and to report to the next Ordinary Session of the Assembly through the Executive Council in July 2010.

**Assembly/AU/Dec.272(XIV)**

**DECISION ON THE HISSENE HABRE CASE**
**Doc. Assembly/AU/9(XVI)**

**The Assembly,**

1. **TAKES NOTE** of the Progress Report of the Commission on the Implementation of Assembly Decision Assembly/AU/Dec.240(XII) and Decision Assembly/AU/246 (XIII) adopted by the Assembly in Addis Ababa, Ethiopia, in February 2009 and in Sirte, Great Libyan Arab Jamahiriya in July 2009 respectively on the Hissene Habre Case;

2. **REITERATES** its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union

3. **ALSO TAKES NOTE** that in spite of its previous Summit decisions calling on all Member States to make voluntary contributions to the budget of the Hissene Habre Case there has been no positive reactions from the majority of Member States;

4. **REITERATES** its appeal to all Member States to contribute to the budget of the trial and extend the necessary support to the Government of Senegal in the execution of the African Union (AU) mandate to prosecute and try Hissene Habre;

5. **RECALLS** its Decision Assembly/AU/246 (XIII) adopted in Sirte, Great Libyan Arab Jamahiriya in July 2009, calling for the African Union to make a token contribution to the budget of the trial for a sum to be determined following consultations between the Commission and the Permanent Representatives Committee;

6. **REQUESTS** the Government of Senegal, the Commission and Partners, particularly the European Union to continue with consultations with the view to ensuring the holding of the Donors Round Table as soon as possible;

7. **INVITES** all partner countries and institutions to support this process and the Donors Round Table that will be organized in Dakar, Senegal in 2010;

8. **REQUESTS** the Commission to monitor the implementation of this Decision and to report to the next Ordinary Session of the Assembly through the Executive Council in July 2010.

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

# DECISION ON THE TERRORIST ATTACK AGAINST THE TOGOLESE NATIONAL FOOTBALL TEAM

**The Assembly,**

1. **STRONGLY CONDEMNS** the terrorist act of 8 January 2010 against the Togolese National Football Team attending the African Nations Cup tournament in the Angolan Province of Cabinda, on the border between the Republic of Angola and the Republic of Congo;

2. **REAFFIRMS** that terrorism is an abominable and condemnable act aimed at destabilizing the peace and security of all peoples;

3. **RECALLS** the principles enshrined in the Constitutive Act of the African Union, the 1999 OAU Convention on Preventing and Combating Terrorism (Algiers Convention) and the 2004 Protocol, the relevant legal instruments of the United Nations and other International Conventions relating to the fight against terrorism, all of which equally condemn the support, sheltering and financing of terrorists groups;

4. **REAFFIRM**S its resolve to fight terrorist acts in Africa and in the world, and **APPEALS** to all African and Non–African countries to abstain from promoting, protecting, supporting, sheltering and harbouring terrorists groups;

5. **URGES** countries from where the terrorist act was organized, planned and later claimed to cooperate with the Government of Angola in arresting and bringing to justice those responsible for the act;

6. **ENCOURAGES** those countries not to allow permanent residence in their territories to those with known terrorist backgrounds and to take necessary measures to prevent the use of their territories for planning and carrying out terrorist attacks against African countries;

7. **CALLS ON** the international community, notably Member States and relevant international organizations, to fully cooperate with the Angolan Authorities in bringing the perpetrators of this heinous act to justice.

# DECISION ON THE PROCLAMATION OF 2010 AS THE INTERNATIONAL YEAR OF THE YOUTH

**The Assembly,**

1. **RECALLS** Decision Assembly/AU/Dec.250 (XIII) requesting all Member States and the African Group in New York to give their support to efforts geared towards the adoption of a draft resolution proclaiming 2010 "International Year of the Youth";

2. **ALSO RECALLS** Decision Assembly/AU/Dec.250 (XIII) inviting all Member States of the United Nations Organisation and other international organizations to support this initiative to proclaim 2010 as International Year of the Youth, and to contribute to its adoption when it is tabled before the United Nations General Assembly;

3. **TAKES NOTE** of the effective adoption on 18 December 2009 by the 64th Session of the United Nations General Assembly of Resolution 64/131 entitled "*2010 International Year of the Youth: Dialogue and Mutual Understanding*" to proclaim the year and to organize a World Youth Conference as the highlight of the Year, and invites the President of the General Assembly to conduct open-ended consultations with Member States with a view to determining the modalities of the Conference and the expected outcomes;

4. **EXPRESSES** its full satisfaction and great pride following the unanimous adoption, on the initiative of His Excellency Zine El Abidine BEN ALI, President of the Republic of Tunisia, of the appeal to proclaim 2010 as the International Year of the Youth;

5. **COMMENDS** the Republic of Tunisia and its President, His Excellency Zine El Abidine BEN ALI, for the special interest given to the role of the youth, in general, and the African Youth, in particular, in the task of developing and consolidation mutual understanding;

6. **CALLS UPON** Member States to continue to support this initiative while actively participating in consultations that will be led by the President of the United Nations General Assembly on the modalities for organizing the World Youth Conference;

7. **URGES** Member States to organize and undertake national actions and participate in regional and international activities to mark the International Year of the Youth;

8. **ALSO URGES** Member States to work with the Commission to launch and implement the African Union Youth Volunteer Corps;

9. **REQUESTS** the Commission to get actively involved in the popularization of the theme of the International Year of the Youth, "*Dialogue and Mutual Understanding*", in the implementation of the appropriate activities and in the monitoring of actions undertaken by Member States and Regional Economic Communities;

10. **ALSO REQUESTS** the Commission to report to the Ordinary Session of the Assembly through the Executive Council in January 2011 on the status of the overall implementation of actions relating to the celebration of the International Year of the Youth.

**DECISION ON THE YEAR OF PEACE AND SECURITY IN AFRICA**
**Doc. Assembly/AU/5(XIV)**

**The Assembly,**

1. **TAKES NOTE** of the Report of the Chairperson of the Commission on the Year of Peace and Security in Africa;

2. **RECALLS** the Tripoli Declaration on the Elimination of Conflicts in Africa and the Promotion of Sustainable Peace [SP/Assembly/PS/Decl.(I)], adopted by the Special Session of the Assembly of the African Union (AU) on the Consideration and Resolution of Conflicts in Africa, held in Tripoli, Great Libyan Arab Jamahiriya, on 31 August 2009, in particular paragraph 23 of the Declaration in which the Heads of State and Government decided to proclaim 2010 as the Year of Peace and Security in Africa;

3. **FURTHER RECALLS** that, while notable gains have been made and the number of violent conflicts on the Continent has been reduced significantly in recent years, nevertheless far too many African countries remain trapped in a vicious cycle of conflict with devastating consequences;

4. **UNDERLINES** the need for the full operationalization of the African Peace and Security Architecture, in order to enhance the capacity of the Continent to successfully address the challenges of peace and security;

5. **STRESSES** that the Year of Peace and Security will be an opportunity for African peoples and leaders, as well as African institutions, in partnership with the international community, to review current efforts towards peace on the Continent, with a view to strengthening them and, where appropriate, launching new initiatives, in particular by:

   (i) giving added momentum to peace and security efforts on the Continent;

   (ii) giving greater visibility to past and ongoing efforts by the African Union (AU) on the ground;

   (iii) speeding up the implementation of commitments made by Member States in various AU instruments relating to peace and security;

   (iv) making synergies between official efforts to promote peace and security with those being undertaken on the ground by grassroots communities; and

   (v) mobilizing resources to support peace and security efforts on the Continent.

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

6. **EXPRESSES ITS FULL SUPPORT** for the steps and initiatives envisaged by the Chairperson of the Commission as contained in his report on the Year of Peace and Security in Africa. The Assembly **COMMENDS** the Commission for the steps already taken towards the implementation of the Year of Peace and Security, in particular the building of the required partnerships, the mobilization of resources and outreach activities;

7. **REQUESTS** the Chairperson of the Commission to pursue those efforts and to urgently take all the required measures for the successful celebration of the Year of Peace and Security, in particular by mobilizing human, technical and financial resources, ensuring the active involvement of all relevant AU structures, including the Pan-African Parliament (PAP), the Economic, Social and Cultural Council (ECOSOCC) and AU Specialized Institutions, among others, mobilizing the African private sector and civil society, as well as the support of AU's bilateral and multilateral partners and other relevant stakeholders. In this respect, the Assembly **WELCOMES** the partnership between the AU and the Confederation of African Football (CAF), as well as the financial and technical support provided by the German Government through GTZ, and the commitment of the United Nations Fund for Children (UNICEF) to work with the AU towards the successful celebration of the Year of Peace and Security;

8. **UNDERLINES** the crucial role of Member States and the Regional Economic Communities (RECs), and **URGES** them to seize the opportunity of the Year of Peace and Security to highlight the actions undertaken in promoting peace and security and intensify their efforts in this regard, including by signing and ratifying relevant AU instruments and effectively implementing the commitments contained therein. The Assembly **WELCOMES** the entry into force of the Pelindaba Treaty and of the Non-Aggression and Common Defence Pact, which enrich the AU normative framework for structural conflict prevention and **ONCE AGAIN, APPEALS TO** all Member States that have not yet done so to speedily take the steps required to become parties to the African Charter on Democracy, Elections and Governance;

9. **FURTHER URGES** Member States to take the necessary measures for the success of the campaign and to take other steps in support of the Year of Peace and Security, including issuing special stamps, providing free air time and space for advertisements in state media and facilitating the successful tour of the Flame of Peace;

10. **REQUESTS** the Peace and Security Council to undertake specific activities in support of the Year of Peace and Security, in particular by holding meetings in countries affected by conflicts, making further visits in the field, so that PSC members can observe at first hand the realities of these countries, and becoming

both more proactive in considering situations of potential and incipient conflict, while remaining engaged in countries that are emerging from conflict. The Assembly **ALSO REQUESTS** the PSC to devote special sessions to the theme of Women and Youth in Conflicts. Recognizing that women and children continue to be the most affected by the conflicts that ravage parts of our Continent and recalling the launch of the African Women's Decade, as decided at the Twelfth Ordinary Session of the Assembly, **DECLARES** that the laudable intentions contained therein should be reinforced by the Declaration of 2010 as the African Year of Peace and Security in Africa, and that its objectives continue to permeate throughout the coming Women's Decade, reinvigorating and strengthening the attainment of lasting peace, security and prosperity on the Continent;

**11.** **NOTES** that, in the next twelve (12) months, seventeen (17) African countries will be celebrating their fiftieth anniversaries as independent states and that these celebrations should mark a new beginning, heralding a new era for the continent, specially through renewed efforts to address the challenge of peace and security;

**12.** **CALLS ON** the African countries concerned to seize the opportunity of their respective national days to work with the Commission in carrying out programmes collaboratively in support of the Year of Peace and Security;

**13.** **APPEALS** to all AU partners and other stakeholders to extend full support to the AU to ensure the successful celebration of the Year of Peace and Security and **ENCOURAGES** them to jointly identify with the Commission activities that could be undertaken in this respect;

**14.** **REQUESTS** the Chairperson of the Commission to submit to it a progress report on the implementation of the Year of Peace and Security campaign at the next Ordinary Session of the Assembly, through the Executive Council in July 2010.

**Assembly/AU/Dec.276(XIV)**

# DECISION ON THE AFRICAN COMMON POSITION ON THE FIFTEEN-YEAR REVIEW OF THE IMPLEMENTATION OF THE BEIJING PLATFORM FOR ACTION

**The Assembly,**

1. **TAKES NOTE** of the Report on the African Common Position on the Fifteen-Year Review of the Implementation of the Beijing Platform for Action, and the recommendations contained therein;

2. **CALLS ON** the United Nations to consider and incorporate the Common African Position on the Fifteen-Year Review of the Implementation of the Beijing Platform for Action, during the global review.

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

**Assembly/AU/Dec.277(XIV)**

# DECISION ON THE ESTABLISHMENT OF THE FUND FOR AFRICAN WOMEN

**The Assembly**,

1. **TAKES NOTE** of the recommendations of the Executive Council to launch the Fund for African Women;

2. **DECIDES** to launch the Fund for African Women in accordance with Assembly Decision Assembly/AU/Dec.143 (VIII) adopted in Addis Ababa, Ethiopia, in January 2007.

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

**Assembly/AU/Dec.278(XIV)**

# DECISION ON THE DATE AND VENUE OF THE FIFTEENTH ORDINARY SESSION OF THE ASSEMBLY OF THE AFRICAN UNION

**The Assembly,**

1. **RECALLS** its earlier acceptance of the invitation by the Republic of Uganda to host the Fifteenth Ordinary Session of the Assembly in Kampala during the Eleventh Ordinary Session of the Assembly of the Union held in Sharm El Sheikh, Egypt, from 30 June to 1 July 2008;

2. **REITERATES** its appreciation to the Government of the Republic of Uganda, for its offer to host the Fifteenth Ordinary Session of the Assembly;

3. **ACCEPTS** the dates proposed by the Republic of Uganda and the Commission for the holding of the Summit meetings in Kampala as follows:

   i) 19 to 20 July 2010: Twentieth Ordinary Session of the Permanent Representatives Committee;

   ii) 22 to 23 July 2010: Seventeenth Ordinary Session of the Executive Council;

   iii) 25 to 27 July 2010: Fifteenth Ordinary Session of the Assembly.

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

**Assembly/AU/Dec.279(XIV)**

# DECISION ON MADAGASCAR

**The Assembly,**

1. **EXPRESSES** deep concern over the continuing political crisis in Madagascar;

2. **RECOGNIZES** the importance and validity of the Maputo Agreement and the Additional Act of Addis Ababa;

3. **STRESSES** that these agreements remain the only roadmap for a comprehensive solution to the Madagascar crisis and **URGES** for their speedy and faithful implementation;

4. **URGES** the illegal regime in Madagascar to desist from attempts to impose unilateral solutions to the current crisis thereby circumventing the Maputo Agreement and the Additional Act of Addis Ababa;

5. **RECOGNIZES** the efforts being made by the African Union (AU) and the Southern African Development Community (SADC), to restore constitutional order in Madagascar;

6. **WELCOMES** the various Summit meetings and decisions of the SADC leaders; the meetings convened in Maputo on 8 and 9 August 2009, and Addis Ababa from 2 to 6 November 2009;

7. REQUESTS the Commission and SADC to continue to work together in assisting the negotiation process in Madagascar;

8. **UNDERSCORES** the leading role played by SADC in the mediation process, given its regional responsibilities and comparative advantages;

9. **STRESSES** the need for the establishment of the Follow Up Mechanism provided for in paragraph 12 of the Additional Act of Addis Ababa of 6 November 2009;

10. **EXPRESSES FULL SUPPORT** to H.E. Joaquim Chissano, former President of the Republic of Mozambique and SADC Mediator, and his mediation team for their endeavours towards re-establishing constitutional order in Madagascar;

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

**11.** **NOTES** the proposals presented by the Chairperson of Commission to the Malagasy parties during his mission to Madagascar from 21 to 22 January 2010 and **URGES** the parties to respond expeditiously to these proposals;

**12.** **REQUESTS** the Peace and Security Council to meet in due course to review the situation and take the required decisions in light of the relevant AU instruments;

**13.** **APPEALS** to the international partners to continue to extend full support to the efforts being made towards the resolution of the crisis in Madagascar and the restoration of constitutional order within the institutional framework approved by the Assembly.

**Assembly/AU/Dec.280(XIV)**

# DECISION ON ELECTION OF THE MEMBERS OF THE PEACE AND SECURITY COUNCIL OF THE AFRICAN UNION Doc. EX.CL/578(XVI)

**The Assembly,**

1. **TAKES NOTE** of the election of the Members of the Peace and Security Council of the African Union by the Executive Council;

2. **APPOINTS** the following five (5) Members of the Peace and Security Council for a three(3)-year term as of 1 April 2010:

| NAME | REGION |
|---|---|
| Equatorial Guinea | Central Region |
| Kenya | Eastern Region |
| Libya | Northern Region |
| Zimbabwe | Southern Region |
| Nigeria | Western Region |

3. **ALSO APPOINTS** the following ten (10) Members of the Peace and Security Council for a two (2)-year term as of 1 April 2010:

| NAME | REGION |
|---|---|
| Burundi | Central Region |
| Chad | Central Region |
| Djibouti | Eastern Region |
| Rwanda | Eastern Region |
| Mauritania | Northern Region |
| Namibia | Southern Region |
| South Africa | Southern Region |
| Benin | Western Region |
| Cote d'Ivoire | Western Region |
| Mali | Western Region |

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

**Assembly/AU/Dec.281(XIV)**

# DECISION ON THE FIFTEENTH CONFERENCE OF PARTIES TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (UNFCCC) AND THE KYOTO PROTOCOL[1]

**Doc. Assembly/AU/10 (XIV)**

**The Assembly,**

1. **TAKES NOTE** of the Report of H.E Meles Zenawi, Prime Minister of the Federal Democratic Republic of Ethiopia, the Coordinator of the Conference of African Heads of State and Government on Climate Change (CAHOSCC), on the conduct and outcomes of the Fifteenth Conference of Parties to the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol, held in Copenhagen, Denmark, in December 2009;

2. **ENDORSES** the provisions of the Copenhagen Accord and **ENCOURAGES** all Member States that may wish to do so, to make individual submissions to the Secretariat of UNFCCC supporting the Accord in the context of the common but differential responsibilities and supported with the means of implementation;

3. **REAFFIRMS** its continued stand to remain united in all future negotiations on climate change; and **ENDORSES** that the leadership of H.E Meles Zenawi, Prime Minister of the Federal Democratic Republic of Ethiopia, as Coordinator of CAHOSCC, be extended to lead CAHOSCC for the next two (2) Conferences of Parties (COP16 in Mexico and COP17 in South Africa, in 2010 and 2011 respectively);

4. **REQUESTS** CAHOSCC to establish a streamlined single negotiating structure at the Ministerial and Expert levels to replace the current coordinating mechanism;

5. **ALSO REQUESTS** CAHOSCC to hold a Post-COP 15 Meeting before the Conference in Bonn, Germany in May 2010 in order to prepare for all the other meetings identified in the report of the CAHOSCC Chairperson;

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[1] Reservation entered by Egypt

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

6. **FURTHER REQUESTS** the Chairperson of the Commission to take all necessary measures to register the African Union as a Party to the UNFCCC, for purposes of negotiation but consistent with the sovereign right of its Member States.

**Assembly/AU/Dec.282(XIV)**

# DECISION ON THE REPORT OF HEADS OF STATE AND GOVERNMENT IMPLEMENTATION COMMITTEE ON THE NEW PARTERSHIP FOR AFRICA'S DEVELOPMENT (NEPAD)

**The Assembly,**

1. **TAKES NOTE WITH APPRECIATION** of the Report by the Chairperson of the New Partnership for Africa's Development (NEPAD) Heads of State and Government Implementation Committee (HSGIC), H.E. Meles Zenawi, Prime Minister of the Federal Democratic Republic of Ethiopia;

2. **NOTES AND WELCOMES** progress made in the implementation of the NEPAD Programme, particularly on the African Union (AU)/NEPAD Comprehensive Africa Agriculture Development Programme (CAADP) through the signing of CAADP Compacts and the finalization of the NEPAD Capacity Development Strategic Framework (CDSF) as a common reference and integrated tool to address capacity challenges in Africa;

3. **RECALLS** Decision Assembly/AU/Dec.241(XII) of the Twelfth Ordinary Session of the AU Assembly on the need for a coherent, systematized and institutionalized partnership engagement with the G8 and **NOTES** the outcomes of the L'Aquila G8/Africa Outreach of July 2009 including the launch of the US$20 billion L'Aquila Food Security Initiative (AFSI), the Pittsburgh G20 Summit of September 2009 and the conclusions of the 13th Africa Partnership Forum (APF);

4. **OBSERVES** that the evolving global context with respect to the G8 and G20, and the latter serving as the premier forum for international economic cooperation has necessitated an in-depth review of Africa's partnership strategy within this new global governance architecture. In this regard, **NOTES** that the G8 has established an accountability mechanism with Africa and therefore **AGREES** that Africa should undertake an independent assessment of G8/Africa partnership as a contribution to the next G8/Africa Outreach;

5. **REQUESTS** the Commission and the NEPAD Secretariat, in collaboration with the Africa Development Forum to undertake this assessment and submit its findings by the June 2010 G8 Summit;

6. **URGES** the adoption of a new strategic approach focusing on partnership dialogue on Africa's development policy issues and **CALLS FOR** the institutionalization of Africa's engagement within the G20, and the effecting of the desired paradigm shift from management of poverty in the Continent to economic transformation for Africa to emerge as a new growth pole to address existing imbalances and play a significant role in the integrated world economy.

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

# DECISION ON THE INTEGRATION OF THE NEW PARTNERHSIP FOR AFRICA'S DEVELOPMENT (NEPAD) INTO THE STRUCTURES AND PROCESSES OF THE AFRICAN UNION INCLUDING THE ESTABLISHMENT OF THE NEPAD PLANNING AND COORDINATING AGENCY (NPCA)

**The Assembly,**

1. **RECALLS AND REAFFIRMS** the Decision of the Second Session of the Assembly in Maputo of July 2003, the 13-Point Conclusions of the Algiers New Partnership for Africa's Development (NEPAD) Brainstorming Meeting of March 2007 as endorsed by the Tenth Ordinary Session of the Assembly in Addis Ababa in February 2008 and the outcomes of the Dakar NEPAD Review Summit of April 2008 as the basis for the integration of NEPAD into the structures and processes of the African Union (AU);

2. **FURTHER RECALLS** the adoption of NEPAD as a programme of the AU by the Thirty-seventh Ordinary Session of the Assembly of the then Organization of African Unity (OAU) in Lusaka, Zambia, in July 2001 and **REITERATES** that the NEPAD vision and programme had since inception remained an intrinsic part of the African Union;

3. **NOTES** the key recommendations contained in the consultancy-study report on AU/NEPAD Integration commissioned in December 2008 and the similarity of views of the African Union Commission and the NEPAD Secretariat on the recommendations as well as the broad consultations with various African stakeholders;

4. **ENDORSES** the recommendations of the 21st NEPAD Heads of State and Government Implementation Committee (HSGIC) as re-submitted by the 22nd HSGIC on the integration of NEPAD into the structures and processes of the African Union;

5. **HEREBY APPROVES**:

   a. **The establishment of the NEPAD Planning and Coordinating Agency (NPCA) as a technical body of the African Union in replacement of the NEPAD Secretariat with the mandate to:**

      i. Facilitate and coordinate the implementation of the continental and regional priority programmes and projects;

ii. Mobilize resources and partners in support of the implementation of Africa's priority programmes and projects;

iii. Conduct and coordinate research and knowledge management;

iv. Monitor and evaluate the implementation of programmes and projects; and

v. Advocate on the AU and NEPAD vision, mission and core principles/values.

**b. The main features of the NEPAD Governance structures**:

i. The NEPAD Heads of State and Government Implementation Committee (HSGIC), with a change of name to the NEPAD Heads of State and Government Orientation Committee (HSGOC);

ii. The HSGOC is a sub-committee of the AU Assembly that provides political leadership and strategic guidance on the NEPAD Programme and reports its recommendations to the Assembly for endorsement;

iii. The HSGOC is the essence and spirit of NEPAD with the lead function of high-level coordination of the NEPAD priority sectors;

iv. An intermediary body to interface between the HSGOC and the new Agency, consisting of the NEPAD Steering Committee;

v. The Chairperson of the African Union Commission exercises supervisory authority over the NEPAD Planning and Coordinating Agency, whilst giving the new Agency adequate and necessary flexibilities to carry out its mandate and thereby maintaining the corporate brand identity of the NEPAD Programme within the African Union.

**c. Financing the NPCA and its programmatic activities will be through**:

i. Established budget from the statutory sources of the African Union Commission;

ii. Continuation of voluntary contributions by AU Member-States;

iii. Additional budgetary support from Development Partners and the Private Sector in conformity with AU financial rules and regulations.

**d.** **URGES** the early conclusion of a permanent Host Agreement for the NEPAD Planning and Coordinating Agency (NPCA) between the South African Authorities and the Commission, in consultation with the NEPAD entity;

**e.** The Chairpersons of HSGOC and the Commission should mandate the CEO of NEPAD to work out the modalities and roadmap for the effective and smooth take-off and functioning of the new NEPAD Agency in collaboration with the Commission by the next Ordinary Session of the Assembly in July 2010.

**6.** **EXPRESSES APPRECIATION** to Member States, the Chairperson of the Commission, the RECs, African institutions and other stakeholders for their contributions to the process of NEPAD integration into the African Union.

# DECISION ON THE RESPONSE TO THE GLOBAL FINANCIAL AND ECONOMIC CRISIS

**The Assembly,**

1. **TAKES NOTE** of the Report on initiatives and responses to the global financial and economic crisis by international financial institutions; the multilateral development banks, including the African Development Bank (AfDB); as well as the African countries;

2. **COMMENDS** the role played by the African Union Commission, the African Development Bank, and the United Nations Economic Commission for Africa (UNECA) in pushing Africa's position regarding the crisis within various international fora such as the G8 and the G20;

3. **EXPRESSES CONCERNS** regarding the impact of the global financial and economic crisis on African countries, despite their economies being less integrated into the international financial system;

4. **FURTHER COMMENDS** efforts made by developed countries, the international financial institutions, African countries, and Regional and Multilateral Development Banks , among others, aimed at mitigating the impact of the crisis;

5. **WELCOMES** the outcome of the G-20 Summit held in Pittsburgh, USA, in September 2009, including the need for increased voice and representation at the Bretton Woods Institutions; general capital increase for Regional and Multilateral Development Bank, including the African Development Bank (AfDB) and the World Bank; sale of gold; debt relief; review of Debt Sustainability Framework; the need to deliver on ODA commitments; increasing policy space; trade, including conclusion of Doha Round / Trade Negotiations; climate change; and support for regional integration in Africa;

6. **CALLS UPON** developed countries as well as international financial institutions to urgently implement the recommendations and commitments made during the Pittsburgh G-20 Summit;

7. **COMMENDS** AfDB and the World Bank for front loading ADF 11 and IDA 15, respectively, and developing new facilities to support African countries, particularly the low income countries, to cope with the crisis;

8. **SUPPORTS** the acceleration of ADF 12 and IDA 16 replenishments, in view of the fact that both AfDB and the World Bank have front loaded ADF 11 and IDA 15 respectively;

9. **NOTES** with concern that the crisis has increased the demand for African Development Bank and World Bank resources and that these banks may soon have inadequate resources to support low income countries to mitigate the impact of the present crisis and resume growth;

10. **RECALLING** the necessity for African countries to attain the MDGs by target date of 2015, **CALLS** for strong and timely replenishment of ADF 12 and IDA 16, and early general capital increases for the two institutions to, among others, provide support for the low income countries; and

11. **REQUESTS** the Commission, in collaboration with the AfDB and UNECA, to continue monitoring the impact of the crisis on African countries, as well as the implementation of the G20 Summit Commitments.

**Assembly/AU/Dec.285(XIV)**

# DECISION ON THE REFORM OF THE UNITED NATIONS SECURITY COUNCIL

**The Assembly,**

1. **ADOPTS** of the Report of the Committee of Ten Heads of State and Government on the Reform of the United Nations (UN) Security Council;

2. **REAFFIRMS** the Ezulwini Consensus and the Sirte Declaration on the reform of the United Nations Security Council containing the African Common Position, and **CALLS** for its intensive promotion to ensure that Africa speaks with one voice on the issue of Security Council Reform;

3. **TAKES NOTE** of current developments in the intergovernmental Negotiations and **ENCOURAGES** the Committee of Ten Heads of State to continue to promote and defend Africa's interest in the Security Council Reform process;

4. **REQUESTS** the Committee of Ten Heads of States to meet regularly in order to keep abreast of developments, with a view to updating African Leaders accordingly;

5. **ALSO REQUESTS** the African Permanent Representatives to the United Nations of the Committee of Ten to work closely with other African Permanent Representatives to the UN as well as with other Interest Groups in the context of the ongoing intergovernmental Negotiations on the Security Council Reform Process;

6. **FURTHER REQUESTS** the Commission to continue to facilitate the activities of the African Permanent Representatives to the UN of the Committee of Ten to enable them to defend Africa's interest on the basis of the Ezulwuini Consensus and the Sirte Declaration;

7. **CALLS ON** the Committee of Ten to remain seized of this matter until Africa achieves its objectives and report on progress made at the next Ordinary Session of the Assembly in July 2010.

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

**Assembly/AU/Dec.286(XIV)**

# DECISION ON THE ANNEXES TO THE STATUTES OF THE AFRICAN INVESTMENT BANK

**The Assembly,**

1. **TAKES NOTE** of Decision EX.CL/Dec.550(XVI) of the Executive Council recommending the adoption of the Annexes to the Statutes of the African Investment Bank;

2. **ADOPTS** the Annexes to the Statutes of the African Investment Bank (AIB) including the selection of scenario B, as amended on the distribution of capital and voting rights of the AIB among Member States, and the choice of Special Drawing Rights (SDRs) of the International Monetary Fund as unit of account of the AIB, until the creation of the African single currency;

3. **REQUESTS** the Member States that have not yet done so to sign and ratify the Protocol and the Annexes to the Statutes of the African Investment Bank.

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

# DECISION ON THE BUDGET OF THE AFRICAN UNION FOR THE 2010 FINANCIAL YEAR[2]

**Assembly/AU/13(XIV)**

**The Assembly,**

1. **ADOPTS** the Budget of the African Union for the Year 2010 amounting to US$ 250,453,697:

   i. A total amount of US$ 111,763,676 assessed to Member States on the basis of the current Scale of Assessment, which includes the balance of the Programs Budget amounting to US$ 11,171,000;

   ii. A total of US$ 5,000,000 from the fund allocated from the purchase of Washington Office and;

   iii. A total amount of US$ 133,690,021 earmarked for the programmes is secured from International Partners.

2. **ADOPTS** the Budget breakdown among the AU Organs to be as follows:

| | **Operational Budget in (US$)** | **Programs Budget in (US$)** | **Total in (US$)** |
|---|---|---|---|
| African Union Commission (AUC) | **82,047,121** | **135,415,745** | **217,462,866** |
| Pan African Parliament (PAP | **9,129,736** | **5,019,514** | **14,149,250** |
| African Commission on Human and Peoples' Rights (ACHPR) | **2,968,874** | **1,960,978** | **4,929,852** |
| African Court on Human and Peoples' Rights (AfCHPR) | **6,169,591** | **1,769,784** | **7,939,375** |
| Economic Social and Cultural Council (ECOSOCC) | **1,531,500** | **-** | **1,531,500** |

[2] Reservation entered by Tunisia

| | Operational Budget in (US$) | Programs Budget in (US$) | Total in (US$) |
|---|---|---|---|
| African Union Commission on International Law (AUCIL) | **225,000** | | **225,000** |
| NEPAD | **3,020,854** | | **3,020,854** |
| Advisory Board on Corruption | **500,000** | | **500,000** |
| Peace and Security Council | | **695,000** | **695,000** |
| **Total** | **105,592,676** | **144,861,021** | **250,453,697** |

3. **REQUESTS** the Commission to implement the decision to increase Member States` contribution towards the Peace Fund from six percent (6%) to twelve percent (12%) over a period of three (3) years starting from 2011;

4. **FURTHER REQUESTS** the Commission and the Organs to scale down anticipated activities in 2010 including;

   **I.** Extraordinary sessions,meetings and seminars of the African Court on Human and Peoples' Rights; and

   **II.** The sessions of the African Union Commission on International Law.

5. **DECIDES** to postpone to 2011 the full operationalization and implementation of new Organs and programs;

6. **DECIDES** to remove the budgetary allocation of election monitoring under the Pan African Parliament and any other Organ, following the decision that the Commission should harmonize the organization of joint election observation missions with other Organs;;

7. **DECIDES** to allocate US$3,020,854 to NEPAD as initial budget for its integration into African Union structures and processes pending:

   i. The approval of its structure by the Policy Organs;

   ii. Continued harmonization of its programs with those of the Commission to avoid duplication and ensure coherence.

**Assembly/AU/Dec.288(XIV)**

# DECISION ON ZIMBABWE

**The Assembly,**

1. **RECALLS** Decision EX.CL/Dec.252(XIII) adopted in Sirte, Great Libyan Arab Jamahiriya, in July 2009 on the immediate lifting of sanctions imposed on Zimbabwe;

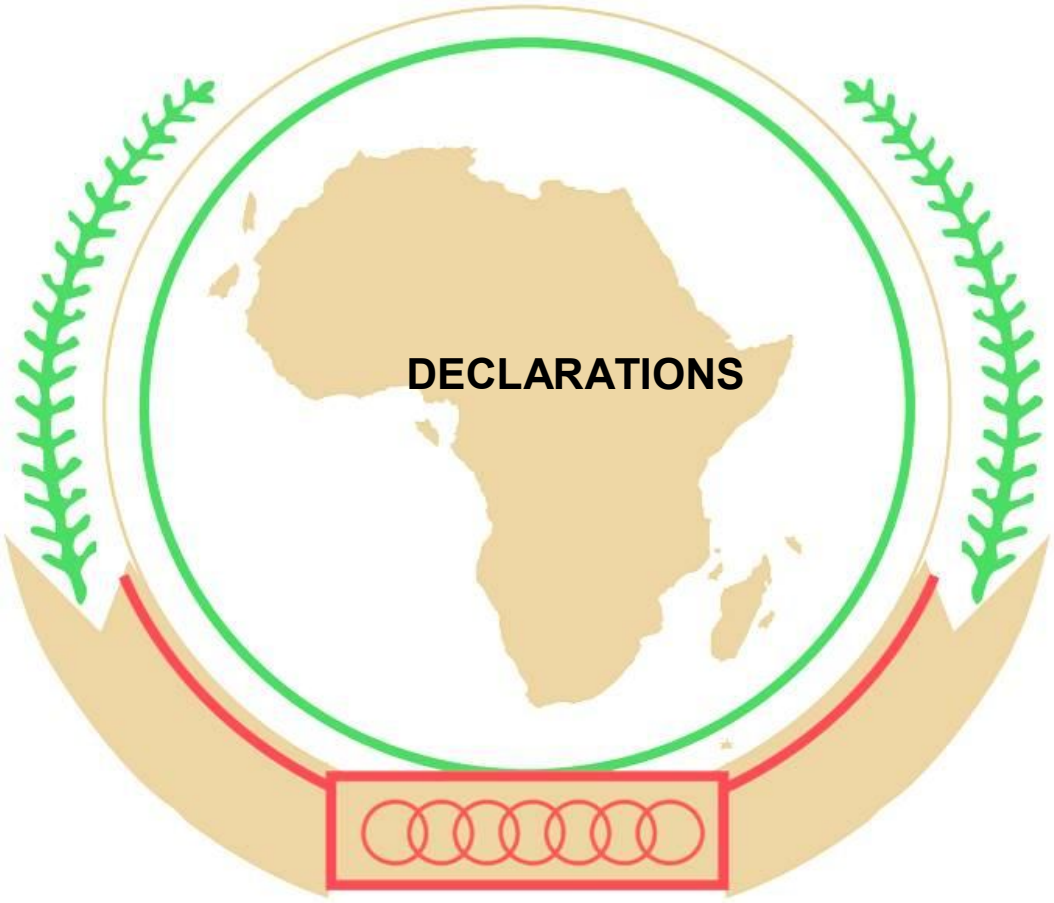
2. **DEPLORES** the absence of the effective implementation of this Decision by the International Community;

3. **DRAWS THE ATTENTION** of Member States and the International Community on the harmful consequences of the non-application of the said Decision on the economic and social stability of Zimbabwe as well as on the well-being of the populations of that country;

4. **INVITES** all Member States and the International Community to give priority to the immediate and permanent lifting of the international sanctions imposed on Zimbabwe;

5. **REQUESTS** the Chairperson of the Commission to ensure the speedy and immediate implementation of this Decision and to report to the next Ordinary Session of the Assembly in July 2010, on all actions undertaken in this regard.

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010



# DECLARATIONS

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

# ADDIS ABABA DECLARATION ON INFORMATION AND COMMUNICATION TECHNOLOGIES IN AFRICA: CHALLENGES AND PROSPECTS FOR DEVELOPMENT

**Doc. Assembly/AU/11(XIV)**

**WE**, the Heads of State and Government of the African Union, meeting in the Fourteenth Ordinary Session of our Assembly in Addis Ababa, Ethiopia on 31 January 2010 and from 1-2 February 2010:

***Considering*** the Abuja Treaty establishing the African Economic Community;

***Reaffirming*** our commitment to the principles and objectives as enshrined in the Constitutive Act of the African Union and our collective commitment to achieve the development of the Continent through the promotion of research in all fields, particularly in the area of science and technology;

***Determined*** to take all the necessary steps to strengthen our common institutions and provide them with the necessary resources to enable them fulfil their mission efficiently including the implementation of the Action Plan of the World Summit on the Information Society (WSIS);

***Recalling*** our commitment to the Millennium Development Goals (MDGs) to achieve the sustainable development of our Continent;

***Reaffirming*** our determination to eliminate poverty, improve public health and education, increase agricultural production, as well as attain the MDGs;

***Aware*** that the attainment of these goals depends not only on the ability of our States to make use of the enormous potential offered by Information and Communications Technologies but also on their will to provide this sector with increased and sustained investment;

***Convinced*** of the powerful catalyzing role that Information and Communication Technologies can play in the development and integration process in Africa, especially in the establishment of a legal and regulatory framework that is harmonized and attractive for investments, shared telecommunications and ICT infrastructure and the convergence of networks, services and administrations;

***Welcoming*** the various initiatives concerning the implementation of the resolutions and recommendations of the two phases of the World Summit on Information Society as well as the international partnerships, including in particular the Connect Africa Initiative, launched in Kigali, Rwanda during the Connect Africa Summit held from 29 to 30 October 2007, the Infrastructure Consortium for Africa, NEPAD, the Africa-EU Partnership for Science, Information Society and Space, the African Information Society Initiative of the United Nations Economic Commission for Africa and the Global Digital Solidarity Fund;

***Recalling*** the Decision of the Executive Council which adopted the Oliver Tambo Declaration to establish a mechanism to accelerate and monitor the implementation of the African Regional Action Plan on the Knowledge Economy (ARAPKE), the Reference Framework for Harmonization of Policies and Regulations on Telecommunications and ICTs in Africa, the Strategies and Action Plans for the Development of Postal Sector in Africa;

***Declaring*** the ICT sector as a sector of top priority in our development programs and therefore encouraging Member States and development partners to consider telecommunications and ICT infrastructure and services, as a basic public utility infrastructure.

**1. UNDERTAKE TO:**

i) **INTENSIFY** the activities to implement the Reference Framework for Harmonisation of Telecommunication and ICT Policies and Regulations in Africa, the action for the development of postal sector as well as the African Regional Action Plan on the Knowledge Economy;

ii) **STRENGTHEN** national programmes and regional cooperation for the development and interconnection of broadband infrastructures, the deployment of Regional Internet Exchange Points, and the improvement of rural area connectivity based on the principles of technological neutrality, non discrimination and open access, in support of the PIDA and through the use of synergies with the transport and energy sectors;

iii) **ACCORD**, in our Telecommunications/ICT development policies and strategies, particular attention to the postal sector, a vital vehicle for

reaching out to our populations in rural areas and the digitalisation of the broadcasting technology in Africa;

iv) **DEVELOP** programmes and actions on training, acquisition of basic competences in Communication and Information Technologies and on capacity building, particularly for national and regional regulatory organs;

v) **PROMOTE** research and development actions as well as an environment favourable to innovation and entrepreneurship in the sector with a view to finding solutions and services suited to the conditions and needs of African users;

vi) **SUPPORT** the effective operationalization of the Forum of Telecommunications Regulators' Assembly as a non-binding Body, and the activities to create local content and socio-economic services adapted to Africa's development imperatives and implement cyber-strategies that guarantee security, freedom, confidentiality and the development of each and everyone;

vii) **ENCOURAGE** harmonization and efficient management of radio frequency spectrum, at both the national and the regional levels, of the scarce resources of the sector (radiofrequency spectrum, numbering plans, etc) and promote a coordinated approach for the efficient development of broad band services;

**viii)** **PROMOTE** favourable regulatory environment for the implementation of innovative public-private partnership and financing models, the sharing of infrastructure, favourable taxation on ICT equipment as well as all the measures needed at national and regional levels to lower the tariffs and provide better quality of service in the sector.

**2.** **REQUEST** the Commission to:

**i)** set, in collaboration with the Regional Economic Communities, the United Nations Economic Commission for Africa, the International Telecommunication Union, higher education and research institutions and the ICT-sector specialised institutions in Africa, an African digital agenda identifying the main stages towards the establishment of an harmonized African ICT market by 2020.

**ii)** develop a coherent and integrated approach as well as a coordination mechanism involving the key African stakeholders and development partners for the implementation and follow up of this Declaration.

**3.** **APPEAL** to the development partners, especially the financing institutions, to support the implementation of this Declaration and integrate Telecommunications and ICT into their priorities by granting them financing conditions similar to those of other basic public utility infrastructures.

# DECLARATION OF THE ASSEMBLY OF THE AFRICAN UNION ON THE SITUATION IN THE REPUBLIC OF HAITI

**WE**, the Heads of State and Government of the African Union, meeting in the Fourteenth Ordinary Session of our Assembly in Addis Ababa, Ethiopia on 31 January 2010 and from 1-2 February 2010:

***Deeply Touched*** by the tragedy that has struck the people of Haiti since the earthquake on 12 January 2010 with particularly devastating consequences;

***Considering*** the manifold and great hardships that the people of Haiti have suffered over so many years;

***Concerned*** by the seriousness of the humanitarian situation currently existing in the country;

***Conscious*** of the strong ties and age-old bonds that unite Africa and Haiti as well as their common heritage;

1. **EXPRESSES** its solidarity with the Government and people of Haiti, offers its deepest sympathy to the populations who have been affected and its condolences to those families that have been afflicted;

2. **PAYS TRIBUTE** to the memory of Mr. HEDI ANNABI, Special Representative of the Secretary General of the United Nations and to the memory of all the Representatives of the international community who died during this horrifying tragedy;

3. **COMMENDS** all efforts made by the international community to provide the victims of the earthquake of 12 January 2010 with generous assistance and contribute to the reconstruction of Haiti;

4. **EXPRESSES** its gratitude to those African States which have been supporting these efforts by making financial and material contributions;

5. **URGES** all Member States to show active solidarity towards Haiti and take action to provide a collective response to the challenge brought about by the earthquake;

6. **ENCOURAGES** Member States to provide scholarships to Haitian students affected by the disaster;

7. **REQUESTS** the Chairperson of the Commission to set up, as quickly as possible, in collaboration with the African Development Bank, an African Humanitarian Fund for Haiti to which all Member States are requested to make a contribution;

8. **FURTHER REQUESTS** the Chairperson to undertake bold action to mobilize funds from all segments of the African society;

9. **CALLS ON** Africans of the Diaspora to contribute to this Fund;

10. **FURTHER REQUESTS** the Chairperson of the Commission to examine the modalities of establishing an African humanitarian mechanism to provide a rapid response, in a coordinated, harmonized and efficient way, to serious humanitarian situations which could occur in Africa and in other parts of the world;

11. **REQUESTS** the African Union to send a mission to Haiti as soon as possible, to offer the sympathy and express the solidarity of all the peoples of Africa to the Haitian people.

**Assembly/AU/Decl.3(XIV)**

# DECLARATION OF THE ASSEMBLY OF THE AFRICAN UNION ON THE ETHIOPIAN AIRLINES PLANE CRASH ON 25 JANUARY 2010

**WE**, the Heads of State and Government of the African Union, meeting in the Fourteenth Ordinary Session of our Assembly in Addis Ababa, Ethiopia, from 31 January to 2 February 2010;

1. **EXPRESS** our deep sorrow and regret for the loss of life caused by the tragic air crash on 25 January 2010 involving an Ethiopian Airlines aircraft Flight 409 flying from Beirut, Lebanon to Addis Ababa, Ethiopia;

2. **CONVEY** our heart-felt condolences and sympathy to the Government and people of the Federal Democratic Republic of Ethiopia, Ethiopian Airlines and the families of all the victims of that tragic air crash.

# RESOLUTIONS

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

**Assembly/AU/Res.1(XIV)**

# RESOLUTION ON THE DECISION OF THE CONFEDERATION OF AFRICAN FOOTBALL (CAF) TO SUSPEND TOGO FROM THE NEXT TWO AFRICAN CUP OF NATIONS TOURNAMENTS

**The Assembly,**

1. **CONVEYS** its heart-felt condolences and sympathy to the Government and people of the Republic of Togo and the families of the victims of the terrorist attack of 8 January 2010 against the Togolese National Football Team attending the African Cup of Nations tournament in the Angolan Province of Cabinda;

2. **NOTES** that the Togolese team suffered from the incident, loss of lives, injury and major psychological shock which can neither be erased nor ignored;

3. **ALSO NOTES WITH REGRET** the decision by the Confederation of African Football (CAF) to suspend the Togolese National team from the next two (2) African Cup tournaments on account of its withdrawal from the competition after the terrorist attack on the team;

4. **FURTHER NOTES** the CAF rules barring interference by Governments in the running of football and is of the view that such rules cannot apply in this case because Governments ultimately have the responsibility for the welfare and security of their citizens;

5. **CALLS ON** CAF and its governing body to reconsider its decision to suspend Togo, in order to maintain the spirit of football aimed at bringing people together in the African spirit of unity, compassion and solidarity.

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

**Assembly/AU/Res.2(XIV)**

# RESOLUTION ON SOLAR ENERGY IN THE SAHARA[3]

**The Assembly,**

***Considering*** the development of solar energy which tends to be a substitute for thermal energy, the sources of which will dwindle;

***Considering*** the many inconveniences related to atomic energy;

***Considering*** that the Sahara is an inexhaustible source of solar energy;

***Considering*** that developed countries are in the process of establishing increasingly powerful solar stations in the Sahara as an alternative source of energy;

***Considering*** the fact that Africa's tardiness in the competition for access to solar energy will result in lack of competitiveness on the part of Continent with a negative impact on its economy;

**DECIDES** to:

i. **REQUEST** all countries which have part of the Sahara within their territories to consider that the solar energy potential in this part of our Continent is a precious asset which should be managed for the benefit of our Continent;

ii. **REQUEST** the Commission to conduct a study on the solar energy issue at technical experts' level to backstop efforts to harness solar energy and to report to the Assembly at its Ordinary Session in January 2011 through the Executive Council and the Permanent Representatives Committee on the financial implications for the implementation of this Resolution.

[3] Reservation entered by Algeria

Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

**AFRICAN UNION**

**الاتحاد الأفريقي**

**UNION AFRICAINE**

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# ASSEMBLY OF THE AFRICAN UNION
## Fifteenth Ordinary Session
## 25 – 27 July 2010
## Kampala, Uganda

**Assembly/AU/Dec.289-331(XV)**
**Assembly/AU/Decl.1-2(XV)**
**Assembly/AU/Res.1(XV)**

# DECISIONS, DECLARATIONS, RESOLUTION

Adopted by the Fifteenth Ordinary Session of the Assembly of the Union on 27 July 2010 in Kampala, Uganda

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| 2 | Assembly/AU/Dec.290(XV) | Decision on the Establishment of the Pan African University Doc. EX.CL/579(XVII) | 1 |
| 3 | Assembly/AU/Dec.291(XV) | Decision on the Five (5)-Year Review of the Abuja Call for Accelerated Action Towards Universal Access to HIV/AIDS, Tuberculosis and Malaria Services in Africa Doc. EX.CL/592(XVII) | 1 |
| 4 | Assembly/AU/Dec.292(XV) | Decision on the Abuse of the Principle of Universal Jurisdiction Doc. EX.CL/606(XVII) | 2 |
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| 9 | Assembly/AU/Dec.297(XV) | Decision on the Hissene Habre Case Doc. Assembly/AU/11(XV) | 1 |
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| 23 | Assembly/AU/Dec.311(XV) | Decision on the Prevention and Combating of Terrorism | 2 |
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| 31 | Assembly/AU/Dec.319(XV) | Decision on the African Diaspora Summit and the Diaspora Initiative | 1 |



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| 32 | Assembly/AU/Dec.320(XV) | Decision on the Partnership for the Eradication of Mother-Child Transmission of HIV/AIDS Doc. Assembly/AU/17 (XV) Add.1 | 1 |
| 33 | Assembly/AU/Dec.321(XV) | Decision on the Accession of African Countries to the Convention on Banning the Use of Certain Conventional Weapons with a Traumatic Effect or which strike Indiscriminately Doc. Assembly/AU/17 (XV) Add.2 | 1 |
| 34 | Assembly/AU/Dec.322(XV) | Decision on the Institution of 3 April as African Cultural Renaissance Day Doc. Assembly/AU/17 (XV) Add.3 | 1 |
| 35 | Assembly/AU/Dec.323(XV) | Decision on Socio-Economic Transformation and Infrastructure Development in Africa: Energy, Railways, Roads and ICT Sectors – Doc. Assembly/AU/17(XV) Add.4 | 3 |
| 36 | Assembly/AU/Dec.324(XV) | Decision on the Establishment of an African Framework for Constitutional Justice Doc. Assembly/AU/17(XVII) Add. 5 | 2 |
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# DECISION ON THE PREPARATIONS FOR THE THIRD AFRICA-EUROPEAN UNION SUMMIT
## Doc. Assembly/AU/16(XV)

**The Assembly,**

1. **WELCOMES** the progress made in the preparations for the Third Africa-European Union (EU) Summit scheduled to be held in the Great Jamahiriya on 29 and 30 November 2010;

2. **REQUESTS** the Commission to work closely with the Permanent Representatives' Committee (PRC) and its relevant Sub-Committee to elaborate a Second Action Plan, jointly with the EU side on the basis of guidelines endorsed by the14th Africa-EU Ministerial Troika meeting held in Luxembourg on 26 April 2010;

3. **REQUESTS** the Commission in collaboration with Member States to engage the EU side to discuss the possibility of adopting "Economic Growth, Job Creation and Investment" as the overarching theme of the Summit;

4. **ALSO REQUESTS** the Commission to report on the implementation of this Decision to the next Ordinary Session of the Assembly through the Executive Council in January 2011.



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**Assembly/AU/Dec.290(XV)**

## DECISION ON THE ESTABLISHMENT OF THE PAN AFRICAN UNIVERSITY Doc. EX.CL/579(XVII)

**The Assembly**,

1. **TAKES NOTE** of the progress achieved towards the establishment of the Pan African University and the recommendation of the Executive Council thereto;

2. **DECIDES** to create the Pan African University, in accordance with the model proposed by the Commission;

3. **ALSO DECIDES** the allocation of the thematic areas to the following regions and countries:

   i) West Africa: Nigeria for Life and Earth Sciences;
   ii) Eastern Africa: Kenya for Basic Sciences, Technology and Innovation;
   iii) Central Africa: Cameroon for Governance, Humanities and Social Sciences.

4. **URGES** the Southern and Northern regions of Africa to finalise consultations and nominate the country with the capacity to host the thematic areas of Space Sciences and Water and Energy Sciences including climate change Institutes respectively by the next Ordinary Session scheduled for January 2011 for consideration and adoption by the Assembly through the Executive Council;

5. **REQUESTS** the Commission to draft the Statutes of the Pan African University and to submit it, in conformity with the established rules and procedures, to the Assembly, through the Executive Council at its next Ordinary Session in January 2011 for consideration.

# DECISION ON THE FIVE (5)-YEAR REVIEW OF THE ABUJA CALL FOR ACCELERATED ACTION TOWARDS UNIVERSAL ACCESS TO HIV/AIDS, TUBERCULOSIS AND MALARIA SERVICES IN AFRICA
## Doc. EX.CL/592(XVII)

**The Assembly,**

1. **TAKES NOTE** of the Progress Report on the Five (5)-Year Review of the Abuja Call for Accelerated Action Towards Universal Access to HIV/AIDS, Tuberculosis (TB) and Malaria (ATM) Services by 2010;

2. **REAFFIRMS** the commitments undertaken at the Special Summit on HIV/AIDS, TB and Malaria in 2000, 2001 and 2006, as well as the commitments made under the Millennium Development Goals (MDGs) and the Decade for Roll Back Malaria;

3. **WELCOMES** the solidarity, support and encouragement by partners and stakeholders at national, regional and international levels;

4. **ENDORSES** the Progress Report on the Abuja Call for Accelerated Action Towards Universal Access to HIV/AIDS, TB and Malaria Services in Africa;

5. **DECIDES** to extend the Abuja Call for Accelerated Action Towards Universal Access to HIV/AIDS, Tuberculosis and Malaria Services in Africa (the Abuja Call) to 2015 to coincide with the MDGs;

6. **URGES** Member States to accelerate the implementation of the Abuja Call through the strengthening of health systems, financing of health research, partnerships with relevant stakeholders; and a multi-sectoral and integrated approach to disease control;

7. **CALLS UPON** Development Partners and stakeholders at national, regional and international levels to provide sustained, well-coordinated and harmonized support, including fulfilling their commitment for adequate funding;

8. **REQUESTS** the Commission, in collaboration with other African Union (AU) Organs, the Regional Economic Communities (RECs) and partners to revise the reporting framework and disseminate it to Member States after consideration by the 5th Session of the AU Conference of Ministers of Health;

9. **ALSO REQUESTS** the Commission, in collaboration with other AU Organs, RECs and partners to monitor and conduct an evaluation of the implementation of the Abuja Call and to submit a progress report in 2013 and a final report in June/July 2015 in preparation for the review of the MDGs in 2015.



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# DECISION ON THE ABUSE OF THE PRINCIPLE OF UNIVERSAL JURISDICTION
## Doc. EX.CL/606(XVII)

**The Assembly,**

1. **TAKES NOTE** of the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.271 (XIV) adopted in Addis Ababa, Ethiopia in February 2010;

2. **REITERATES** its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union;

3. **ALSO REITERATES** its conviction that there has been blatant abuse of the Principle of Universal Jurisdiction, particularly in some non African States and **CALLS** for immediate termination of all pending indictments;

4. **FURTHER REITERATES** its conviction on the need for an international regulatory body with competence to review and/or handle complaints or appeals arising out of the abuse of the Principle of Universal Jurisdiction by individual States;

5. **REQUESTS** the Commission to finalise the study on the implications of empowering the African Court on Human and Peoples' Rights to try international crimes such as genocide, crimes against humanity and war crimes and report to the next Ordinary Session of the Assembly through the Executive Council in January/February 2011;

6. **CALLS ON** all concerned States to respect International Law and particularly the immunity of state officials when applying the Principle of Universal Jurisdiction;

7. **URGES** the European Union (EU) and its Member States to extend the necessary cooperation to the African Union (AU) to facilitate the search for a durable solution to the abuse of the Principle of Universal Jurisdiction;

8. **ALSO URGES** the EU and its Member States to implement the recommendations of the AU-EU Joint ad-hoc Expert group;

9. **EXPRESSES APPRECIATION** to the Chairperson of the AU and the Chairperson of the AU Commission for efforts made so far towards ensuring that this matter is exhaustively discussed at the level of the United Nations;

10. **UNDERSCORES** the need for African States Parties to speak with one voice to ensure that the interests of Africa are safeguarded during the forthcoming negotiations on the Principle of Universal Jurisdiction at the level of the United Nations;



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**11.** **REQUESTS** the African Group in New York to follow-up on the implementation of this Decision in collaboration with the Commission and to ensure that the concerns raised by the AU and its Member States regarding the Abuse of the Principle of Universal Jurisdiction by some non African States are properly addressed at the Level of the United Nations with a view to finding a durable solution and to submit a report thereon to the Assembly through the Executive Council on actions taken;

**12.** **ALSO REQUESTS** the Commission to follow-up on the implementation of this Decision and to report to the next Ordinary Session of the Assembly through the Executive Council in January 2011.

**Assembly/AU/Dec.293(XV)**

# DECISION ON THE ADOPTION OF THE AFRICAN MARITIME TRANSPORT CHARTER
## Doc. Assembly/AU/3(XV)

**The Assembly,**

1. **TAKES NOTE** of Decision EX.CL/Dec.542(XVI) on the Report of the Second African Union Conference of Ministers responsible for Maritime Transport adopted by the Sixteenth Ordinary Session of the Executive Council held in Addis Ababa, Ethiopia in January 2010;

2. **ADOPTS** the African Maritime Transport Charter as recommended by the Second African Union Conference of Ministers responsible for Maritime Transport held in Durban, South Africa in October 2009 and the Sixteenth Ordinary Session of the Executive Council held in Addis Ababa, Ethiopia in January 2010;

3. **URGES** Member States to speed up signature and ratification of the African Maritime Transport Charter in order to ensure its speedy entry into force to facilitate accelerated development of maritime transport in the Continent;

4. **ALSO URGES** Member States, the Regional Economic Communities and Specialised Agencies to participate effectively in the implementation of the African Maritime Transport Charter;

5. **APPEALS** to the United Nations Economic Commission for Africa, the African Development Bank, the International Maritime Organization, the United Nations Development Programme, the United Nations Office on Drugs and Crime, the World Bank, European Union, interested countries and all development partners to support the implementation of the African Maritime Transport Charter;

6. **REQUESTS** the Commission to prepare and manage a plan of action for the implementation of the African Maritime Transport Charter;

7. **FURTHER REQUESTS** the Commission to report regularly to the Assembly through the Executive Council on the implementation of this Decision.



2010 MAKE PEACE HAPPEN

**DECISION ON THE REPORT OF THE PEACE AND SECURITY COUNCIL ON ITS ACTIVITIES AND THE STATE OF PEACE AND SECURITY IN AFRICA**
**Assembly/AU/6(XV)**

**The Assembly,**

1. **TAKES NOTE** of the Report of the Peace and Security Council (PSC) of the African Union (AU) on its Activities and the State of Peace and Security in Africa;

2. **RECALLS** the Tripoli Declaration on the Elimination of Conflict and the Promotion of Sustainable Peace in Africa [SP/ ASSEMBLY/PS: DECL (1)] and Plan of Action [SP/ASSEMBLY/PS/MAP], adopted at its Special Session on the Consideration and Resolution of Conflicts in Africa, held in Tripoli, Libya, on 31 August 2009. The Assembly **REITERATES** the need for the effective follow-up and implementation of both the Declaration and the Plan of Action;

3. **WELCOMES** the efforts deployed by the AU and the Regional Economic Communities / Regional Mechanisms for Conflict Prevention, Management and Resolution (RECs/RMs), with the support of the international community, towards the full operationalization of the African Peace and Security Architecture, in particular the Continental Early Warning System (CEWS) and the African Standby Force (ASF). In this respect, the Assembly **NOTES** the significance of the exercise *Amani Africa*, scheduled to be held in October 2010, to test the operational readiness of the ASF. The Assembly **CALLS FOR** continued support to the African Centres of Excellence on Conflict Resolution and Peacekeeping;

4. **ALSO WELCOMES** the efforts made towards conflict prevention and resolution, as well as the consolidation of peace, where it has been achieved, and **CALLS ON** all stakeholders to redouble their efforts with a view to speeding up the achievement of the objective of a conflict-free Africa;

5. **REITERATES ITS CONCERN** at the continued impasse in the process aimed at restoring constitutional order in Madagascar, due mainly to the refusal of the *de facto* authorities to cooperate with the AU and the Southern African Development Community (SADC) towards the implementation of the Maputo Agreements of 6 August 2009 and the Addis Ababa Additional Act of 6 November 2009. The Assembly **ENCOURAGES** the SADC Mediator, former President Joachim Chissano, to pursue and intensify his consultations with the Malagasy parties, with a view to facilitating an early and consensual return to legality, in accordance with the AU relevant instruments and decisions. In the meantime, the Assembly **CALLS FOR** renewed efforts to fully implement the targeted sanctions imposed



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by the PSC, in line with the decisions adopted at its meetings held on 19 February and 17 March 2010, respectively;

6. **WELCOMES** the signing in Moroni, on 16 June 2010, of the "Agreement for the Management of the Interim Period" by the President of the Union and the Governors of the Autonomous Islands of Ngazidja, Anjouan and Mohéli. The Assembly **URGES** the Comorian parties to work in good faith for the strict implementation of this Agreement, including the organization, within the scheduled timeframe, of the harmonized elections of the President of the Union and the Governors of the Autonomous Islands and the handing over of power between the President-elect and the outgoing one, and **URGES** the international community to provide the financial and technical support necessary for the success of the process;

7. **REAFFIRMS ITS FULL SUPPORT** to the Transitional Federal Government (TFG) of Somalia, and **STRONGLY CONDEMNS** the attacks and other acts of violence perpetrated by Al Shabab and other terrorist groups against the TFG, the Somali people and the AU Mission in Somalia (AMISOM). The Assembly **FURTHER CONDEMNS** the despicable terrorist attacks claimed by Al Shabab that were committed in Kampala, on 11 July 2010, against innocent civilians. The Assembly **CALLS ON** Member States and the entire international community to isolate and take all required measures against individuals, entities and States engaged in terrorist acts and whose action is undermining the peace and reconciliation process in Somalia, as well as regional stability and international security;

8. **ENCOURAGES** the Transitional Federal Institutions (TFIs) to enhance their cohesion and work purposefully towards national reconciliation and unity among Somalis, in line with the Djibouti Agreement of August 2009. In this respect, the Assembly **WELCOMES** the signing and implementation of the Agreement reached in Addis Ababa, on 15 March 2010, between the TFG and Ahlu Sunna Wal Jamma'a, as well as the Agreement signed with the Somali region of Puntland, on 12 April 2010;

9. **EXRESSES, ONCE AGAIN, ITS APPRECIATION** to the Troop Contributing Countries (TCCs) to AMISOM, namely Uganda and Burundi, for their invaluable contribution to peace in Somalia and for the sacrifices made. The Assembly **ENCOURAGES** ongoing efforts to build the capacity of the Somali security forces, and **ENDORSES** the decisions, contained in the communiqué of the 15th Extra-ordinary Session of the Assembly of Heads of State and Government of the

Inter-Governmental Authority on Development (IGAD), held in Addis Ababa, on 5 July 2010, and **DEEPLY APPRECIATES** the regional initiative under the African Peace and Security Architecture to enable AMISOM reach its authorized strength of 8,100 troops. The Assembly **MANDATES** the Commission to initiate the planning for the new phases of the deployment of AMISOM, supported by the ASF, once operationalized;

10. **FURTHER RECOGNISES** the imperative of political engagement in Somalia, and **REQUESTS** the Chairperson of the Commission to appoint a High Level Personality, to galvanize international support and attention for Somalia, and the engagement of the population in governance processes, in order to enhance the legitimacy of the TFG. The Assembly **AFFIRMS** that the Djibouti process remains the sole basis for peace and reconciliation in Somalia, and **URGES** the TFG to continue the efforts that it has been making to broaden its political base in the context of the legitimacy of the TFIs, by including those who genuinely embrace peace and renounce violence. The Assembly **CALLS ON** all actors in Somalia to support and bolster activities that guarantee the livelihoods of the population. The Assembly **ALSO REITERATES** its call to the larger international community and the United Nations Security Council, in particular, to play their rightful role, including the transformation of AMISOM into a United Nations Peace Mission, and to mobilize resources commensurate with the magnitude of the challenges facing Somalia and the region;

11. **REITERATES ITS CONCERN** at the continued impasse in the peace process between Ethiopia and Eritrea and **REAFFIRMS** AU's readiness to assist the two countries to overcome the current deadlock through dialogue, and normalize their relations;

12. **WELCOMES** the signing, under the mediation efforts of the Emir of Qatar, of an Agreement between Djibouti and Eritrea, in which the two countries agreed to settle their border dispute through mediation and peaceful means. The Assembly **CALLS FOR** the scrupulous implementation of this Agreement and **EXPRESSES THE HOPE** that this development will have positive impact on the overall situation in the Horn of Africa, through sustained efforts to be deployed in a comprehensive and consistent manner, as well as in good faith;

13. **WELCOMES** the sustained efforts aimed at consolidating peace in Burundi and **UNDERSCORES**, in this regard, the importance of successfully completing the electoral process which began in May and is due to end in September 2010. The Assembly **APPEALS URGENTLY** to all the political actors to draw lessons from

the local and presidential elections of 21 May and 28 June 2010, and work together to strengthen the democratic process, especially by participating in future elections and in contributing to the proper functioning of the institutions. The Assembly **ALSO COMMENDS** the progress which continues to be made in the consolidation of peace in the Democratic Republic of Congo (DRC). The Assembly **UNDERSCORES THE IMPORTANCE** of the swift implementation of the recommendations of the AU multidisciplinary mission that visited the DRC and Burundi in January and February 2010, as endorsed by the PSC at its 230th meeting held on 27 and 31 May 2010;

14. **WELCOMES** the peaceful and successful holding of the April 2010 General Elections in the Sudan, despite the challenges that faced the process, and **ENCOURAGES** the Sudanese parties to redouble their efforts towards the democratic transformation of the country, in line with the vision articulated in the 2005 Comprehensive Peace Agreement (CPA) ;

15. **NOTES** that the CPA is entering its final stage of implementation, which will culminate in the holding of the self-determination referendum in Southern Sudan and the referendum in Abyei, in January 2011. The Assembly **STRESSES** the critical importance of the partnership between the NCP and the SPLM and **URGES** them, in consultation with the other stakeholders, to expeditiously address the outstanding issues in the CPA implementation, particularly the resolution of the issue of Abyei, the modalities for the organization of popular consultations in Blue Nile and Southern Kordofan states, and the completion of the demarcation of the North-South border;

16. **FURTHER URGES** the parties to work towards the successful completion of the negotiations on post-referendum issues and arrangements, building on the Mekele Memorandum of Understanding (MoU) of 22 June 2010 and the outcome of the Exposure Session held in Juba on 19 and 20 July 2010, in order to ensure sustainable peace, close cooperation between the North and South and the protection of the rights of all Sudanese, regardless of the outcome of the referendum on self-determination. The Assembly **PLEDGES AU'S FULL SUPPORT** to the efforts being made by the Sudanese parties and its commitment to respect the outcome of the self-determination referendum and facilitate its implementation, as one of the CPA's Guarantors;

17. **EXPRESSES CONCERN** at the recent degradation of the security situation in Darfur, and **CALLS ON** all parties to demonstrate restraint and refrain from actions likely to further complicate the situation. The Assembly **ENCOURAGES** the parties to the

Doha process, led by the AU-UN Joint Chief Mediator, with the support of the Government of Qatar, to intensify their efforts towards achieving further progress, and **URGES** the Movements that are not participating in the Doha talks to join the process without any further delay. The Assembly **EXPRESSES ITS FULL SUPPORT** to the early convening, in Darfur, of the Darfur-Darfur Conference, as envisaged by the AU High-Level Implementation Panel (AUHIP) on Sudan, and **CALLS ON** all concerned to extend the necessary cooperation and support;

**18.** **WELCOMES** the work being done by the AUHIP since its establishment in October 2009, in particular the support to the implementation of the CPA, the negotiations on the post-referendum issues and arrangements and the search for an inclusive and comprehensive solution to the conflict in Darfur. The Assembly **STRESSES** the importance of effective coordination at international level and on the ground, in support of the efforts of the Sudanese parties. In this respect, the Assembly **WELCOMES** the establishment of the Sudan Consultative Forum co-chaired by the AU and the UN, which held its first meeting in Khartoum on 17 July 2010;

**19.** **WELCOMES** the consolidation of the normalization process in the relations between Chad and Sudan, and **COMMENDS** the two countries for the steps taken in this respect, as well as the two Heads of State for their vision and leadership;

**20.** **NOTES WITH CONCERN** the delays in the implementation of the calendar of elections in the Central African Republic (CAR) and in the execution of the DDR program. The Assembly **FURTHER EXPRESSES ITS CONCERN** at the continued activities of the Lord's Resistance Army in CAR. The Assembly **CALLS ON** the Central African parties to work towards the early holding of elections and **REQUESTS** the international community to provide the necessary support;

**21.** **REQUESTS** the Commission, within the framework of the Tripoli Plan of Action, to organize, as soon as possible, action-oriented consultations between the countries affected by the activities of the LRA, and all other interested parties, with a view to facilitating a coordinated regional action in the face of the threat the group represents;

**22.** **URGES** the Ivorian parties to do their utmost, with the help of the Facilitator, President Blaise Compaoré of Burkina Faso, to scrupulously implement the provisions of the Ouagadougou Political Agreement and its Supplementary Agreements, in order to create an enabling environment for the speedy holding of the elections, which should conclude the process for a way out of the crisis;



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**23.** **TAKES NOTE** of the transition and the process for the return to constitutional order as defined by the *de facto* authorities in Niger in consultation with the Niger parties, and **REQUESTS** all the stakeholders in Niger to ensure strict compliance. The Assembly CALLS UPON Member States and the international community at large to provide the support required for the proper conduct of the transition process, in particular the elections, and the necessary assistance to cope with the food shortages facing Niger;

**24.** **WELCOMES** the holding on 27 June 2010, of the first round of the presidential election in Guinea and **UNDERSCORES** the imperative need for the speedy organization of the second round of the presidential elections, to be followed by the legislative elections. The Assembly **COMMENDS** the President of the Transition and the IEC for the efforts deployed and **ENCOURAGES** them to persevere in their determination, and **WARNS** against any attempt to undermine the progress made and the electoral process. The Assembly **INVITES** Member States and international partners to continue to lend their support towards the completion of the ongoing transition in Guinea, as well as the reform of the defence and security sector, and the country's economic recovery;

**25.** **WELCOMES** the holding in Brussels on 14 and 15 June 2010, under the auspices of the European Union, of the Partners Round Table for Mauritania, and **ENCOURAGES** the partners concerned to rapidly disburse the funds pledged. The Assembly **URGES** the Mauritanian parties to promote political dialogue in good faith, in accordance with the Dakar Framework Agreement;

**26.** **EXPRESSES DEEP CONCERN** at the developments which took place in Guinea Bissau on 1st April 2010, undermining constitutional order, and **CONDEMNS** the continued interference of the Army in the functioning of the democratic institutions. The Assembly **EMPHASIZES THE IMPORTANCE** of the effective implementation of the security sector reform and **REQUESTS** the AU and ECOWAS Commissions to speed up preparations for the rapid deployment of the stabilization mission provided for in the Tripoli Plan of Action;

**27.** **REITERATES ITS DEEP CONCERN** over the persistence and spread of maritime piracy, which is an international crime pursuant to relevant international instruments, including resolution 1918 (2010), and **WELCOMES** the holding in Addis Ababa, on 6 and 7 April 2010, of a Workshop on Maritime Security and Safety. The Assembly **LENDS ITS SUPPORT** to the efforts being made by the Commission towards the implementation of the conclusions of the Workshop, including the elaboration of a continental strategy for the management of the continent's maritime domain and the



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involvement of the ASF in efforts to promote maritime security and safety, and **STRESSES,** in this context, the importance of adequate protection of the African maritime domain and that of Island States in particular, against organized crime, as well as illegal fishing and dumping of toxic waste. The Assembly **REITERATES ITS CALL**, as contained in the Tripoli Plan of Action, for the convening, within the framework of the United Nations, of a conference to develop an international Convention on Piracy;

**28.** **REITERATES** the need for continued and sustained efforts to address the scourge of terrorism, **WELCOMES** the holding of the 4th meeting of Focal Points of the African Centre for the Study and Research on Terrorism (ACSRT), and **CALLS FOR** increased cooperation between Member States, in accordance with the relevant AU instruments. The Assembly **REQUESTS** the Commission to submit to the PSC as soon as possible, a series of new measures designed to enhance the effectiveness of collective African action against the phenomenon of terrorism, including appropriate measures in terms of mutual legal and criminal assistance and the elimination of sources of funding for terrorists groups, including payment of ransom in hostage taking situations;

**29.** **WELCOMES** the efforts deployed by the Commission to develop a framework of action and AU guidelines on the protection of civilians in peacekeeping operations, pursuant to the Protocol Relating to the Establishment of the Peace and Security Council and other relevant instruments of the AU. In this regard, the Assembly **TAKES NOTE** of the organization, in Addis Ababa, by the Commission, with the help of the Australian Government and the Asia Pacific Civil-Military Centre of Excellence, of a workshop on the issue, and **REQUESTS** the Commission to continue its efforts and to report to the relevant organs of the AU to enable them to take the necessary decisions on the basis of the relevant AU instruments;

**30.** **WELCOMES** the partnership being developed between the PSC, on the one hand, the United Nations Security Council (UNSC) and the European Union Political and Security Committee, on the other hand, including the convening, in New York, on 9 July 2010, of the 4th annual consultative meeting between the AUPSC and the UNSC and **CALLS FOR** the mobilization of the international community as a whole in support to African solutions to African problems;

31. **EXPRESSES SATISFACTION** at the level attained in the operationalization of the African Peace and Security Architecture and **ENCOURAGES** the RECs/RMs and all Member States to strengthen and increase their contributions towards creating the necessary conditions for the success of African efforts to promote opeace and security;

32. **REQUESTS** the Commission to continue and intensify its activities for the diligent and full implementation of the Tripoli Declaration and Plan of Action, including aspects relating to the objectives of the Year of Peace and Security in Africa.

**DECISION ON THE PROGRESS REPORT OF THE CHAIRPERSON OF THE COMMISSION ON THE IMPLEMENTATION OF DECISION ASSEMBLY/AU/DEC.275(XIV) ON THE YEAR OF PEACE AND SECURITY IN AFRICA**
**Doc. Assembly/AU/7(XV)**

**The Assembly,**

1. **TAKES NOTE** of the Report of the Chairperson of the Commission on the implementation of Decision Assembly/AU/Dec.275(XIV) on the Year of Peace and Security in Africa adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia in February 2010;

2. **WELCOMES** the steps taken and the efforts made by the Commission, within the framework of the implementation of this Decision, including the establishment by the Chairperson of the Commission of the Year of Peace and Security Advisory Council and the appointment of Peace Ambassadors;

3. **EXPRESSES SATISFACTION** at the progress made in the implementation of the 2010 Year of Peace and Security in Africa, in particular the momentum gained by the outreach campaign, the spaces opened up to enable the various stakeholders to contribute to the achievement of the objective of a conflict-free Africa, the partnerships built, the efforts made at national and regional levels, as well as the intensification of efforts towards the consolidation of the African Union (AU) normative and institutional framework on peace and security;

4. **URGES** Member States to fully take ownership of this initiative, including by signing and ratifying relevant AU instruments, including the *African Charter on Democracy, Elections and Governance*, and effectively implementing the commitments contained therein, as well as by intensifying their efforts for peace;

5. **ALSO URGES** Member States to take practical steps to support and popularize the campaign in their respective countries, notably through issuing special stamps, providing free air time and space for advertisements in state media, and facilitating the successful tour of the Flame of Peace, as well as supporting other activities such as the *Make Peace Happen Lesson Plan,* to be implemented with the support of Ministries of Education;

6. **STRESSES** the need to mobilize increased resources from within the continent to ensure real ownership and leadership in the quest for peace;

7. **WELCOMES** the initiatives undertaken by a number of African civil society organizations, in response to the AU's call for partnership, including the *African Centre for the Constructive Resolution of Disputes* (ACCORD), *Femmes Africa Solidarité* (FAS), the *Institute for Peace and Security Studies* (IPSS) of the Addis

Ababa University, the *Institute for Security Studies* (ISS), which is working towards the launching of a Peace Academy, an important tool for the enhancement of Africa's capacity in the area of peace and security, the *Organisation for Social Science Research in Eastern and Southern Africa* (OSSREA) and the *Council for the Development of Social Science Research* (CODESRIA) and the Cairo Regional Center for Conflict Resolution and Peacekeeping in Africa;

**8.** **ENCOURAGES** all businesses in Africa to contribute to this initiative and also to sign the AU-initiated *Make Peace Happen Industry Charter* and **WELCOMES** the pledges made by some private sector companies, namely Kenya Airways and Ethiopian Airlines, in response to the request by the Commission to contribute to the Year of Peace and Security;

**9.** **STRESSES** the critical importance of the United Nations proclaimed International Day of Peace, on 21st September, as a way to provide a single rallying point for the continent to show that peace is possible, and **ENDORSES** the objectives being pursued and the activities planned, namely:

i) cessation of hostilities in all conflict areas which are still experiencing varying levels of violence,

ii) distribution of humanitarian supplies, materials and services to communities in conflict areas, as well as in non-conflict areas in critical need of these,

iii) one minute of silence for peace across Africa at 10.00am GMT,

iv) relevant developmental work and community support in all AU Member States to be carried out by members of the armed and security forces,

v) *One Day One Goal* football games, and

vi) *Make Peace Happen Lesson Plan* to be taught in all schools on Peace Day or during other relevant occasions;

**10.** **URGES** all Member States to start preparations in earnest, to mobilize all stakeholders and set up the required structures to coordinate the activities to be implemented on Peace Day as outlined above;

**11.** **CALLS ON** all AU partners, humanitarian organizations, civil society, media houses and religious organizations to fully embrace the objectives of the Peace Day and contribute to its success.

**12.** **CALLS ON** the UN to take all necessary steps in support of the Year of Peace and Security and Peace Day in Africa, taking into account its critical role in the overall success of Peace Day and the Year of Peace and Security as a whole. ;

**13.** **EXPRESSES ITS GRATITUDE** to the AU partners who have contributed financially and technically to the implementation of the Year of Peace and Security, in particular the German Government, through GTZ, and the Italian Government, as well as to the United Nations Children's Fund (UNICEF), the United Nations Development Fund for Women (UNIFEM), the United Nations High Commission for Refugees (UNHCR), Oxfam and ISS, for their support in terms of outreach and communication;

**14.** **REQUESTS** the Commission to submit, at its next Ordinary Session in January 2011, a detailed report, taking stock of the implementation of the Year of Peace and Security program, the achievements made and constraints faced, and to make recommendations on how best to sustain the campaign for peace beyond 2010.

**DECISION ON THE PROGRESS REPORT OF THE COMMISSION ON THE IMPLEMENTATION OF DECISION ASSEMBLY/AU/DEC.270(XIV) ON THE SECOND MINISTERIAL MEETING ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)**
**Doc. Assembly/AU/10(XV)**

**The Assembly,**

1. **TAKES NOTE** of the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) adopted by the Fourteenth Ordinary Session of the Assembly held in Addis Ababa, Ethiopia, on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) and all comments and observations made by Member States and **ENDORSES** the recommendations contained therein;

2. **REITERATES** its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union;

3. **RECALLS** the African Union (AU) position expressed through the Decision Assembly/AU/Dec.270(XIV);

4. **EXPRESSES** its disappointment that the United Nations Security Council (UNSC) has not acted upon the request by the African Union to defer the proceedings initiated against President Omar Hassan El-Bashir of the Republic of The Sudan in accordance with Article 16 of the Rome Statute of ICC which allows the UNSC to defer cases for one (1) year and **REITERATES** its request in this regard;

5. **REITERATES** its Decision that AU Member States shall not cooperate with the ICC in the arrest and surrender of President El-Bashir of The Sudan;

6. **REQUESTS** Member States to balance, where applicable, their obligations to the AU with their obligations to the ICC;

7. **URGES** all Member States to speak with one voice to ensure that the proposed amendment to Article 16 of the Rome Statute which would allow the UN General Assembly to take over the power of the UNSC to defer cases for one (1) year in cases where the UNSC has failed to take a decision within a specified timeframe;

8. **DECIDES** to reject for now, the request by ICC to open a Liaison Officer to the AU in Addis Ababa, Ethiopia and **REQUESTS** the Commission to inform the ICC accordingly;



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**9.** **EXPRESSES CONCERN** over the conduct of the ICC prosecutor, Mr. Moreno Ocampo who has been making egregiously unacceptable, rude and condescending statements on the case of President Omar Hassan El-Bashir of The Sudan and other situations in Africa;

**10.** **REQUESTS** the Commission to report regularly on the implementation of this decision.

# DECISION ON THE HISSENE HABRE CASE
## Doc. Assembly/AU/11(XV)

**The Assembly,**

1. **TAKES NOTE** of the Progress Report of the Commission on the Implementation of Decision Assembly/AU/ Dec.240(XII) adopted in Addis Ababa, Ethiopia, in February 2010 on the Hissene Habre case;

2. **REITERATES** its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union;

3. **REITERATES** its appeal to all Member States to contribute to the budget of the trial and extend the necessary support to the Government of Senegal in the execution of the African Union mandate to prosecute and try Hissene Habre ;

4. **REQUESTS** the Government of Senegal, the Commission and Partners, particularly the European Union to continue consultations with the view to the holding of the Donors Round Table;

5. **INVITES** all partner countries and institutions to attend the Donors Round Table that will be organized in this regard in Dakar, Senegal in November 2010;

6. **REQUESTS** the Commission to monitor the implementation of this decision and to report to the next Ordinary Session of the Assembly through the Executive Council in January 2011.



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# DECISION ON THE TRANSFORMATION OF THE AFRICAN UNION COMMISSION INTO THE AFRICAN UNION AUTHORITY
## Doc. Assembly/AU/12(XV)

**The Assembly,**

1. **TAKES NOTE** of the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.263(XIII) adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Jamahiriya on 3 July 2009;

2. **REITERATES** its commitment to the vision of gradually transforming the African Union Commission into the African Union Authority in order to strengthen the institutional building processes of the African Union and to accelerate the integration of the continent;

3. **REQUESTS** the Commission to convene a follow-up meeting of Government Experts open to members of the Permanent Representatives' Committee (PRC) for ten (10) working days to pursue consideration of the remaining legal instruments on the transformation of the African Union Commission into the African Union Authority;

4. **ALSO REQUESTS** the Commission to convene a meeting of Ministers of Justice/Attorneys General of Member States to consider and approve the legal instruments on the transformation of the African Union Commission into the African Union Authority;

5. **DECIDES** that the meetings of experts and Ministers be held as soon as practicable and be financed through the supplementary budget or virement;

6. **FURTHER REQUESTS** the Commission to report on the implementation of this Decision and to submit the necessary legal instruments to the Assembly through the Executive Council at its next Ordinary Session in January 2011 for consideration.



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**DECISION ON THE PREPARATIONS FOR THE SECOND AFRO-ARAB SUMMIT**
**Doc. Assembly/AU/15(XV)**

**The Assembly,**

1. **TAKES NOTE** of the Report on the Status of Preparations for the Second Afro-Arab Summit to be held in the Great Jamahiriya in October 2010;

2. **WELCOMES** the renewed commitment of both the African and the Arab sides to revitalize and further consolidate the Afro-Arab Cooperation in the interest and benefit of the peoples of the two sides;

3. **UNDERSCORES** the importance of the Second Afro-Arab Summit to continue the political dialogue and address the political and socio-economic challenges prevailing in the two regions;

4. **REITERATES** its appreciation for the offer by Brother Muammar Gaddafi and the People of the Great Jamahiriya to host the Second Afro-Arab Summit;

5. **ENDORSES** 10 October 2010 as the proposed date for the Second Afro-Arab Summit and **URGES** Member States to actively participate in the Summit and Pre-Summit meetings as well as activities at the highest possible level.



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**DECISION ON THE THEME OF THE JULY 2011 AU SUMMIT**
**Doc.EX.CL/588(XVII)**

**The Assembly,**

1. **TAKES NOTE** of the recommendations of the Executive Council on the Report of the African Ministers of Youth (COMY III), held in Victoria Falls, Zimbabwe from 12 to 16 April 2010;

2. **DECIDES** that the theme for the Summit in July 2011 will be "*Accelerating Youth empowerment for sustainable development*";

3. **REQUESTS** the Commission, in collaboration with the Permanent Representatives' Committee to work out a criteria for determining the themes of the Summits;

4. **ALSO REQUESTS** the Commission to report on the implementation of this Decision to the next Ordinary Session of the Assembly, through the Executive Council in January 2011.



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# DECISION ON THE DATE AND VENUE OF THE TWENTY-THIRD ORDINARY SESSION OF THE ASSEMBLY OF THE AFRICAN UNION

**The Assembly,**

1. **WELCOMES** the offer by the Government of the Republic of Gabon to host the Twenty-third Ordinary Session of Assembly of the African Union scheduled for July 2014 in Libreville, Gabon;

2. **ACCEPTS** the offer by the Republic of Gabon to host the Twenty-third Ordinary Session of the Assembly of the African Union;

3. **REQUESTS** the Commission in consultation with the host country to propose in due course, dates for the holding of the meetings of the Libreville Summit.

**DECISION ON STRENGTHENING OF THE COOPERATION AMONG THE AFRICAN UNION COMMISSION, THE AFRICAN DEVELOPMENT BANK AND THE UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA TO ADDRESS THE DEVELOPMENT CHALLENGES OF AFRICA**
**Doc. EX.CL/586(XVII)**

**The Assembly,**

1. **NOTES WITH APPRECIATION** the highly successful convening of the Third Meeting of the Joint African Union (AU) Conference of Ministers of Economy and Finance and the United Nations Economic Commission for Africa (UNECA) Conference of Ministers of Finance, Planning and Economic Development in Lilongwe, Malawi in March 2010;

2. **REAFFIRMS** the importance of strengthening and increasing cooperation and collaboration between the AU Commission, the African Development Bank (AfDB) and UNECA;

3. **NOTES WITH SATISFACTION** the establishment of several joint flagship initiatives between the AU Commission, AfDB and UNECA including the publication of the assessing Regional Integration in Africa Report and annual report of Progress on the Millennium Development Goals;

4. **ALSO NOTES** with satisfaction the improved functioning of the Regional Coordination Mechanism of the UN Agencies working in support of the AU and its New Partnership for Africa' Development (NEPAD) Planning and Coordinating Agency jointly convened by the AU Commission and UNECA and tasked with coordinating UN support to the AU Ten Year Capacity Building Plan as well as NEPAD Planning and Coordinating Agency activities;

5. **WELCOMES** the recent finalization of arrangements for the establishment of the Joint Support Office of the Joint AU Commission/AfDB/UNECA Secretariat to be operationalized in the third quarter of 2010;

6. **COMMENDS** the 2010- 2012 UNECA Business Plan which is closely aligned to the AU Strategic Plan and **CALLS ON** the UN Secretary General and Africa's Development Partners to continue to support the current management of UNECA to ensure the successful implementation of the Business Plan;

7. **REQUESTS** the AU Commission to continue to cooperate with UNECA in undertaking joint activities, projects and programmes for Africa's development,



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especially by making the Joint AU-UNECA Conference of Ministers as a major annual ministerial platform for the deliberation and exchange of views on issues relating to Africa's growth and development;

8. **ENCOURAGES** Dr. Jean Ping, Chairperson of the AU Commission; Mr. Donald Kaberuka, President of the African Development Bank; and Mr. Abdulie Janneh, Executive Secretary of the Economic Commission for Africa to pursue their on-going joint efforts to deepen the relationship among the three Pan-African institutions.

# DECISION TO SUPPORT THE SQUARE KILOMETRE ARRAY (SKA) PROJECT ON THE AFRICAN CONTINENT Doc.EX.CL/584(XVII)

**The Assembly,**

1. **ENDORSES** the recommendation of the Executive Council with regard to the Square Kilometre Array (SKA) Project provided for in the Report of the Fourth Ordinary Session of the African Ministerial Conference on Science and Technology (AMCOST IV), held in Cairo, Egypt, from 8 to 11 March 2010;

2. **ACKNOWLEDGES** the importance of science, technology and innovation emanating from the SKA Project in development of our knowledge-based economies and driving human capital development programmes;

3. **APPRECIATES** the efforts of the Republic of South Africa in coordinating Africa's bid to promote space related science and technology matters on the continent;

4. **ENDORSES** the African bid to host the SKA on the African continent, thereby providing the world with the unique instrument for frontier research and discovery, cementing Africa's commitment to contribute to global scientific excellence and enterprise;

5. **ALSO ENDORSES** the Republic of South Africa's bid to host, in collaboration with Botswana, Ghana, Namibia, Madagascar, Mauritius, Mozambique, Kenya and Zambia the Square Kilometre Array (SKA) Project on the African continent;

6. **CALLS ON** Member States, the Commission and the Regional Economic Communities to fully cooperate with the Republic of South Africa on this project by providing the necessary support to this bid;

7. **ALSO CALLS ON** Africa's development partners and the global scientific community to support the African SKA bid, both directly and in all relevant forums where such support would promote the success of the bid.



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# DECISION ON THE THEME, DATE AND VENUE OF THE SIXTEENTH ORDINARY SESSION OF THE ASSEMBLY OF THE AFRICAN UNION

**The Assembly,**

1. **RECALLS** the Decision EX.CL/Dec.525(XVI) adopted by the Sixteenth Ordinary Session of the Executive Council and endorsed by the Fourteenth Ordinary Session of the Assembly in February 2010 on the theme of the January/February 2011 Summit which shall be devoted to the Shared Values in Africa, in particular, the putting in place of a Pan-African Architecture on Governance;

2. **DECIDES** that the dates of the Sixteenth Ordinary Session of the Assembly which will hold in Addis Ababa, Ethiopia, shall be the following:

   i. Twenty-first Ordinary Session of the Permanent Representatives Committee: 24 and 25 January 2011;

   ii. Eighteenth Ordinary Session of the Executive Council: 27 and 28 January 2011;

   iii. Sixteenth Ordinary Session of the Assembly: 30 and 31 January 2011.



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**Assembly/AU/Dec.305(XV)**

**DECISION ON THE STAFF REGULATIONS AND RULES**
**DOC. Assembly/AU/4 (XV)**

**The Assembly,**

1. **TAKES NOTE** of the recommendation of the Executive Council on the Draft Staff Regulations and Rules of the African Union;

2. **ADOPTS** the Staff Regulations and Rules of the African Union;

3. **REQUESTS** the Commission to report annually on the implementation of the Staff Regulations and Rules to the Assembly through the Executive Council.

Adopted by the Fifteenth Ordinary Session of the Assembly of the Union on 27 July 2010 in Kampala, Uganda

# DECISION ON THE AFRICAN UNION KWAME NKRUMAH SCIENTIFIC AWARDS

**The Assembly,**

1. **ENDORSES** the recommendation of the Chairperson of the Commission of the African Union to honour the memory of the Great Pan-Africanist and First President of the Republic of Ghana, Dr. Kwame Nkrumah;

2. **DECIDES** to name the African Union Scientific Awards as "African Union Kwame Nkrumah Scientific Awards".



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# DECISION ON THE ESTABLISHMENT AND OPERATIONALISATION OF THE AFRICAN PETROLEUM FUND

**The Assembly,**

1. **TAKES NOTE** of Decision EX.CL/Dec.546(XVI) on the Report of the Second Conference of African Union Ministers responsible for hydrocarbons (Oil and Gas) adopted by the Sixteenth Ordinary Session of the Executive Council held in Addis Ababa, Ethiopia in January 2010;

2. **DECIDES** on the establishment of the African Petroleum Fund, the financing of which will be on a voluntary basis;

3. **ENDORSES** the Addis Ababa Declaration and Plan of Action on the operationalization of the African Petroleum Fund;

4. **CALLS ON** the African Development Bank (AfDB) to host and operate the African Petroleum Fund on behalf of the Commission;

5. **REQUESTS** the Commission, in collaboration with AfDB and other development partners to implement the measures contained in the Addis Ababa Declaration and Plan of Action.



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African Union Headquarters

# DECISION ON CLIMATE CHANGE NEGOTIATIONS
## Doc. Assembly/AU/13(XV)

**The Assembly,**

1. **TAKES NOTE** of the Report of the Coordinator of the Committee of Heads of State and Government on Climate Change (CAHOSCC), H.E. Meles Zenawi, Prime Minister of the Federal Democratic Republic of Ethiopia on progress made in the implementation of Decision Assembly/AU/Dec.281(XIV) adopted at the Fourteenth Ordinary Session of the Assembly held in Addis Ababa, Ethiopia in February 2010;

2. **COMMENDS** the efforts of H.E. Meles Zenawi, Prime Minister of the Federal Democratic Republic of Ethiopia as well as those of the African negotiators under the leadership of CAHOSCC, in promoting the African Common Position on Climate Change and in advancing it through a united African voice;

3. **ENDORSES** the recommendations of CAHOSCC on the streamlined single negotiation structure at the Ministerial and Experts' levels, with a view to ensuring effective coordination of the negotiation on climate change towards the 16th Conference of Parties (COP) 16 and COP 17 in Cancun, Mexico and in South Africa in 2010 and 2011, respectively, as follows:

   i. Algeria to serve as Coordinator at the Ministerial level and Mali, in its capacity as current Chairperson of the African Ministerial Conference on Environment to serve as Co-Coordinator;

   ii. The Democratic Republic of Congo to serve as Coordinator at the Experts' level together with Nigeria as Co-Coordinator;

   iii. The African Group of Technical Negotiators to establish a Bureau.

4. **ALSO ENDORSES** the recommendations of CAHOSCC for the continuation of the membership of the Republic of South Africa, the Host of COP 17, within CAHOSCC, as well as the inclusion of the Democratic Republic of Congo in its capacity as the Chairperson of the African Group of the Technical Negotiators;

5. **FURTHER ENDORSES** the Decision of CAHOSCC to hold a meeting before COP 16 scheduled in Cancun, Mexico in December 2010.



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**DECISION ON THE REFORM OF THE UNITED NATIONS SECURITY COUNCIL**
**Assembly/AU/9(XV)**

**The Assembly,**

1. **ADOPTS** the Seventh Report of the Committee of Ten Heads of State and Government on the Reform of the United Nations (UN) Security Council;

2. **TAKES NOTE** of the current developments in the intergovernmental Negotiations and **NOTES WITH APPRECIATION** the efforts of the African Permanent Representatives in promoting and defending the continent's interest in the UN Security Council Reform process;

3. **REAFFIRMS** the Ezulwini Consensus and the Sirte Declaration on the Reform of the UN Security Council containing the African Common Position, **CALLS** for its intensive promotion and **STRESSES** the need for Africa to continue to speak with one voice on this question;

4. **REQUESTS** the Committee of Ten Heads of States to intensify their efforts in advocating, canvassing and promoting the African Common Position as well as endeavouring to reach out at the highest political levels including, holding of regular meetings, with a view to considering developments and providing updates;

5. **ALSO REQUESTS** the African Permanent Representatives to the United Nations of the Committee of Ten to continue to work closely with other African Permanent Representatives to the UN as well as with other Interest Groups in the context of the ongoing inter-governmental Negotiations on the Security Council Reform Process;

6. **CALLS ON** the Committee of Ten to remain seized of this matter until Africa achieves its objectives and report on progress made at the next Ordinary Session of the Assembly in June/July 2011.



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# DECISION ON THE APPOINTMENT OF THE MEMBERS OF THE PANEL OF THE WISE
## Doc. Assembly/AU/14(XV)

**The Assembly;**

1. **TAKES NOTE** of the Report of the Chairperson of the Commission on the Panel of the Wise of the African Union (AU) and on the appointment of new members, including the Addendum to the report;

2. **DECIDES,** in line with the provisions of Article 11 of the Protocol Relating to the Establishment of the Peace and Security Council (PSC) of the AU, to re-appoint, for a further and final mandate of three years, the following personalities as members of the Panel of the Wise, at the expiration of their terms on 17 December 2010:

   i) President Ahmed Ben Bella (North Africa),
   ii) Dr. Salim Ahmed Salim (East Africa);

3. **FURTHER DECIDES**, in line with Article 11 of the PSC Protocol, to appoint, for a mandate of three (3) years, starting from 18 December 2010, the following personalities as new members of the Panel of the Wise:

   i) President Kenneth Kaunda (Southern Africa);
   ii) Mrs. Marie Madeleine Kalala-Ngoy (Central Africa);
   iii) Mrs. Mary Chinery Hesse (West Africa).

4. **TAKES NOTE** of the steps being envisaged by the Chairperson of the Commission to enhance the capacity of the Panel of the Wise, as outlined in his report, including the establishment of a team of "Friends of the Panel of the Wise";

5. **PAYS TRIBUTE** to the outgoing members of the Panel of the Wise, namely their Excellencies Miguel Traovoda, Brigalia Bam and Elizabeth Pognon, for their contribution to the quest for peace, security and stability on the continent, and **LOOKS FORWARD** to their continued support and contribution as members of the team of "Friends of the Pane of the Wise", as envisaged by the Chairperson of the Commission in the Addendum to his report. The Assembly **FURTHER ENCOURAGES** the Chairperson of the Commission to select two more distinguished Africans as members of the team of "Friends of the Panel of the Wise".



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# DECISION ON THE PREVENTION AND COMBATING OF TERRORISM

**The Assembly,**

1. **RECALLS** all the relevant African Union (AU) instruments on the prevention and combating of terrorism, in particular the Algiers Convention of 1999 and the related Protocol, as well as the Plan of Action on the Prevention and Combating of Terrorism, and **NOTES WITH SATISFACTION** the role played by the African Centre for Study and Research on Terrorism;

2. **EXPRESSES** serious concern over the worsening of the scourge of terrorism and the threat posed by this situation to peace, security and stability in Africa;

3. **STRONGLY CONDEMNS** all terrorist attacks perpetrated in the continent and **EXPRESSES ITS DETERMINATION** to fight any form of acts of terrorism;

4. **CONDEMNS MOST VEHEMENTLY** the attack perpetrated on 11 July 2010, in Kampala, by Al Shabab terrorists, which resulted in the death and injury of innocent civilians, and CONSIDERS this cowardly act that targeted innocent civilians as an attack against the entire people of Africa. The Assembly **UNDERSCORES THE NEED** to leave no stone unturned to apprehend the perpetrators and the masterminds of this ignoble act, with a view to bringing them to justice and taking all other necessary measures. The Assembly **EXPRESSES** its condolences to, and solidarity with, the Ugandan Government and the families of the victims;

5. **UNDERSCORES** the need for renewed efforts and increased mobilization to combat the scourge of terrorism. In this regard, the Assembly **REQUESTS** the Commission to expeditiously submit to the Peace and Security Council concrete recommendations aimed at strengthening the effectiveness of Africa's actions in the prevention and combating of terrorism;

6. **REJECTS** all forms of blackmailing carried out by terrorist groups, such as the threat of execution or execution of hostages and demand of ransom to finance terrorist operations;

7. **REQUESTS** all African States to work closely together, directly and through the relevant organs of the AU, to implement enhanced measures for cooperation, mutual legal assistance and coordination between the security services, in order to boost Africa's collective action against terrorism;



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8. **ALSO REQUESTS** the Commission to carry out all necessary consultations and initiate appropriate measures to mobilize wide support and effective contribution of the international community towards combating terrorism in Africa, including cutting off its financing sources and ending the payment of ransom;

9. **FURTHER REQUESTS** the Commission to submit regular reports on the status of the fight and cooperation against terrorism in Africa.

# DECISION ON THE ALTERNATIVE SOURCES OF FINANCING

**The Assembly,**

1. **TAKES NOTE** of the Report of the Chairperson on the Activities of the Commission covering the period January to June 2010;

2. **RECALLS** its Decision on Alternative Sources of Financing adopted in Lusaka, Zambia in 2001;

3. **ALSO RECALLS** the urgent need to provide innovative means of financing the activities of the AU Organs to enable the AU to fulfil its objectives;

4. **REQUESTS** the Commission, through the Ministers of Economy and Finance to expeditiously finalize the current work on this matter for its consideration and final adoption at the next Ordinary Session of the Assembly, through the Executive Council in January 2011.



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**DECISION ON APPOINTMENT OF A MEMBER OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS**
**DOC. EX.CL/616 (XVII)**

**The Assembly,**

1. **TAKES NOTE** of the election conducted by the Executive Council;

2. **DECIDES** to appoint the following person as a Member of the African Commission on Human and Peoples' Rights, as elected by the Seventeenth Ordinary Session of the Executive Council held in Kampala, Uganda in July 2010:

| Name | Country | Term of Office |
|---|---|---|
| Mrs. Lucy ASUAGBOR | Cameroun | 3-year term |



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**DECISION ON THE APPOINTMENT OF MEMBERS OF THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD**
**Doc. EX.CL/617(XVII)**

**The Assembly,**

1. **TAKES NOTE** of the election conducted by the Executive Council;

2. **DECIDES** to appoint the following persons as Members of the African Committee of Experts on the Rights and Welfare of the Child, as elected by the Seventeenth Ordinary Session of the Executive Council held in Kampala, Uganda in July 2010:

| No. | Name | Country | Term of Office |
|---|---|---|---|
| **1.** | Mrs. Amal Muhammad AL-HANGARI | Libya | 5-year term |
| **2.** | Mr. Alfas M. CHITAKUNYE | Zimbabwe | 5-year term |
| **3.** | Mr. Benyam DAWIT Mezmur | Ethiopia | 5-year term |
| **4.** | Mrs. Fatima DELLADJ-SEBAA | Algeria | 5-year term |
| **5.** | Mr. Clement Julius MASHAMBA | Tanzania | 5-year term |
| **6.** | Ms. Félicité MUHIMPUNDU | Rwanda | 5-year term |



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# DECISION ON THE APPOINTMENT OF JUDGES OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
## Doc. EX.CL/618(XVII)

**The Assembly,**

1. **TAKES NOTE** of the election conducted by the Executive Council;

2. **DECIDES** to appoint the following persons as Judges of the African Court on Human and Peoples' Rights, as elected by the Seventeenth Ordinary Session of the Executive Council held in Kampala, Uganda in July 2010:

| No. | Name | Country | Term of Office |
|---|---|---|---|
| **1.** | Mr. Fatsah OUGUERGOUZ | Algeria | 6-year term |
| **2.** | Mr. Augustino S. L. RAMADHANI | Tanzania | 6-year term |
| **3.** | Mr. Duncan TAMBALA | Malawi | 6-year term |
| **4.** | Ms.Elsie Nwanwuri THOMPSON | Nigeria | 6-year term |
| **5.** | Mr. Sylvain ORE | Côte d'Ivoire | 4-year term |

# DECISION ON PROCEDURES RELATING TO ITEMS PROPOSED BY MEMBER STATES TO THE ASSEMBLY
## PRC/Rpt.(XX)

**The Assembly,**

1. **RECALLS** the relevant provisions of the Rules of Procedure of the Assembly relating to items proposed for the agenda of the ordinary sessions of the Assembly;

**2.** **TAKES NOTE** that some of the items proposed by Member States to the Fifteenth Ordinary Session of the Assembly did not comply with Rule 8(2) of the Rules of Procedure of the Assembly which provides that:

i) Items proposed by a Member State be submitted sixty (60) days before the opening of the Session;

ii) Supporting documents and draft decisions be communicated to the Chairperson of the Commission at least thirty (30) days before the opening of the meeting;

**3.** **REQUESTS** the Commission to ensure compliance with Article 19(3) of the Rules of Procedure of the Assembly to provide the financial implications for all draft decisions submitted for consideration to the Policy Organs;

**4.** **URGES** Member States and the Commission to strictly comply with the Rules of the Policy Organs.



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**DECISION ON THE REPORT OF HEADS OF STATE AND GOVERNMENT ORIENTATION COMMITTEE ON NEPAD**
**Assembly/AU/8 (XV)**

**The Assembly:**

1. **WELCOMES** the Report by the Chairperson of the NEPAD Heads of State and Government Orientation Committee (HSGOC), H.E. Meles Zenawi Prime Minister of Ethiopia;

2. **RECALLS** the Assembly Decision of February 2010 on the integration of NEPAD into the African Union (AU) structures and processes, which approved the establishment of the NEPAD Planning and Coordinating Agency (NPCA) and **REAFFIRMS** the NEPAD vision and core objectives as adopted by the AU in 2001 and the NPCA mandate and status as the technical body of the AU;

3. **WELCOMES** the progress made on the integration of NEPAD into the AU structures, particularly NPCA transition towards adopting AU rules, regulations and practices for Human Resources, Administration and Finance systems; and the work program harmonization between the Commission and the NEPAD Agency;

4. **COMENDS** the Chairperson of the Commission and the NPCA Chief Executive Officer for the progress on NEPAD integration into the AU towards implementing the Assembly Decision;

5. **NOTES** the NPCA Strategic Direction based on the Strategic Plan of the African Union Commission: 2009-2012, including the Agency's thematic priorities, operating model and organizational design, and **CALLS ON** NPCA to ensure that its thematic and programmatic work fully encompasses the sectoral priorities identified in the NEPAD framework;

6. **REQUESTS** NPCA to re-focus on concrete delivery of its mandate and the key objectives of NEPAD especially in coordinating the implementation of Africa's regional and continental priority programs/projects and mobilizing partners and resources;

7. **ENDORSES** NPCA's activity report for February to June 2010, noting in particular the increasing support for the Comprehensive African Agriculture Development Programme (CAADP) Compact signing and bankable investment projects by countries and RECs; technical support for the Great Green Wall (GGW) initiative; transformation of the e-Africa Commission into the "NEPAD e-Africa Programme" to drive the ICT sector priority; NPCA's role as regional coordinator for the setup of the Africa Platform on Development Effectiveness in conjunction with AUC; and the launch of NEPAD Regional Centre for African Bio-safety in Ouagadougou, Burkina Faso;



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8. **REQUESTS** NPCA to scale up technical support to AU Member States on agriculture and food security by providing necessary technical guidelines on access to global financing to boost CAADP's implementation;

9. **RECALLS** the intrinsic importance of infrastructure to realizing Africa's growth and development goals and existing African Union and NEPAD infrastructure initiatives, particularly the AU/NEPAD African Action Plan: 2010-2015 as endorsed by the 21st NEPAD HSGOC and the Programme for Infrastructure Development in Africa (PIDA), and **RE-EMPHASISES** the urgent need to overcome challenges relating to regional and multi-country infrastructure projects including limited technical capacity, financial resources and political ownership at the highest level;

10. **NOTES** that primary responsibility for implementing NEPAD priority programmes/projects outlined in the African Action Plan (AAP) lies with national governments and the Regional Economic Communities (RECs), and **UNDERSCORES** the overriding need for sponsoring regional infrastructure projects, through political leadership and championing of specific regional infrastructure projects as a key prerequisite for success;

11. **NOTES** the participation of African Leaders and the conclusions of the G8/Africa Outreach and G20 Summit held in Muskoka and Toronto Canada respectively in June 2010 and **WELCOMES** in particular the G8 Muskoka Initiative on Maternal, Newborn and Under-5 Child Health, the G20 enlargement of Africa's participation to two seats, and the G20 inclusion of development of low income countries in its mandate for the first time and for this purpose the decision to setup a Working Group on Development with South Africa and South Korea as co-chairs;

12. **AFFIRMS** that the Decision on Africa's representation in the G20 should be made by Africa itself, and in this regard **RECOMMENDS** that the Chairpersons of the AU and the NEPAD Orientation Committee be designated as Africa's representatives in the G20. Furthermore, **CALLS FOR** Africa to participate in all levels of consultations and decision-making processes of the G20;

13. **REITERATES** the call for the two (2) seats reserved for the Continent in the G20 to be based on membership and **FURTHER EXPRESSES** support for additional individual African countries to become members of the G20;

14. **UNDERSCORES** that Africa's partnership with the G20 should be based on the key priorities of NEPAD as presented in the summary Report of the HSGOC Chairperson;

15. **FURTHER REITERATES** the critical need for delivery on commitments by development partners and in this regard **URGES** G8 Partners to fully fulfill their commitments to Africa for the sustainability of the partnership;

16. **ALSO UNDERSCORES** the paramount importance of the partnership principle of mutual accountability and **WELCOMES** mutual accountability mechanisms being put in place within Africa's partnership processes and **EMPHASIZES** that the Mutual Review of Development Effectiveness (MRDE) should form the primary basis of Africa's monitoring of G8 partnership commitments, jointly coordinated by the AU Commission and NPCA, in consultation with the United Nations Economic Commission for Africa (UNECA) the United Nations Development Programme (UNDP) and other African partner institutions;

17. **REQUESTS** the AU Commission and NPCA to finalize the Assessment Report on G8/Africa partnership commitments by the Ordinary Session of the Assembly in January/February 2011 for presentation by African Leaders at the 2011 G8/Africa Outreach.

# DECISION ON THE IMPLEMENTATION OF THE PREVIOUS DECISIONS OF THE EXECUTIVE COUNCIL AND THE ASSEMBLY Doc. EX.CL/581(XVII)

**The Assembly,**

1. **TAKES NOTE** of the Report of the Commission on the Implementation of the Previous Decisions of the Executive Council and the Assembly of the African Union;

2. **REQUESTS** the Commission to improve on the format of the Report on the Implementation of Decisions of the Executive Council and the Assembly of the African Union;

3. **ALSO REQUESTS** the Commission to take necessary measures to elaborate in collaboration with the Permanent Representatives' Committee the guidelines on the preparation and adoption of decisions, including the number of decisions, the timeframe for reporting and to make appropriate recommendations to the Assembly, through the Executive Council at its next Ordinary Session in January 2011.



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# DECISION ON THE AFRICAN DIASPORA SUMMIT AND THE DIASPORA INITIATIVE

**The Executive Council,**

1. **TAKES NOTE** of the updated information provided by South Africa on the status of its preparations towards hosting the African Diaspora Summit;

2. **COMMENDS** the efforts by the Republic of South Africa and the Commission in this regard;

3. **REQUESTS** the Commission, in consultation with the Republic of South Africa, to continue to work closely on this initiative in order to develop an appropriate roadmap and timeline for this exercise;

4. **FURTHER REQUESTS** the Commission to work together with Member States to ensure the successful preparation and conduct of the Diaspora Summit and the advancement of the Diaspora initiative in general.



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# DECISION ON THE PARTNERSHIP FOR THE ERADICATION OF MOTHER-CHILD TRANSMISSION OF HIV/AIDS
## Doc. Assembly/AU/17 (XV) Add.1

**The Assembly,**

1. **REAFFIRMS** its previous commitments, especially as contained in the Abuja Declaration on HIV/AIDS, Tuberculosis, Malaria and other Related Infectious Diseases, the Maputo Plan of Action and the Campaign for the Reduction of Maternal Mortality in Africa;
2. **RECALLS** that despite the progress achieved, Africa continues to be gravely affected by the scourge of HIV/AIDS;
3. **EXPRESSES** its preoccupation with the seriousness of the phenomenon of the transmission of HIV/AIDS from mother to child, which constitutes a threat to the future of the Continent;
4. **INVITES** all Member States to intensify efforts relating to antiretroviral treatment and prevention of mother to child transmission and to extend such efforts to primary health centres;
5. **UNDERSCORES** the need to promote throughout the continent, programs for the total eradication of mother to child transmission so that no child is born with HIV/AIDS;
6. **REQUESTS** the coordination, within the shortest time possible, of collective action of all African actors concerned, with help of interested international partners, to put a final end to the transmission of HIV/AIDS from mother to child.



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# DECISION ON THE ACCESSION OF AFRICAN COUNTRIES TO THE CONVENTION ON BANNING THE USE OF CERTAIN CONVENTIONAL WEAPONS WITH A TRAUMATIC EFFECT OR WHICH STRIKE INDISCRIMINATELY

**Doc. Assembly/AU/17 (XV) Add.2**

**The Assembly,**

1. **TAKES NOTE** of the proposal by the Republic of Senegal inviting Member States of the African Union to accede to the Convention on Banning the Use of Certain Conventional Weapons with a Traumatic Effect or Which Strike Indiscriminately;

2. **REITERATES** its determination to promote peace and security in Africa and in the world by contributing to the non-proliferation, disarmament and maintenance of International Humanitarian Law as a priority on the international agenda;

3. **REAFFIRMS** the need to take on board the interests and views of African countries during international negotiations including those held within the context of the Convention on Banning the Use of Certain Conventional Weapons with a Traumatic Effect or Which Strike Indiscriminately;

4. **INVITES** African States to massively accede to this Convention in order to strengthen their contribution to the building and consolidation of International Humanitarian Law, particularly the formulation of international rules for the control of conventional weapons.



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# DECISION ON THE INSTITUTION OF 3 APRIL AS AFRICAN CULTURAL RENAISSANCE DAY
## Doc. Assembly/AU/17 (XV) Add.3

**The Assembly,**

1. **TAKES NOTE** of the Report presented by the Republic of Senegal on the institution of 3 April as African Cultural Renaissance Day;

2. **COMMENDS** the President of the Republic of Senegal, Mr. Abdoulaye Klade for all the efforts and initiatives undertaken with a view to promoting the Continent's revival;

3. **WELCOMES**, in this regard, with satisfaction, the construction of the African Renaissance Monument and its inauguration on 3 April 2010;

4. **DECIDES** to celebrate 3 April every year as African Cultural Renaissance Day throughout the Continent;

5. **INVITES** all Member States and the Commission to promote the celebration of this Day and ensure that it is widely publicized among African populations.



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# DECISION ON SOCIO-ECONOMIC TRANSFORMATION AND INFRASTRUCTURE DEVELOPMENT IN AFRICA: ENERGY, RAILWAYS, ROADS AND ICT SECTORS – Doc. Assembly/AU/17(XV) Add.4

**The Assembly,**

1. **TAKES NOTE** of the paper proposed by the Republic of Uganda titled "Socio-Economic Transformation and Infrastructure Development in Africa: Energy (Electricity), Railways, Roads and ICT Sectors"; and **EXPRESSES APPRECIATION** to H.E. President Yoweri Kaguta Museveni for the proposal;

2. **RECALLS** its previous decisions on infrastructure development in Africa, particularly its "Declaration on development of Transport and Energy Infrastructure in Africa" adopted by the 12th Ordinary Session of the Assembly of the African Union on 3 February 2009 in Addis Ababa and "Declaration on ICT in Africa (challenges and prospects)" adopted by the 14th Ordinary Session of the Assembly of the African Union on 2 February 2010 in Addis Ababa;

3. **FURTHER RECALLS** the ongoing programmes in the energy and transport sectors, especially: The Programme on Infrastructure Development in Africa (PIDA), jointly initiated by the AUC, AfDB and NEPAD; and the Trans-African Highway (TAH) programme, launched with the objective of linking africa's capitals and other commercially important centres of production and consumption;

4. **RECOGNIZES** that effective implementation of the above Declarations, Programmes and other related initiatives will require policy re-orientations and innovative funding mechanisms;

5. **FURTHER RECOGNIZES** that, in the energy sector, Africa will have to diversify its energy sources to meet the ever increasing gaps in energy production and consumption; and **COGNIZANT** of the fact the development and peaceful use of nuclear energy will be essential in the long run;

6. **ENDORSES** the recommendations in the above mentioned paper and, more in particular, agrees on the following measures:

   **(a) FINANCING**

   i) Prioritize and ring fence infrastructure funding in national budgets for infrastructure development to enable long term planning and development of projects;



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ii) Utilize and promote Public Private partnerships to implement infrastructure projects. This may entail respective Member States to have PPP policy and legal and institutional framework;

iii) Generate funding using infrastructure bonds, and other available modalities, at national, regional and international markets for specific infrastructure projects;

iv) Encourage public companies to float shares to generate revenue from the public which can be used for infrastructure development;

v) Harmonize the financing and execution of cross-border project.

**(b) ENERGY**

i) Make electricity infrastructure development a key priority sector in the national development plans;

ii) Realizing that conventional energy sources are not sufficient to meet the growing demand, consider developing our capacity to generate power from non-traditional sources such as renewable and nuclear energy in the long run. This will entail putting in place a sound framework for the purpose;

iii) Seek support from multilateral and bilateral development partners to make it a priority to support energy development in Africa in order to meet the MDGs and subsequently reduce dependency on them in the long run.

**(c) TRANSPORT**

i) Include in the national priorities the various regional and continental interconnection infrastructure network projects and programmes;

ii) Harmonize regulations, standards and executions to promote country-to-region interconnection and efficient operation of networks and market development;

iii) Create appropriate institutional frameworks for development of the major integration projects and carry out the necessary reforms to ensure better operation and maintenance of the projects;

iv) Contribute financially to the NEPAD infrastructure projects preparation facility;

v) Reduce the cost of construction and maintenance of railway infrastructure by using cheap labour provided by National Armies;

**(d) ICT**

i) Strategic investment in broadband and its integration in national and regional development strategies;

ii) Establish and operationalise ICT Incubation centres and ICT Parks to harness the economic benefits of increased band width;

iii) Adopt e-government models that have been demonstrated to work elsewhere (Egypt, Kenya, Rwanda, Senegal, South Africa, etc);

iv) Develop regularly frameworks that promote competition and eliminate entry barriers in order to increase competition, reduce prices, and drive growth.

**7. REQUESTS** the Commission of the African Union to integrate the above measures within the Programme for Infrastructure Development in Africa (PIDA).

# DECISION ON THE ESTABLISHMENT OF AN AFRICAN FRAMEWORK FOR CONSTITUTIONAL JUSTICE
## Doc. Assembly/AU/17(XVII) Add. 5

**The Assembly,**

1. **REITERATES** Africa's commitment to the universal values and principles of Rule of Law, Democracy and Human Rights;

2. **RECALLS,** in this regard, that the Constitutive Act of the African Union underscores the will of the Heads of State and Government of the African Union to "promote and protect human and peoples' rights, consolidate democratic institutions and cultures, and ensure good governance and the rule of law";

3. **RECALLS ALSO** that the African Charter on Democracy, Election and Governance reaffirms that Member States shall be guided by the "common mission to strengthen and consolidate the institutions for good governance, continental unity and solidarity";

4. **RECALLS WITH SATISFACTION** that African countries have progressively provided for themselves, individually, judicial mechanism for control of the constitutionality of laws;

5. **WELCOMES** Algeria's initiative in creating an African Framework for Constitutional Justice, as a collective space for consultation, experience-sharing and cooperation in the area of constitutional control;

6. **NOTES** that the said Framework is intended to complement the various mechanisms established by the African Union to consolidate the Rule of Law, Democracy and the primacy of the law in the Continent; and **AFFIRMS** that the Framework, once created, will enable Africa to bring its contribution to bear, at international level, in the domain of constitutional justice;

7. **DECLARES,** in this connection, that Africa should get itself in readiness for the Conference scheduled to take place in Rio de Janeiro in January 2011, at which it is expected that a global Framework for Constitutional Courts and Councils would be established, in pursuance of the meetings held in Seoul, Vilnius and Algiers, which prepared the First World Conference on Constitutional Justice held in Cape Town, South Africa, in January 2009;



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8. **ENCOURAGES** Member States to convene a Conference of the **Presidents** of African Constitutional Courts and Councils in any Member State to deliberate on the project to establish an African Framework for Constitutional Justice;

9. **REQUESTS** African Union Commission to follow up on the issue and work towards achieving this objective.

# DECISION ON THE THIRD AFRICAN CONFERENCE ON THE APPLICATION OF SPACE SCIENCES AND TECHNOLOGIES FOR SUSTAINABLE DEVELOPMENT IN AFRICA
## Doc. Assembly/AU/17(XVII) Add.6

**The Assembly,**

1. **TAKES NOTE** of the Communication of the Algerian delegation on the deliberations of the Third African Conference on the Application of Space Sciences and Technologies for Sustainable Development in Africa held in Algiers, Algeria from 7 to 9 December 2009;

2. **WELCOMES** the establishment of the satellite constellation between Algeria, Nigeria, South Africa and Kenya and calls on other Member States of the African Union to join in this initiative in order to strengthen African cooperation in this area;

3. **ALSO WELCOMES** the signing an Agreement between Algeria and the Office for Outer Space Affairs (OOSA) of the United Nations Office in Vienna (UNOV) for the opening of a Regional Support Office for North Africa and the Sahel of the United Nations Platform for Space-based Information for Disaster Management and Emergency Response (UN-SPIDER);

4. **FURTHER CALLS ON** Member States to develop bilateral and multilateral cooperation in the area of Space Technologies in order to speed up their development



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**DECISION ON THE INTEGRATION OF THE AFRICAN REGIONAL ORGANIZATION FOR STANDARDIZATION**
**Doc. Assembly/AU/17(XV) Add.7**

**The Assembly,**

1. **TAKES NOTE** of the proposal by the Republic of Kenya to integrate the African Regional Organization for Standardization (ARSO) into the African Union Structures;

2. **WELCOMES** the critical role ARSO has played in promoting Africa's contribution to global trade;

3. **REQUESTS** the Commission to work in collaboration with the Permanent Representatives' Committee (PRC) and its relevant Sub-Committees, and the Republic of Kenya in compiling a report on ARSO including the structural and financial implications of ARSO's integration into the AU structures for consideration by the Assembly through the Executive Council;

4. **ALSO REQUESTS** the Commission to report on the implementation of this Decision to the next Ordinary Session of the Executive Council in January/February 2011.

**Assembly/AU/Dec.327(XV)**

# DECISION ON THE COMMEMORATION OF AFRICA DAY FOR FOOD AND NUTRITION SECURITY
## Doc. Assembly/AU/17(XV) Add.8

**The Assembly,**

1. **TAKES NOTE** of the proposal made by the Republic of Malawi to launch an Africa Day for Food and Nutrition Security;

2. **RECALLS** the vision of the Current Chairperson of the African Union (AU) on a Food Secure Africa within five (5) years from 2010;

3. **ALSO RECALLS** the relevant previous Assembly decisions on agriculture, food and nutrition security including the Comprehensive Africa Agriculture Development Programme (CAADP);

4. **NOTES** Africa's potential in becoming food secure and the global momentum to support Africa's cause;

5. **WELCOMES** and **ENDORSES** the proposal submitted by the Republic of Malawi to establish a strategic Group of Seventeen (17) countries to spearhead and monitor the African Food Basket Initiative;

6. **DECIDES** that an Africa Food and Nutrition Security Day (AFND) will be commemorated on 30 October every year;

7. **REQUESTS** the Commission to coordinate efforts of Member States to commemorate the Africa Day for Food and Nutrition Security;

8. **ALSO REQUESTS** the Commission together with the New Partnership for Africa's Development (NEPAD) Planning and Coordinating Agency (NPCA), in collaboration with partners, to take necessary steps to develop and coordinate the implementation of a strategy to take forward the vision of a food secure Africa within five (5) years.



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**DECISION ON THE PROMOTION OF COOPERATION, DIALOGUE AND RESPECT FOR DIVERSITY IN THE FIELD OF HUMAN RIGHTS**
**Doc. Assembly/AU/17(XV) Add.9**

**The Assembly**,

1. **RECALLS** the African Charter on Human and Peoples' Rights adopted in June 1981;

2. **REITERATES** the importance of respecting regional, cultural and religious value systems as well as particularities in considering human rights issues;

3. **STRESSES** the need to maintain joint ownership of the international human rights agenda and to consider human rights issues in an objective and non-confrontational manner;

4. **STRONGLY REJECTS** any attempt to undermine the international human rights system by seeking to impose concepts or notions pertaining to social matters, including private individual conduct, that fall outside the internationally agreed human rights legal framework, taking into account that such attempts constitute an expression of disregard for the universality of human rights;

5. **TAKES NOTE** of the upcoming review of the United Nations (UN) Human Rights Council and **DECIDES** to support the UN Human Rights Council as a global forum for dialogue on human rights issues based on the principles of mutual respect, cooperation, objectivity and non-selectivity;

6. **UNDERTAKES** to support the Human Rights Council's broad and balanced agenda, and to strengthen the mechanisms addressing issues of importance for Africa, including fighting racism, racial discrimination, xenophobia and related intolerance, in all their forms.



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# DECISION ON THE "RECONSIDERATION OF DECISION ASSEMBLY/AU/DEC.263(XIII) ON THE TRANSFORMATION OF THE AFRICAN UNION COMMISSION INTO THE AFRICAN UNION AUTHORITY" Doc. ASSEMBLY/AU/17(XV) Add.10

**The Assembly,**

1. **ENDORSES** Decision EX.CL/Dec.593(XVII) adopted by the Seventeenth Ordinary Session of the Executive Council held in Kampala, Uganda in July 2010 on the proposal by the Great Socialist People's Libyan Arab Jamahiriya on the "Reconsideration of Decision Assembly/AU/Dec.263 (XIII) on the Transformation of the African Union Commission into the African Union Authority ;

2. **DECIDES** that matters that have been debated and decision reached on by the Assembly cannot be reopened for debate and accordingly Decision Assembly/AU/263(XIII) adopted by the Thirteenth Ordinary Session of the Assembly held in Sirte, Great Jamahiriya in July 2009 be maintained as is.



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**DECISION ON THE "CONVENING OF MID-YEAR SESSIONS OF THE ASSEMBLY OF THE AFRICAN UNION (JULY SESSIONS)"**
**Doc. Assembly/AU/17(XV)Add.11**

**The Assembly,**

1. **RECALLS** Decision Assembly/AU/Dec.63(IV) on the Framework for The Organization of Future Summits adopted at its Fourth Ordinary Session held in Abuja, Nigeria, in January 2005;

2. **ENDORSES** Decision EX.CL/Dec.594 (XVII) on the "Convening of Mid-Year Sessions of the Assembly of the African Union (July Sessions)" adopted by the Seventeenth Ordinary Session of the Executive Council held in Kampala, Uganda in July 2010;

3. **DECIDES** that matters that have been debated and decision reached on by the Assembly cannot be reopened for debate and accordingly Decision Assembly/AU/63(IV) adopted by the Fourth Ordinary Session of the Assembly held in Abuja, Nigeria in January 2005 be maintained as is.



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# DECISION ON THE SOVEREIGNTY OF THE REPUBLIC OF MAURITIUS OVER THE CHAGOS ARCHIPELAGO

**The Assembly,**

1. **RE-AFFIRMS** that the Chagos Archipelago, including Diego Garcia, which was unlawfully excised by the former colonial power from the territory of Mauritius in violation of UN Resolutions 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965 which prohibit colonial powers from dismembering colonial territories prior to granting independence, forms an integral part of the territory of the Republic of Mauritius and **CALLS UPON** the United Kingdom to expeditiously put an end to its continued unlawful occupation of the Chagos Archipelago with a view to enabling Mauritius to effectively exercise its sovereignty over the Archipelago.



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**ASSEMBLY OF THE UNION**
**Fifteenth Ordinary Session**
**25 – 27 July 2010**
**Kampala, UGANDA**

**Assembly/AU/Decl.1(XV)**

# ACTIONS ON MATERNAL, NEWBORN AND CHILD HEALTH AND DEVELOPMENT IN AFRICA BY 2015

Adopted by the Fifteenth Ordinary Session of the Assembly of the Union on 27 July 2010 in Kampala, Uganda

# ACTIONS ON MATERNAL, NEWBORN AND CHILD HEALTH AND DEVELOPMENT IN AFRICA BY 2015

**We**, the Heads of State and Government of the African Union, meeting at our Fifteenth Ordinary Session in Kampala, Republic of Uganda, from 25 to 27 July 2010, following our debate on ***"Promoting Maternal, Infant and Child Health and Development in Africa":***

***Acknowledge*** the progress made in the implementation of these and other relevant commitments on maternal, infant and child health and the launching of the Campaign on Accelerated Reduction of Maternal Mortality in Africa (CARMMA) by the African Union continentally and nationally but remaining deeply concerned that Africa still has a disproportionately high level of maternal, newborn and child morbidity and mortality due largely to preventable causes;

***Mindful*** that universal access to quality healthcare is a human right and that large segments of our population do not have access to this right which impact on their dignity and leads to morbidity and death;

***Also Mindful*** of the important role we have to play in improving the wellbeing of women and children for Africa's development through provision of an enabling environment, including strong leadership and political will for concrete actions, allocation of resources as well as effective governance of our health delivery systems;

***Welcome*** the G8 Muskoka Initiative and the pledge to support maternal, newborn and child health.

Hereby commit to the following:

1. Individually and collectively **REAFFIRM** our previous commitments aimed at accelerating the health of our people and the social development of Africa. In this regard, we re-dedicate ourselves and commit our countries to accelerate efforts to improve the state of health of Africa's women and children and thereby attain all Millennium Development Goals (MDGs) particularly MDGs 4, 5 and 6 by 2015.

2. **COMMIT TO UNDERTAKE** the following actions:



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(i) Launch CARMMA in our countries and broaden it as an advocacy strategy for the promotion of Maternal, Newborn and Child Health and involve all key stakeholders such as the women, children and young people, persons with disabilities, parliamentarians, community and religious leaders, civil society organizations, the media, and the private sector and institutionalize an annual CARMMA week in solidarity with the women and children of Africa for the next four years;

(ii) Strengthen the health system to provide comprehensive, integrated, maternal, newborn and child health care services, in particular through primary health care, repositioning of family planning including reproductive health commodities security, infrastructure development and skilled human resources for health in particular to train Community Health Workers to mitigate the human resource crisis in the Health sector;

(iii) Provide stewardship as national Governments and achieve policy coherence by developing integrated health plans within the development plan with cross disease and cross sector health goals and coordinate multi-sectoral actions and multi-agency partnerships;

(iv) Provide strong support for sharing and scaling up of identified good practices that have high impact and that are cost effective; and request the AU Commission to map and disseminate such practices;

(v) Provide sustainable financing by enhancing domestic resources mobilization including meeting the 15% Abuja target, as well as, mobilizing resources through public-private partnerships and by reducing out-of pocket payments through initiatives such as waiving of user fees for pregnant women and children under five and by instituting national health insurance;

(vi) Request the AU Commission in collaboration with partners including the G-8 to develop a mechanism for accessing such fund by AU Member States;

(vii) Call on the Global Fund for Fight against HIV/AIDS, Malaria and TB to create a new window to fund maternal, Newborn and Child Health. In this context, we appeal to development partners and donors for the replenishment of the Global Fund during its October 2010 meeting and to ensure that the new pledges are earmarked for Maternal Newborn and

Child Health. We also appeal for equitable access to the Global Fund resources for all African Union Member States;

(viii) Institute a strong and functional monitoring and evaluation (M&E) framework at country level to provide accurate, reliable and timely maternal, newborn, and child data to monitor progress against agreed indicators and targets, measure health performance and for informed decisions and actions including making maternal deaths notifiable and institute maternal death reviews.

3. **FINALLY COMMIT** to annually report on progress and **REQUEST** the Commission to establish a Task force on Maternal, Newborn and Child Health to amongst others, prepare such reviews and reports.

# DECLARATION ON THE SUCCESSFUL HOSTING OF THE 2010 FIFA WORLD CUP BY THE REPUBLIC OF SOUTH AFRICA

**The Assembly,**

**Recalling** the historic decision of FIFA accepting the offer by South Africa to host the 2010 World Cup, the first ever on the African continent;

***Also Recalling*** the Khartoum Assembly Decision declaring 2007 as the International Year of African Football, as an expression of solidarity with South Africa;

***Further Recalling*** the January 2010 Assembly Decision declaring that the 2010 Africa Day celebration focus on: Building and Maintaining Peace through Sport in Africa;

***Noting*** with pride and satisfaction the impressive planning, organization and hosting of the FIFA World Cup by South Africa, from 11 June to 11 July 2010;

1. **CONGRATULATES** the President, the Government and People of the Republic of South Africa for the successful world event which raised the profile of South Africa and indeed the whole Continent.

2. **COMMENDS** the African teams that participated in the World Cup, namely, Algeria, Cameroun, Côte d'Ivoire, Ghana, Nigeria and South Africa, in particular the Black Stars of Ghana which had sterling performance in the service of Africa.

# RESOLUTION ON THE SPECIAL TIES BETWEEN AFRICA AND CARIBBEAN COUNTRIES

We the Heads of State and Government of the African Union meeting at our Fifteenth Ordinary Session in Kampala, Uganda, from 25 to 27 July 2010:

1. **EXPRESS OUR APPRECIATION** for the participation of some Caribbean Leaders in the Official Opening Ceremony of its Fifteenth Ordinary Session held in Kampala, Uganda on 25 July 2010;

2. **WELCOME** the strong message of solidarity conveyed to the Assembly on behalf of the Caribbean Leaders by the Right Honourable Dr. Ralph E. Goncalves, Prime Minister of St. Vincent and Grenadines;

3. **DECIDE** to further strengthen Africa-Caribbean relations and to hold, as soon as possible, the first African Diaspora Summit in the Republic of South Africa and **REQUEST** the Commission, in consultation with the Republic of South Africa to continue to work closely on this initiative in order to develop an appropriate roadmap and timeline for this exercise;

4. **FURTHER REQUEST** the Commission to work together with all Member States to ensure the successful preparation and conduct of the Diaspora Summit and the advancement of the Diaspora initiative in general;

5. **CALL ON** the Government of the United States of America to remove the long-standing and unjustifiable economic and trade embargo imposed on the Republic of Cuba to enable it to enjoy all the legitimate prospects for its sustained development, which is long overdue.



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*"We are determined to deal once and for all with the scourge of conflicts and violence on our continent, acknowledging our shortcomings and errors, committing our resources and our best people, and missing no opportunity to push forward the agenda of conflict prevention, peacemaking, peacekeeping and post-conflict reconstruction. We, as leaders, simply cannot bequeath the burden of conflicts to the next generation of Africans."*

Adopted by the Fifteenth Ordinary Session of the Assembly of the Union on 27 July 2010 in Kampala, Uganda

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**DECISION ON THE PROGRESS REPORT OF THE COMMISSION ON THE IMPLEMENTATION OF THE ASSEMBLY DECISIONS ON THE INTERNATIONAL CRIMINAL COURT (ICC)**
**Doc. EX.CL/710(XX)**

**The Assembly,**

1. **TAKES NOTE** of the Progress Report of the Commission on the implementation of Assembly Decisions on the International Criminal Court (ICC);

2. **REITERATES** its commitment to fight impunity in conformity with the provisions of Article 4(h) and (o) of the Constitutive Act of the African Union;

3. **STRESSES** the need to explore ways and means to ensure that the request by the African Union (AU) to the United Nations (UN) Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, be acted upon and, in this regard, **REITERATES** its request to the UN Security Council and **REQUESTS** African members of the UN Security Council to place the matter on the agenda of the Council;

4. **RECOGNISES** the efforts by African Members of the UN Security Council to initiate dialogue and discussions on the issue of placing AU's request for deferral under Article 16 of the Rome Statute, both with regard to The Sudan and Kenya on the UN Security Council agenda and **ENCOURAGES** African non-Permanent Members of the UN Security Council to pursue their efforts in this regard;

5. **REQUESTS** the Group of African States Parties to the Rome Statute in New York and in the Hague as well as African Members of the United Nations Security Council to scrupulously follow-up on the implementation of Assembly Decisions on the ICC in collaboration with the Commission to ensure that African proposals and concerns are properly considered by the UN Security Council and the Assembly of States Parties to the Rome Statute;

6. **REAFFIRMS** its understanding that Article 98(1) was included in the Rome Statute establishing the ICC out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute, and by referring the situation in Darfur to the ICC, the UN Security Council intended that the Rome Statute would be applicable, including Article 98;

7. **ALSO REAFFIRMS** that by receiving President Bashir, the Republic of Malawi, like Djibouti, Chad and Kenya before her, were implementing various AU Assembly Decisions on non-cooperation with the ICC on the arrest and surrender of President Omar Hassan Al Bashir of The Sudan;

**8.** **URGES** all Member States to comply with Assembly Decisions on the warrants of arrest issued by the ICC against President Bashir of The Sudan pursuant to Article 23(2) of the Constitutive Act and Article 98 of the Rome Statute of the ICC;

**9.** **REGRETS** that the AU's endorsement of two (2) persons as sole African candidates for the post of judge of the ICC was not respected by some Member States and **REQUESTS** that this situation, as it repeats itself in several other instances, be considered by the Commission together with the Permanent Representatives' Committee with a view to identifying ways and means of addressing it, in order to find a durable solution that will strengthen the African Common Positions and endorsements, and make appropriate recommendations to the Executive Council;

**10.** **REQUESTS** the Commission to consider seeking an advisory opinion from the International Court of Justice regarding the immunities of State Officials under international law;

**11.** **ALSO REQUESTS** the Commission to place the Progress Report of the Commission on the implementation of Assembly Decisions on the ICC on the agenda of the forthcoming Meeting of Ministers of Justice and Attorneys General for additional input;

**12.** **FURTHER REQUESTS** the Commission to report on regular basis on the implementation of this Decision to the Executive Council.

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**PRESS RELEASE Nº 002/2012**

**ON THE DECISIONS OF PRE-TRIAL CHAMBER I OF THE INTERNATIONAL CRIMINAL COURT (ICC) PURSUANT TO ARTICLE 87(7) OF THE ROME STATUTE ON THE ALLEGED FAILURE BY THE REPUBLIC OF CHAD AND THE REPUBLIC OF MALAWI TO COMPLY WITH THE COOPERATION REQUESTS ISSUED BY THE COURT WITH RESPECT TO THE ARREST AND SURRENDER OF PRESIDENT OMAR HASSAN AL BASHIR OF THE REPUBLIC OF THE SUDAN**

**Addis Ababa, 9 January 2012 -** The African Union Commission has noted with grave concern the decisions ICC-02/05-01/09-139 and ICC-02/05-01/09-140 of 12 and 13 December 2011, respectively, of Pre-Trial Chamber I of the International Court (ICC) on the alleged failure of the Republic of Malawi and the Republic of Chad to comply with the cooperation requests issued by the ICC with respect to the arrest and surrender of President Omar Al Bashir of the Republic of Sudan.

In its decision on Malawi, and *mutatis mutandis* on Chad, the Chamber asserts to have found,

> '*in accordance with article 87(7) of the Rome Statute,* that the Republic of Malawi has *failed to comply with the cooperation requests contrary to the provisions of the Statute and has thereby prevented the Court from exercising its functions and powers under this Statute. The Chamber decides to refer the matter both to the United Nations Security Council and to the Assembly of States Parties.'*

With respect to the immunity of Heads of State in relation to requests for arrest and surrender, the Chamber noted that

> "*there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State. The Chamber considers that Malawi, and by extension the African Union, are not entitled to rely on article 98(1) of the Statute to justify refusing to comply with the Cooperation Requests."*

Following these Decisions of ICC Pre-Trial Chamber I, the African Union Commission expresses its deep regret that the decision has the effect of:

(i) Purporting to change customary international law in relation to immunity *ratione personae*;
(ii) Rendering Article 98 of the Rome Statute redundant, non-operational and meaningless;
(iii) Making a decision *per incuriam* by referring to decisions of the African Union while grossly ignoring the provisions of Article 23 (2) of the Constitutive Act of the African Union, to which Chad and Malawi are State Parties, and which obligate all AU Member States "***to comply with the decisions and policies of the Union".***

In this regard, the AU Commission wishes to point out that Article 27(2) of the Statute provides that "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person". However, this Article 27 appears under the part of the Statute setting out 'general principles of criminal law' and applies only in the relationship between the Court and the suspect. In the relationship between the Court and states, article 98(1) applies. This Article provides: "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity".

As a general matter, the immunities provided for by international law apply not only to proceedings in foreign domestic courts but also to international tribunals: states cannot contract out of their international legal obligations vis-à-vis third states by establishing an international tribunal. Indeed, contrary to the assertion of the ICC Pre-Trial Chamber I, article 98(1) was included in the Rome Statute establishing the ICC out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute. This is because immunities of State officials are rights of the State concerned and a treaty only binds parties to the treaty. A treaty may not deprive non-party States of rights which they ordinarily possess. In this regard, it is to be recalled that the immunity accorded to senior serving officials, *ratione personae*, from foreign domestic criminal jurisdiction (and from arrest) is absolute and applies even when the official is accused of committing an international crime. The International Court of Justice (ICJ) made this clear in the *Arrest Warrant Case (Democratic Republic of Congo v. Belgium)*. The ICJ stated that *"it has been unable to deduce . . . that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."*

The Security Council has not lifted President Bashir's immunity either; any such lifting should have been explicit, mere referral of a "situation" by the UNSC to the ICC or requesting a state to cooperate with the ICC cannot be interpreted as lifting immunities granted under international law. The consequence of the referral is that the Rome Statute, including article 98, is applicable to the situation in Darfur.

Additionally, the African Union Commission expresses its total disagreement with the decisions of the Pre-Trial Chamber I which did not take cognisance whatsoever of the obligations of AU Member states arising from Article 23 (2) of the Constitutive Act of the African Union, to which Chad and Malawi are State Parties, and which obligate all AU Member States "***to comply with the decisions and policies of the Union"***. Moreover, by decision Assembly/AU/Dec. 245(XIII) adopted by the 13th Ordinary Session of the Assembly of Heads of State and Government, the Assembly ***"Decide[d] that in view of the fact that the request by the African Union has never been acted upon (by UN Security Council), the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan"***. This decision adopted by the AU policy organs pursuant to the provisions of Rule 33 of the Rules of Procedure of the Assembly is binding on Chad and Malawi and it would be wrong to seek to coerce them to violate or disregard their obligations to the African Union.

The African Union Commission recalls that by virtue of their membership of the African Union, Chad and Malawi, and indeed all other African States parties to the Constitutive Act, have committed themselves under Article 4 of the Constitutive Act to "*condemnation and rejection of impunity*" and voluntarily negotiated the Rome Statute and joined the ICC with a view to enhancing the fight against impunity. Indeed, all Member States of the then Organization of African Unity were party to the adoption of decision CM/Dec.399 (LXVII) during the 67th Ordinary Session of the Council of Ministers held in Addis Ababa, Ethiopia from 25 to 28 February 1998, urging all Member States to support and participate in the Rome Process, along with a representative of the OAU General Secretariat, in the firm belief that the proposed international Criminal Court would be a unique and independent mechanism in the fight against impunity.

The African Union will continue to fight against impunity as required by Article 4 of the Constitutive Act and the relevant Assembly decisions and shall oppose any ill-considered, self-serving decisions of the ICC as well as any pretensions or double standards that become evident from the investigations, prosecutions and decisions by the ICC relating to situations in Africa. Indeed, the African Union believes that the fight against impunity is too important to be left to the ICC alone.

The African Union believes that issues of peace and justice should be addressed comprehensively and in a holistic manner and will continue to pursue in respect of The Sudan the interconnected, mutually interdependent and equally desirable objectives of peace, justice and reconciliation. It also requests all African Union Member States and Friends of Africa to reject any draft resolution that may be tabled before the UN Security Council as well as the Assembly of the States Parties to the Rome Statute with the intention of sanctioning the Republic of Malawi and Chad.

**Addis Ababa, 9 January 2012**

# The Immunity Provision in the AU Amendment Protocol

## Separating the (Doctrinal) Wheat from the (Normative) Chaff

Dire Tladi*

**Abstract**

*In July 2014, the African Union adopted a new Protocol amending the Protocol on the African Court. In doing so it included a provision stating that certain state officials shall be immune from prosecution during their tenure of office. This article discusses whether the immunity provision is a reflection of customary international law or whether, on the contrary, it violates international law and undermines the Statute of the International Criminal Court.*

### 1. Statement of the Issues

In July 2014, the African Union (AU) adopted a Protocol amending the Protocol on the African Court ('Amendment Protocol'),[1] and included a provision on immunity for certain state officials.[2] The hero-villain trend so characteristic of the international criminal justice debate is clearly on show in the disagreement concerning the immunities provision of the Amendment Protocol.[3] While the AU has consistently viewed its position on immunities as reflective of customary international law, those opposed to the Amendment Protocol and the inclusion of immunities have argued that that it is inconsistent with international law or, at best, undermines the Statute of the International Criminal Court (ICC).[4]

* LLB (Pretoria), LLM (Connecticut), PhD (Rotterdam); Professor of International Law, University of Pretoria; Member of the UN International Law Commission. I am grateful to Christopher Gevers and the anonymous reviewers for their helpful comments on an earlier version of the article. [diretladi2012@gmail.com]

[1] 2014 Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (AU EX.CL/846 (XXV)).

[2] Art. 46A*bis* of the Amendment Protocol.

[3] See D. Tladi, 'When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic', 7 *African Journal of Legal Studies* (2014) 381, at 381 where the author described debates on the ICC-AU relationship as being 'characterised by an ideological chasm that has pitted villains against protagonists — with both sides casting the other villains intent on wanton destruction and themselves as protagonists fighting the good fight.'

[4] See e.g. J. Njeri Kariri, 'Can the New African Court Truly Deliver Justice for Serious Crimes?', *ISS Toady*, 8 July 2014, available online at www.issafrica.org (visited 7 October 2014).

As with much of the debate related to international criminal justice, and the ICC in particular, especially in relation to the latter's relationship with Africa, much of the positions on both sides of the divide ignore the nuances of what is a complex area of law. In the jockeying for positions, the line between doctrinal positions and normative policy assertions become blurred (and sometimes disappear altogether). The doctrinal question whether immunities of certain officials before international courts is consistent with modern international law is very often answered by the normative policy postulation that the AU should not have included the immunities provision in the Amendment Protocol. Conversely, the normative postulation questioning the wisdom of prosecuting heads of state is met by a reference to a provision in the ICC Statute. Added to the mix is very often an empirical assertion, either that a position will result in impunity or will lead to the destabilization of a country or region. Further complicating the discourse is the resort by commentators to the political rationale or objective behind the Amendment Protocol, i.e. an assertion, not necessarily untrue, that the Amendment Protocol, and the immunity provision in particular, is a response to the prosecutions of African heads of state by the ICC.[5] However, whatever the motives of the AU in adopting the Amendment Protocol, any evaluation of the instrument and its provisions must be done on its merit, unclouded by the political considerations that gave rise to the instrument.[6] This is to say, the instrument cannot be contrary to international law *just because* the motives of its creators were less than angelic.

The purpose of this article is to try to synthesize from the mixture of normative, doctrinal and empirical positions often advanced in favour of preserving or excluding immunities in the Amendment Protocol, the position under international law. At the outset,

[5] See for an assessment A. Abass, 'The Proposed Criminal Jurisdiction for the African Court: Some Problematical Aspects', 60 *Netherlands International Law Review* (2013) 27-50.

[6] At any rate Abass, *supra* note 5, at 42 *et seq*. argues that it is overly simplistic to suggest that the Amendment Protocol was adopted only to respond to the ICC, pointing to, *inter alia*, the desire of the AU to ensure an African trial for Hissène Habré as a contributing factor independent of the ICC. See also A. Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', 24 *European Journal of International Law* (2013) 933-946, at 935 who says: 'The pervasive, but arguably erroneous assumption is that Africa began prospecting for international criminal jurisdiction *after* and as a *consequence* of the fall out over the Al Bashir arrest warrant.' The AU's concern for what it termed the abuse of the principle of universal jurisdiction may similarly also be advanced as a reason for the AU's pursuit of criminal jurisdiction for the African Court. See e.g. § 9 of AU Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.213 (XII), which requested the Commission to 'examine the implications of the [African] Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes.' It is however, difficult to deny that the ICC-AU tension was, at the very least, an impetus for the speedy finalisation of the Amendment Protocol. See e.g. § 10(iv) AU Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (October 2013) in which the AU, after lamenting ICC responses to the AU's concerns, decides to 'fast track the process of expanding the mandate of the African Court on Human and Peoples' Rights (AfCHPR) to try international crimes, such as genocide, crimes against humanity and war crimes.'

and in order to exclude it from the analysis altogether, I wish to state, upfront, my normative policy position: The decision of the AU to provide for the immunity of officials sends out wrong signals about its commitment to the fight against impunity. Devoid of this normative policy question, this paper seeks to place the immunity provision of the Amendment Protocol in context of international law, including the ICC Statute. I begin in the next section by describing the various arguments that have been made both in support of the provision and in opposition to it. I then, in the section that follows, provide an evaluation of the immunities clause in the context of the international law and in light of the arguments that have been made, both in support and opposition. Finally, I offer some concluding remarks.

## 2. Immunity before the African Court: Unpacking the Case for and Against

### *A. Scope of Immunity in the Amendment Protocol*

Before addressing some of the issues that have been raised, concerning the immunity provision in the Amendment Protocol, it is useful to set out the provision and attempt to identify its scope. Article 46A*bis* of the Amendment Protocol provides as follows:

> No charges shall be commenced or continued against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

As a preliminary point, irrespective of the broader legal issues pertaining to immunity under international law, the text of Article 46A*bis* is ambiguous and not well drafted.[7] Firstly, , the meaning of the phrase 'or anybody … entitled to act in such capacity', which first appeared in the decision of the AU Extraordinary Summit of October 2014,[8] is unclear. A broad interpretation of the phrase could refer to any number of persons including potentially all ministers and even all members of parliament in some states.[9] At its narrowest, the provision could mean a deputy Head of State or Government.[10] The former interpretation, being dependent on the constitutional system of each state, is inherently relative and would result in

[7] See Njeri Kariri, *supra* note 4.
[8] Paragraph 10(i) of the Decision on Africa's Relationship with the International Criminal Court (ICC), *supra* note 6.
[9] Section 90 of the Constitution of the Republic of South Africa, 1996, provides that the Deputy President, a Minister designated by the President, a Minister designated by other members of the cabinet, the Speaker of Parliament until the parliament designates one of its members, may act as Head of State.
[10] Under Sec. 147(3) of the Constitution of Kenya, only the Deputy President may hold the office of the acting President in the absence of the President. See also Art. II Section 6 of the Constitution of the United States.

different rules being applicable to officials from different states. The latter, narrower, interpretation is more objective and thus more consistent with the objective of the decision in which the phrase first appeared, i.e. to prevent the prosecution of Kenya's Head of State and his deputy. Admittedly there might be a fair degree of uncertainty in general international law itself regarding the beneficiaries of immunities. For example much has been made of the fact that the International Court of Justice (ICJ) in the *Arrest Warrant* case, in addressing the question of immunities of Ministers for Foreign Affairs, described 'certain holders of high ranking office in a state' in an illustrative rather than an exhaustive list.[11] However, the ambiguity of the ICJ approach to the list of officials entitled to immunities may be somewhat overstated. First, it is not clear that in its oft-cited proposition, the ICJ was referring specifically to persons entitled to immunity *ratione personae* since the ICJ only speaks of immunities for these office bearers, which could include immunity *ratione materiae*.[12] Moreover, the International Law Commission (ILC) has seemingly adopted a compromise by deciding that only the troika (Head of State, Head of Government and Minister for Foreign Affairs) enjoy immunity *ratione personae*.[13] At any rate, it is unnecessary to resolve the conceptual issue of who enjoys immunity under general international law for the purposes of this article since this interesting conceptual discussion does not affect the doctrinal question at issue. It need only be said that the ambiguity in Article 46A*bis* does not result from conceptual uncertainty but rather from drafting difficulties. The choice of interpretation, broad or narrow, does not affect the doctrinal issue discussed below.

The second ambiguity relates to whether Article 46A*bis* aims at providing two different regimes of immunity i.e. immunity *ratione personae* and immunity *ratione*

[11] The ICJ, in addressing the question of whether Ministers for Foreign Affairs benefit from immunity, stated 'certain holders of high-ranking office in a State, *such as* the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunities from jurisdiction in other States, both civil and criminal.' (emphasis added). See ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgement of 14 February 2002, ICJ Reports (2002) 3, § 53.

[12] *Ibid*. It is interesting to note, in this regard, that the ICJ compared the immunities it was referring to, to those enjoyed by diplomatic and consular officials. While the former may be said to enjoy immunity *ratione personae*, the latter clearly only enjoy immunity for acts performed in official capacity.

[13] At its 65th Session, in the context of its work on Immunity of State Officials from Foreign Criminal Jurisdiction, the ILC adopted Draft Arts 3 and 4 on immunity *ratione personae* as covering all acts, whether in private or official capacity, performed by Heads of State, Heads of Government and Ministers for Foreign Affairs; see Chapter 5 of the Report of the International Law Commission on the Work of its Sixty-Fifth Session (6 May to 7 June and 8 July to 9 August 2013) General Assembly Official Records Sixty-Eighth Session, Supplement 10 (A/68/10). This is a compromise approach because some within the Commission, including the author, were of the view that, notwithstanding the *Arrest Warrant* case neither the logic of immunity *ratione personae* or state practice justified extending that type of immunity to Ministers for Foreign. Also see *infra* note 17.

*materiae*, or only one.[14] Moreover, if the aim is to establish only one regime, it would be unclear whether the regime would be immunity *ratione materiae* or immunity *ratione personae*. An ordinary meaning of Article 46A*bis* appears to support two separate categories.[15] The first category, approximating immunity *ratione personae*, would be applicable to 'Heads of State or Government' and 'anybody acting or entitled to act in such capacity'. The second category, approximating immunity *ratione materiae*, would apply to 'other senior officials based on their functions'. The phrase, 'based on their functions' in Article 46A*bis,* appears to only qualify 'other senior officials' and not 'Heads of State or Government, or anybody acting or entitled to act in such capacity'. An interpretation of Article 46A*bis* as establishing two categories of immunities would also be consistent with applicable principles of international law.[16] Assuming this interpretation were the more correct interpretation, it would mean that, contrary to the conclusions of the ILC and the ICJ decision in the *Arrest Warrant* case, immunity *ratione personae* under the Statute of the African Court would not be extended to Ministers for Foreign Affairs.[17]

An alternative interpretation of Article 46A*bis* is that it establishes only immunity *ratione personae*. Under such an interpretation, the qualifier 'based on their functions' does not qualify the extent of immunity but rather forms part of the description of the senior officials. In other words, senior officials, defined in terms of their functions, enjoy the same type of immunity of Heads of State or Governments and other anyone acting or entitled in

[14] See Chapter 5 of the Report of the International Law Commission on the Work of its Sixty-Fifth Session (6 May to 7 June and 8 July to 9 August 2013) General Assembly Official Records Sixty-Eighth Session, Supplement 10 (A/68/10). At its 66th Session, in the context of its work on Immunity of State Officials from Foreign Criminal Jurisdiction, the ILC adopted Draft Article 5 on immunity *ratione materiae* as applicable to state officials acting as such. See Chapter 9 of the Report of the International Law Commission on the Work of its Sixty-Sixth Session (5 May to 6 June and 7 July to 8 August 2014), General Assembly Official Records Sixty-Ninth Session, Supplement 10 (A/69/10).

[15] The general rule on interpretation of treaties, in Art. 31(1) of the Vienna Convention on the Law of Treaties (VCLT), requires the terms of a treaty to be given their ordinary meaning in context and in the light of the treaty's object and purpose.

[16] Under the Vienna rules of interpretation, in particular Art. 31(3)(c) VCLT, 'relevant rules of international law applicable in the relations between the parties' are to be taken into account in the interpretation of treaties. On the notion of two categories of immunities under international law, see the work of the ILC, *supra* note 14.

[17] See ICJ *Arrest Warrant* case, *supra* note 11, § 54 where the Court held that Ministers for Foreign Affairs enjoy immunity *ratione personae*. Whether Ministers for Foreign Affairs should enjoy immunity *ratione personae* was a matter of intense debate during the ILC's consideration of the topic. Although the ILC decided to include Ministers for Foreign Affairs, at § 5 of the Commentary to Draft Art. 3, the ILC states as follows: 'On the one hand, some members of the Commission pointed out that the Court's judgment [in the *Arrest Warrant* case] was not sufficient grounds for concluding that a customary rule existed, as it did not contain a thorough analysis of the practice and that several judges expressed opinions that differed from the majority view. One member of the Commission who considered that the Court's judgment does not that there is a customary rule nevertheless said that, in view of the fact that Court's judgement in that case had not been opposed by States, the absence of a customary rule does not prevent the Commission from including [Minister for Foreign] among the persons enjoying immunity *ratione personae*.'

that capacity. Indeed the phrase 'based on their functions' appears to have been drawn from the ICJ's reasoning for extending immunity *ratione personae* to Ministers for Foreign Affairs in the *Arrest Warrant* case.[18] This interpretation is supported mainly by the fact that in its earlier decisions leading to the adoption of Article 46A*bis*, the AU has never made a distinction between the immunities of heads of state and those of other senior state officials.[19] Moreover, such an interpretation would resolve the inconsistency between the first interpretation and the ICJ decision relating to Ministers for Foreign Affairs. Although Article 46A*bis* could be read as establishing two categories of immunities, namely immunity *ratione materiae* and immunity *ratione personae*, on a balance it appears that this second alternative is more convincing. Under this interpretation, however, other officials whose functions do not exhibit the characteristics identified by the Court in the *Arrest Warrant* case as indicating immunity *ratione personae* would not have immunity before the African Court's criminal law section. Finally, consistent with the *Arrest Warrant* case, the immunity, being immunity *ratione personae*, may be relied upon only while the individual in question holds the relevant office.[20]

### *B. Arguments on the Immunity Provisions in the Amendment Protocol*

As a normative proposition, arguments against the immunity provision in the Amendment Protocol are numerous and are often based on the fight against impunity. However, as a doctrinal question, arguments against the immunity provisions in the amendment protocol have tended to revolve around its consistency with international law and the ICC Statute in particular. Jemima Njeri Kariri, for example, puts forward primarily normative arguments against the immunity provision. She observes that the immunity provision is a 'setback to advancing democracy and the rule of law' and provides a 'protective veil that denies justice to victims and is detrimental to accountability'.[21] These are arguments that suggest that the African Union *should not* have included the immunity provision. Although not focused on the legal doctrinal question about the place of immunity in international (and domestic) law,

[18] In the ICJ *Arrest Warrant* case, *supra* note 11, at § 53, the Court states that to determine the extent of the immunities of Ministers for Foreign Affairs it 'must first consider the nature of the functions exercised by a Minister for Foreign Affairs'.

[19] See e.g. § 9 of the Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (Oct 2013).

[20] See § 61 of the ICJ *Arrest Warrant* case, *supra* note 11. See also Draft Art. 4(1) of the ILC's preliminary Draft Articles on the Immunity of State Officials, *supra* note 14. See especially § 2 of the commentary to Draft Art. 4.

[21] Njeri Kariri, *supra* note 7.

Njeri Kariri postulates, as a legal position, that 'the immunity provision flouts international law and is contrary to the national laws of African states like Kenya and South Africa'.[22]

The doctrinal argument, questioning the legal basis of an immunity provision in the Amendment Protocol can be illustrated by reference to Chacha Bhoke Murungu's observations on the African Court.[23] Murungu asserts, citing Article 27 of the ICC Statute, that 'immunity of state officials is no longer a valid defence for the commission of international crimes'.'[24] This position is also one that appears to have been advanced by the ICC in its decisions in the *Malawi* and *Chad* non-cooperation cases.[25] More to the point, Murungu asks whether extending the jurisdiction of the African Court to cover ICC-crimes (along with Article 46A*bis*) 'has a legal basis under the ICC Statute'.[26] The ICC Statute, he asserts, 'does not expressly allow or even imply that regional courts … be conferred with jurisdiction' over ICC-crimes.[27] On the basis of his analysis he concludes that 'it is difficult to establish a clear legal basis' for extending the jurisdiction of the African Court in the ICC Statute.[28] Indeed, Murungu suggests that the very process of establishing the criminal section of the African Court was 'contrary to the provisions of the ICC Statute' in relation to cooperation.[29] Murungu's critique of the extension of jurisdiction of the African Court is based on the issues of immunity of African heads of state raised by the AU. He states, for example, that the only purpose behind the AU's attempts to expand the jurisdiction of the African Court is to 'protect some of its leaders'.[30]

The arguments of Murungu are reflective of the whispers in the corridors of ICC meetings, even if not always captured in the literature. These arguments can be reduced to three related propositions. First, customary international law does not provide for immunity of officials before international courts. Second, the provision of immunity in Article 46A*bis* is inconsistent with international law or, at best, goes against the trend of practice. Finally,

[22] *Ibid*.
[23] C. Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', 9 *Journal of International Criminal Justice* (*JICJ*) (2011) 1067-1088.
[24] *Ibid*., at 1077.
[25] See e.g. Decision Pursuant to Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Request Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December 2011, §§ 18 and 36. See more recently Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber II, 9 April 2014.
[26] See Murungu, *supra* note 23, at 1077.
[27] *Ibid*.
[28] *Ibid*.
[29] *Ibid*.
[30] *Ibid*.

Article 46A*bis* undermines the ICC Statute. These legal propositions about immunity for ICC-crimes are often based on statements about the effect of immunity on the fight against impunity. The granting of immunity is said to be contrary to the AU commitment to protecting the sanctity of life and condemning and rejecting impunity.[31] Steven Lamony of the Coalition for the International Criminal Court is quoted as saying 'Africa should be moving forward in the fight against impunity, not regressing'.[32] Similarly Netsanet Belay of Amnesty International has said that the decision 'undermines the integrity of the African Court'.[33]

The AU itself has defended the need for immunities both on normative and doctrinal grounds. While, in the specific context of the arrest and surrender of Al Bashir, the AU has based its arguments on the related duty of African states parties to respect the immunities of the Sudanese President consistent with Article 98 of the ICC Statute,[34] the AU has also made broader argument concerning immunities before international tribunals as well.[35] According to a recent decision of the AU, under customary international law, 'Heads of State and other senior state officials are granted immunities during their tenure of office'.[36] Further, this decision does not limit the application of these immunities to domestic courts. Indeed, addressing the consequences of the customary international law position, the decision declares that 'no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government'.[37] As a doctrinal proposition and more explicitly, the AU has maintained that 'immunities provided for by international law apply not only to proceedings in foreign domestic courts *but also to international tribunals*', and that states cannot circumvent its obligations in this regard 'by establishing an international tribunal'.[38] To provide for immunities of heads of state and other officials in the

[31] International Justice Resource Centre, 'African Union Approves Immunity for Government Officials in Amendment to African Court of Justice and Human Rights Statute', 2 July 2014, available online at www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute (visited 10 August 2014).
[32] *Ibid*.
[33] *Ibid*.
[34] The Art. 98 question is considered in D. Tladi, 'The ICC Decisions in Chad and Malawi: On Cooperation, Immunities, and Article 98', 11 *JICJ* (2013) 199 and will not be addressed in this article.
[35] See e.g. Opening Statement by the Legal Counsel of the AU Commission at the First Session of the Specialised Technical Committee on Justice and Legal Affairs, held from 6-14 May 2014 in Addis Ababa where the Legal Counsel links the insertion of Article 46A*bis to* 'proceedings against African Heads of State and Government'.
[36] See § 9 of the Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (Oct 2013).
[37] *Ibid*., at § 10(i).
[38] See AU Commission Press Release 02/2012 on the Decision of Pre-Trial Chamber of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of

Amendment Protocol, is therefore, from the AU's perspective, is to act in furtherance of international law.

The AU does not dispute the legality of arrangements such as those in Article 27 of the ICC Statute, which provides that neither immunity nor other special procedural rules attaching to the official capacity of a person constitute a bar for the ICC exercising jurisdiction over an individual.[39] The AU, instead, approaches Article 27 as a treaty rule applicable only to state parties and that for non-state parties, the rules of customary international law relating to immunities remain intact. In response to the decisions of the ICC on non-cooperation by Malawi and Chad, the AU issued a press release which stated, in part, that: 'immunities of State officials are rights of the State concerned and a treaty only binds parties to the treaty. A treaty may not deprive non-Party States of rights which they ordinarily possess.'[40] This position essentially presents Article 27 ICC Statute, and similar provisions in the statutes of other international tribunals, as exceptions to the rules of customary international law relating to immunities and applying only as between parties to the constitutive treaties. The immunities provision in the Amendment Protocol are, from this perspective, seen not only as acceptable but as reflecting customary international law. This has been the legal basis of the AU's call for non-cooperation with the ICC's call for the arrest and surrender of Al Bashir.[41] According to the AU, Article 27 leaves intact customary international law on immunities and the waiver of immunities implied by Article 27 applies only between states parties to the ICC Statute. Thus while there may be a duty on states

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Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued By the Court With Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan, 9 January 2012. See also D. Akande, 'The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case?' *EJIL Talk* blogpost, 8 February 2012 who states that 'what the AU wants is an opinion [from the ICJ] that would clarify the immunity (or otherwise) of *State officials from prosecution by the ICC* and from enforcement action taken by States acting at the request of the ICC'. (Emphasis added).

[39] Art. 27(1) ICCSt. states that the 'Statute shall apply equally to all persons without distinction any distinction based on official capacity. In particular, official capacity as a Head of State or Government, member of a Government … shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.' Art. 27(2) provides that '[I]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising jurisdiction over such a person'.

[40] AU Commission Press Release 02/2012, *supra* note 38.

[41] In its first decision on non-cooperation with respect to Omar Al Bashir, for example, the AU Summit requests the Commission and African states to engage in a process to clarify 'the Immunities of officials whose States are not party to the [Rome] Statute.' See § 8 of the AU Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec. 245(XIII) Rev. 1. See especially § 6 of the AU Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC), Assembly/AU/Dec.397 (XVIII) in which the AU Assembly reaffirms 'its understanding that Article 98(1) was included in the Rome Statute … out of a recognition that the Statute is not capable of removing an immunity which international law grants to officials of States that are not parties to the Rome Statute'.

parties to the ICC to cooperate in the arrest and surrender of a head of a state party no such a duty exists in relation to the arrest and surrender of a head of non-state party.[42] While this aspect is slightly tangential to the consideration of Article 46A*bis* of the Amendment Protocol, it does serve to illustrate the AU's understanding of immunities under customary international law and, more to the point, the perceived exceptionality of Article 27 of the ICC Statute.

Both the positions supporting the immunities provision and the position opposing immunities are based on doctrinal assumptions about the rules of general international law relating to immunities. I turn now to evaluate these doctrinal assumptions.

### 3. Evaluating the Doctrinal Argument Concerning the Immunity Provision

For convenience sake, I begin with an evaluation of the AU's argument on immunities. It is difficult to argue with the AU's assertion that that duty on States Parties to cooperate with the ICC cannot deprive non-states parties of their rights under customary international law. Treaties create rights and obligations only as between parties to the treaty and the rights of non-parties cannot be affected by the treaty.[43] Whether this means, as is argued by the AU, that there is no duty to cooperate in the arrest and surrender of Al Bashir is dependent on other legal questions, such the effect of a Security Council referral of a situation to the ICC and the interpretation of Article 98, both of which fall beyond the scope of the enquiry here.[44]

While the assertion that the rights relating to immunities under customary international law of a non-state party cannot be affected by the duty to cooperate under the ICC Statute cannot be disputed, what does require closer scrutiny is the assertion that under customary international law heads of state (and other officials entitled to immunity) enjoy immunity before international courts and tribunals. This assertion seems to ignore the ICJ dictum in *Arrest Warrant* where the Court stated that, notwithstanding the customary international law rules on immunity of officials from foreign criminal jurisdiction, a state official may still be prosecuted before an international court under certain circumstances.[45]

[42] See AU Commission Press Release 20/2012, *supra* note 38.
[43] See generally Art. 34 VCLT.
[44] This aspect of the immunities debate has been considered in various articles. See e.g. D. Akande, 'The Legal Nature of the Security Council Referrals to the ICC and its Impact on Bashir's Immunities', 7 *JICJ* (2009) 333-352 and P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' 7 *JICJ* (2009) 315-332. See also Tladi, *supra* note 34.
[45] ICJ, *Arrest Warrant* case, *supra* note 11, at § 61.

But there is a far more fundamental problem with the AU's postulation. The immunity of states officials, whether *ratione personae* or *ratione materiae*, under customary international law means, in essence, the immunity of state official from the jurisdiction of courts of *foreign states*. This immunity is an extension of the immunity of the state from the jurisdiction of other states based on the principle of sovereign equality of states.[46] International tribunals, like the ICC and the African Court, are not foreign states. The rationale for immunity of states and its officials — sovereign equality of states — does not apply to the exercise of jurisdiction of international courts and tribunals since, thought created by states, they are not themselves states. In contrast, the AU has asserted that to hold that rules on immunities do not apply to proceeding before international courts would be allow to states to circumvent their obligations under international law by creating an international tribunal.[47] This argument might be applicable in the case of a tribunal created by a handful of states which exercise control over it. However, it is unconvincing when applied to a court having 122 states parties none of which can exercise control over its decisions.[48] Moreover, since the immunity of officials from the jurisdiction of the courts of *foreign states* can be shown to exist in the practice of states accepted as law, to extend this immunity to cover also proceedings before international courts and tribunals would require evidence of practice of states accepted as law, which does not exist.[49] Quite the contrary, if anything given the history of international criminal law adumbrated in, for example, the ICC decisions in *Malawi* and *Chad*, there appears to be practice going in the other direction i.e. towards excluding immunity.[50] Therefore, the AU argument that the insertion of Article 46A*bis* is not only consistent with, but is reflective of, customary international law is doctrinally flawed.

Does the fact that there is no rule under customary international law granting immunity to state officials before international criminal courts and tribunals mean, at the same time, that there is a rule denying them immunity? This was essentially the argument

[46] See e.g., § 6 of the commentary to Draft Art. 4 of the ILC's Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, *supra* note 14.
[47] See AU Commission Press Release 20/2012, *supra* note 38.
[48] For the suggestion that the ICC is indeed controlled by a few states see Statement by Ambassador Macharia Kamau, Permanent Representative of the Republic of Kenya on the Report of the ICC, 69th Session of the UN General Assembly, 30 October 2014 (on file with the author) urging the ICC to 'unshackle itself from a pernicious group of countries' whose control ensures that the Court 'represents [their] moral, ethical and, most disturbingly political values'. These countries, the statement continues, has a 'proprietorship' over the ICC.
[49] In this regard, the ICJ in the *Arrest Warrant* case, *supra* note 11, at §§ 58 and 59, where the Court makes it clear that the rules relating jurisdiction of national courts, including immunities applicable before them, should be distinguished from the same relating to international courts.
[50] ICC, *Malawi* decision, *supra* note 25, at § 23 *et seq*.

advanced in *Malawi* and *Chad*.[51] The experience with the Nuremburg Tribunal, the Tokyo Tribunal, the International Criminal Tribunal for the former Yugoslavia, the International Criminal for Rwanda, the Special Court for Sierra Leone and the Lebanon Tribunal constitutes practice of a denial of immunity. However, to transform the empirical fact — practice in the language of international law — to a rule of customary international law requires that the practice be accompanied by a sense of obligation, or *opinio iuris*.[52] No evidence of such an acceptance of law is present in relation to immunity of state officials before international courts and tribunals and none is presented by the ICC Pre-Trial Chamber in *Malawi* and *Chad*. Indeed, in the debate over the arrest and surrender of Al Bashir, those arguing that there was indeed a duty to arrest have advanced as a legal reason not the fact that the court was an international court but rather that the situation was referred to the ICC by the Security Council, which, the argument goes, has the power to override customary international law.[53]

Proponents of the view that there is a rule under customary international law denying immunity before international courts and tribunals may point to *Arrest Warrant*, where the ICJ [54] famously made the following observations:

> immunities enjoyed under international law by an [official] do not represent a bar to criminal prosecution in certain instances. …. Fourthly, an [official enjoying immunity in national courts] may be subject to criminal proceedings before certain international criminal courts, [sic] where they have jurisdiction.[55]

It bears mentioning that nothing in the quoted extract remotely suggests that anything about the status of immunities before international courts under customary international law. The ICJ was not here laying down a rule of international law but referring to *possible* avenues that may be followed for the prosecution of officials with immunity *if certain conditions were met*. The first avenue provided by the ICJ, for example, refers to the possibility of a person being tried before the courts of their own state.[56] Yet this can only happen if the national court in question has jurisdiction and the official in question has no immunity under domestic law. Similarly, an international court or tribunal can only try an individual if there is no jurisdictional bar, including immunity, to trying the individual. Whether or not the

[51] *Ibid*.
[52] See generally § 169 of the Report of the ILC at Sixty-Sixth Session (Chapter 10), *supra* note 14.
[53] See e.g. Akande, *supra* note 44. See *contra*, Tladi, *supra* note 34.
[54] ICC, *Malawi* decision, *supra* note 25, at § 34.
[55] ICJ, *Arrest Warrant* case, *supra* note 11, at § 61.
[56] *Ibid*.

international court or tribunal will have jurisdiction and whether or not there is a bar to the exercise of such jurisdiction will be dependent on the constitutive instrument establishing such a court or tribunal.[57] The argument that customary international law denies immunity before international courts is, therefore, unconvincing.

That there is no legal rule under customary international law denying immunity to state officials does not, of course, mean that a state official can plead immunity before a tribunal having jurisdiction which, by its constitutive instrument, has removed immunity such as Article 27 of the ICC Statute.[58] By the same token, however, the exclusion of immunity in a treaty establishing an international court or tribunal does not affect the relationship between a non-state party to the treaty and states parties. Thus, the fact that a state is party to the ICC Statute does not imply that such a state is no longer obliged to respect the immunity of an official from a state that is not a party to the Statute. Indeed even if the assertion that customary international law excludes immunities in respect of proceedings before international courts were correct — and I have argued that it is not — this would apply only as between the state official appearing before the court and the international court or tribunal concerned and would not, by itself, affect the relationship between states *inter se*.[59]

If neither the AU argument that customary international law requires international courts to respect immunity nor the argument advanced by, *inter alia*, the ICC that customary international law denies immunity before international courts is correct, then how is Article 46A*bis* of the Amendment Protocol to be understood from the perspective of customary international law? If customary international law neither requires nor precludes the immunity before international courts and tribunals, then as matter of law the AU is free to include or exclude immunities as a bar to prosecution as it deems fit. This is consistent with the proposition made above that the existence or not of immunities before international courts and tribunals is dependent not on rules of customary international law but rather on the constitutive instrument establishing the court or tribunal. Whether the incorporation of immunities in an instrument establishing an international court or tribunal is desirable or not is a different question. Thus Article 46A*bis* is neither reflective of nor inconsistent with customary international law. The question may well be asked whether, under a treaty that is

[57] See *ibid*. where the ICJ refers to the constitutive instruments establishing the ICC, the ICTY and the ICTR.
[58] *Ibid*.
[59] In the context of the ICCSt., this distinction is explained in Tladi, *supra* note 44, at 211 noting that Art. 27 'applies to defences, substantive or jurisdictional, that an individual *may raise before the ICC*. It does not, in any way, address the relationship between states nor does it address the relationship between the ICC and states parties.' (emphasis in the original).

silent on immunities, state officials are entitled to claim immunities. Subject to the normal rules of interpretation, a court, national or international, having jurisdiction is entitled to exercise that jurisdiction unless there is a rule of international law prohibiting such exercise. This is not the same as saying, however, that there is a rule of international law excluding immunity.

A related question is whether Article 46A*bis* of the Amendment Protocol undermines the fight against impunity. The argument on which this is based appears to be that the extension of the African Court's jurisdiction to international crimes while also expressly including immunity will shield perpetrators from the reaches of justice. However, this argument does not follow. The effect of the extension of the African Court's jurisdiction is, *potentially*, to expand the reach of international criminal justice. It does not, as the argument may suggest, reduce this reach. Assuming African states that are not party to the ICC Statute become party to the expanded African Court, then the reach of the international courts to potential situations and perpetrators becomes enlarged. On the other hand, regardless of the number of states that fall within the jurisdiction of the expanded African Court, the reach of the ICC will remain unaffected.

The idea that Article 46A*bis* of the Amendment Protocol affects the reach of international criminal justice can only be based on a misconstruction of the relationship between the AU Court and the ICC. Under Article 46A*bis* the African Court will not have the competence to try the persons having immunity but this will not prevent the ICC from exercising jurisdiction against such persons if it has jurisdiction. Under the principle of complementarity, the ICC is of course barred from proceedings with trials where a court with competence is willing and able to exercise jurisdiction.[60] This procedural bar, however, applies only to state prosecutions and/or investigations and does not extend to the exercise of jurisdiction by regional courts. Although an amendment to the ICC Statute, to recognize the competence of regional courts for the purposes of complementarity has been transmitted to the Secretary-General by Kenya,[61] this amendment is unlikely to be adopted by the Assembly

[60] See Arts 17, 18 and 19 ICCSt.

[61] See ICC Working Group on Amendments Informal Compilation of Proposals to Amend the Rome Statute (on file with the author). It should be noted, that the Kenyan proposal only seeks to amend the Preambular paragraph relating to complementarity and does not address the substantive provisions in Arts 17, 18 and 19. As currently drafted, it is therefore unlikely to be sufficient to establish a complementarity role for the African Court. See also Note Verbale 560/2014 from the Permanent Mission of Kenya to the United Nations to the President of the Assembly of States Parties detailing the amendment proposals it submitted for consideration.

of States Parties. At any rate, until such a time as an amendment has been passed, from the perspective of the ICC, Article 46A*bis* should be a non-issue.

**4. Conclusion**

The expansion of the jurisdiction of the AU Court to include also international crimes has raised much controversy in international criminal justice circles — both diplomatic and academic. Even more controversial has been the decision by the AU to make provision for immunities of certain officials before the AU Court in the form Article 46A*bis*. In the back and forth of arguments for and against Article 46A*bis*, normative policy arguments, empirical statements and doctrinal arguments have been lumped together in a way that can result in confusion. This confusion has aided in the perpetuation of the hero-villain trend in which supporters of the ICC see themselves as heroes and the AU as villains and the supporters of the AU see themselves as heroes and the ICC as villains.

In the eagerness to put on the white hat and fight the evil other, basic principles of international law are conveniently covered in a heap of rhetoric and slightly bent doctrine. Much of the confusion created by the debate arises from the failure by commentators to make a distinction between the law relating to immunity and the wisdom (or desirability) of Article 46A*bis*. Supporters of Article 46A*bis* present it as salvaging international law and reclaiming the foundational international principle of sovereignty by preserving immunity. What is ignored in this narrative is that international law rules on immunity apply to the exercise of jurisdiction by domestic courts over officials of a foreign state and that customary international law neither requires immunity before international courts nor prevents it. Opponents of Article 46A*bis*, on the other hand, present it as doing harm to the fight against impunity by protecting officials from the reach of international courts. What is ignored is that the expansion of the jurisdiction of the African Court does not, in any way, affect the jurisdiction of other courts, including the ICC, and can in no way prevent the exercise of jurisdiction by those courts over individuals who may be immune from prosecution before the African Court by virtue of Article 46A*bis*.

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# AFFAIRE RELATIVE AU MANDAT D'ARRÊT DU 11 AVRIL 2000

(RÉPUBLIQUE DÉMOCRATIQUE DU CONGO c. BELGIQUE)

**ARRÊT DU 14 FÉVRIER 2002**

# 2002

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

(DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM)

**JUDGMENT OF 14 FEBRUARY 2002**

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ARRÊT

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JUDGMENT

INTERNATIONAL COURT OF JUSTICE

YEAR 2002

2002
14 February
General List
No. 121

**14 February 2002**

# CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

## (DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM)

*Facts of the case — Issue by a Belgian investigating magistrate of "an international arrest warrant* in absentia *" against the incumbent Minister for Foreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity — International circulation of arrest warrant through Interpol — Person concerned subsequently ceasing to hold office as Minister for Foreign Affairs.*

* *

*First objection of Belgium — Jurisdiction of the Court — Statute of the Court, Article 36, paragraph 2 — Existence of a "legal dispute" between the Parties at the time of filing of the Application instituting proceedings — Events subsequent to the filing of the Application do not deprive the Court of jurisdiction.*

*Second objection of Belgium — Mootness — Fact that the person concerned had ceased to hold office as Minister for Foreign Affairs does not put an end to the dispute between the Parties and does not deprive the Application of its object.*

*Third objection of Belgium — Admissibility — Facts underlying the Application instituting proceedings not changed in a way that transformed the dispute originally brought before the Court into another which is different in character.*

*Fourth objection of Belgium — Admissibility — Congo not acting in the context of protection of one of its nationals — Inapplicability of rules relating to exhaustion of local remedies.*

*Subsidiary argument of Belgium —* Non ultra petita *rule — Claim in Application instituting proceedings that Belgium's claim to exercise a universal jurisdiction in issuing the arrest warrant is contrary to international law — Claim not made in final submissions of the Congo — Court unable to rule on that ques-*

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*tion in the operative part of its Judgment but not prevented from dealing with certain aspects of the question in the reasoning of its Judgment.*

* *

*Immunity from criminal jurisdiction in other States and also inviolability of an incumbent Minister for Foreign Affairs — Vienna Convention on Diplomatic Relations of 18 April 1961, preamble, Article 32 — Vienna Convention on Consular Relations of 24 April 1963 — New York Convention on Special Missions of 8 December 1969, Article 21, paragraph 2 — Customary international law rules — Nature of the functions exercised by a Minister for Foreign Affairs — Functions such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability — No distinction in this context between acts performed in an "official" capacity and those claimed to have been performed in a "private capacity".*

*No exception to immunity from criminal jurisdiction and inviolability where an incumbent Minister for Foreign Affairs suspected of having committed war crimes or crimes against humanity — Distinction between jurisdiction of national courts and jurisdictional immunities — Distinction between immunity from jurisdiction and impunity.*

*Issuing of arrest warrant intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs — Mere issuing of warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs — Purpose of the international circulation of the arrest warrant to establish a legal basis for the arrest of Minister for Foreign Affairs abroad and his subsequent extradition to Belgium — International circulation of the warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs.*

* *

*Remedies sought by the Congo — Finding by the Court of international responsibility of Belgium making good the moral injury complained of by the Congo — Belgium required by means of its own choosing to cancel the warrant in question and so inform the authorities to whom it was circulated.*

## JUDGMENT

*Present:* *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL; *Judges* ad hoc BULA-BULA, VAN DEN WYNGAERT; *Registrar* COUVREUR.

In the case concerning the arrest warrant of 11 April 2000,

*between*

the Democratic Republic of the Congo,

represented by

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Ngele Masudi, Minister of Justice and Keeper of the Seals,
Maître Kosisaka Kombe, Legal Adviser to the Presidency of the Republic,
Mr. François Rigaux, Professor Emeritus at the Catholic University of Louvain,
Ms Monique Chemillier-Gendreau, Professor at the University of Paris VII (Denis Diderot),
Mr. Pierre d'Argent, Chargé de cours, Catholic University of Louvain,
Mr. Moka N'Golo, Bâtonnier,
Mr. Djeina Wembou, Professor at the University of Abidjan,

as Counsel and Advocates;

Mr. Mazyambo Makengo, Legal Adviser to the Ministry of Justice,

as Counsellor,

*and*

the Kingdom of Belgium,

represented by

Mr. Jan Devadder, Director-General, Legal Matters, Ministry of Foreign Affairs,

as Agent;

Mr. Eric David, Professor of Public International Law, Université libre de Bruxelles,
Mr. Daniel Bethlehem, Barrister, Bar of England and Wales, Fellow of Clare Hall and Deputy Director of the Lauterpacht Research Centre for International Law, University of Cambridge,

as Counsel and Advocates;

H.E. Baron Olivier Gilles de Pélichy, Permanent Representative of the Kingdom of Belgium to the Organization for the Prohibition of Chemical Weapons, responsible for relations with the International Court of Justice,
Mr. Claude Debrulle, Director-General, Criminal Legislation and Human Rights, Ministry of Justice,
Mr. Pierre Morlet, Advocate-General, Brussels Cour d'Appel,
Mr. Wouter Detavernier, Deputy Counsellor, Directorate-General Legal Matters, Ministry of Foreign Affairs,
Mr. Rodney Neufeld, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge,
Mr. Tom Vanderhaeghe, Assistant at the Université libre de Bruxelles,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

1. On 17 October 2000 the Democratic Republic of the Congo (hereinafter referred to as "the Congo") filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter referred to as "Belgium") in respect of a dispute concerning an "international arrest warrant issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi".

In that Application the Congo contended that Belgium had violated the "principle that a State may not exercise its authority on the territory of another State", the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations", as well as "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

In order to found the Court's jurisdiction the Congo invoked in the aforementioned Application the fact that "Belgium ha[d] accepted the jurisdiction of the Court and, in so far as may be required, the [aforementioned] Application signifie[d] acceptance of that jurisdiction by the Democratic Republic of the Congo".

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of Belgium by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case; the Congo chose Mr. Sayeman Bula-Bula, and Belgium Ms Christine Van den Wyngaert.

4. On 17 October 2000, the day on which the Application was filed, the Government of the Congo also filed in the Registry of the Court a request for the indication of a provisional measure based on Article 41 of the Statute of the Court. At the hearings on that request, Belgium, for its part, asked that the case be removed from the List.

By Order of 8 December 2000 the Court, on the one hand, rejected Belgium's request that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. In the same Order, the Court also held that "it [was] desirable that the issues before the Court should be determined as soon as possible" and that "it [was] therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition"

5. By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. By Orders of 14 March 2001 and 12 April 2001, these time-limits, taking account of the reasons given by the Congo and the agreement of the Parties, were successively extended. The Memorial of the Congo was filed on 16 May 2001 within the time-limit thus finally prescribed.

6. By Order of 27 June 2001, the Court, on the one hand, rejected a request

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by Belgium for authorization, in derogation from the previous Orders of the President of the Court, to submit preliminary objections involving suspension of the proceedings on the merits and, on the other, extended the time-limit prescribed in the Order of 12 April 2001 for the filing by Belgium of a Counter-Memorial addressing both questions of jurisdiction and admissibility and the merits. The Counter-Memorial of Belgium was filed on 28 September 2001 within the time-limit thus extended.

7. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

8. Public hearings were held from 15 to 19 October 2001, at which the Court heard the oral arguments and replies of:

*For the Congo:* H.E. Mr. Jacques Masangu-a-Mwanza,
H.E. Mr. Ngele Masudi,
Maître Kosisaka Kombe,
Mr. François Rigaux,
Ms Monique Chemillier-Gendreau,
Mr. Pierre d'Argent.

*For Belgium:* Mr. Jan Devadder,
Mr. Daniel Bethlehem,
Mr. Eric David.

9. At the hearings, Members of the Court put questions to Belgium, to which replies were given orally or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. The Congo provided its written comments on the reply that was given in writing to one of these questions, pursuant to Article 72 of the Rules of Court.

*

10. In its Application, the Congo formulated the decision requested in the following terms:

> "The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels Tribunal de première instance against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law', that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000."

11. In the course of the written proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of the Congo,*

in the Memorial:

> "In light of the facts and arguments set out above, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC;
3. the violation of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 precludes any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that, following the Court's Judgment, Belgium renounces its request for their co-operation in executing the unlawful warrant."

*On behalf of the Government of Belgium,*

in the Counter-Memorial:

"For the reasons stated in Part II of this Counter-Memorial, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the preceding submission, the Court concludes that it does have jurisdiction in this case and that the application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the application."

12. At the oral proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of the Congo,*

"In light of the facts and arguments set out during the written and oral proceedings, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the war-

rant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

*On behalf of the Government of Belgium,*

"For the reasons stated in the Counter-Memorial of Belgium and in its oral submissions, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the Application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the submissions of Belgium with regard to the Court's jurisdiction and the admissibility of the Application, the Court concludes that it does have jurisdiction in this case and that the Application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the Application."

* * *

13. On 11 April 2000 an investigating judge of the Brussels Tribunal de première instance issued "an international arrest warrant *in absentia*" against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.

At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo.

14. The arrest warrant was transmitted to the Congo on 7 June 2000, being received by the Congolese authorities on 12 July 2000. According to Belgium, the warrant was at the same time transmitted to the International Criminal Police Organization (Interpol), an organization whose function is to enhance and facilitate cross-border criminal police co-operation worldwide; through the latter, it was circulated internationally.

15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", as amended by the Law of 10 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law" (hereinafter referred to as the "Belgian Law").

Article 7 of the Belgian Law provides that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed". In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which

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the arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia's alleged offences was also uncontested.

Article 5, paragraph 3, of the Belgian Law further provides that "[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law".

16. At the hearings, Belgium further claimed that it offered "to entrust the case to the competent authorities [of the Congo] for enquiry and possible prosecution", and referred to a certain number of steps which it claimed to have taken in this regard from September 2000, that is, before the filing of the Application instituting proceedings. The Congo for its part stated the following: "We have scant information concerning the form [of these Belgian proposals]." It added that "these proposals . . . appear to have been made very belatedly, namely *after* an arrest warrant against Mr. Yerodia had been issued".

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings (see paragraph 1 above), in which the Court was requested "to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000". The Congo relied in its Application on two separate legal grounds. First, it claimed that "[t]he *universal jurisdiction* that the Belgian State attributes to itself under Article 7 of the Law in question" constituted a

> "[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations".

Secondly, it claimed that "[t]he non-recognition, on the basis of Article 5 . . . of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office" constituted a "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

18. On the same day that it filed its Application instituting proceedings, the Congo submitted a request to the Court for the indication of a provisional measure under Article 41 of the Statute of the Court. During the hearings devoted to consideration of that request, the Court was informed that in November 2000 a ministerial reshuffle had taken place in the Congo, following which Mr. Yerodia had ceased to hold office as Minister for Foreign Affairs and had been entrusted with the portfolio of Minister of Education. Belgium accordingly claimed that the Congo's Application had become moot and asked the Court, as has already been

recalled, to remove the case from the List. By Order of 8 December 2000, the Court rejected both Belgium's submissions to that effect and also the Congo's request for the indication of provisional measures (see paragraph 4 above).

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today.

20. On 12 September 2001, the Belgian National Central Bureau of Interpol requested the Interpol General Secretariat to issue a Red Notice in respect of Mr. Yerodia. Such notices concern individuals whose arrest is requested with a view to extradition. On 19 October 2001, at the public sittings held to hear the oral arguments of the Parties in the case, Belgium informed the Court that Interpol had responded on 27 September 2001 with a request for additional information, and that no Red Notice had yet been circulated.

21. Although the Application of the Congo originally advanced two separate legal grounds (see paragraph 17 above), the submissions of the Congo in its Memorial and the final submissions which it presented at the end of the oral proceedings refer only to a violation "in regard to the . . . Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers" (see paragraphs 11 and 12 above).

* * *

22. In their written pleadings, and in oral argument, the Parties addressed issues of jurisdiction and admissibility as well as the merits (see paragraphs 5 and 6 above). In this connection, Belgium raised certain objections which the Court will begin by addressing.

* *

23. The first objection presented by Belgium reads as follows:

> "That, in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], there is no longer a 'legal dispute' between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case."

24. Belgium does not deny that such a legal dispute existed between the Parties at the time when the Congo filed its Application instituting proceedings, and that the Court was properly seised by that Application. However, it contends that the question is not whether a legal dispute

existed at that time, but whether a legal dispute exists at the present time. Belgium refers in this respect *inter alia* to the *Northern Cameroons* case, in which the Court found that it "may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties" (*I.C.J. Reports 1963*, pp. 33-34), as well as to the *Nuclear Tests* cases (*Australia* v. *France*) (*New Zealand* v. *France*), in which the Court stated the following: "The Court, as a court of law, is called upon to resolve existing disputes between States . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision" (*I.C.J. Reports 1974*, pp. 270-271, para. 55; p. 476, para. 58). Belgium argues that the position of Mr. Yerodia as Minister for Foreign Affairs was central to the Congo's Application instituting proceedings, and emphasizes that there has now been a change of circumstances at the very heart of the case, in view of the fact that Mr. Yerodia was relieved of his position as Minister for Foreign Affairs in November 2000 and that, since 15 April 2001, he has occupied no position in the Government of the Congo (see paragraphs 18 and 19 above). According to Belgium, while there may still be a difference of opinion between the Parties on the scope and content of international law governing the immunities of a Minister for Foreign Affairs, that difference of opinion has now become a matter of abstract, rather than of practical, concern. The result, in Belgium's view, is that the case has become an attempt by the Congo to "[seek] an advisory opinion from the Court", and no longer a "concrete case" involving an "actual controversy" between the Parties, and that the Court accordingly lacks jurisdiction in the case.

25. The Congo rejects this objection of Belgium. It contends that there is indeed a legal dispute between the Parties, in that the Congo claims that the arrest warrant was issued in violation of the immunity of its Minister for Foreign Affairs, that that warrant was unlawful *ab initio*, and that this legal defect persists despite the subsequent changes in the position occupied by the individual concerned, while Belgium maintains that the issue and circulation of the arrest warrant were not contrary to international law. The Congo adds that the termination of Mr. Yerodia's official duties in no way operated to efface the wrongful act and the injury that flowed from it, for which the Congo continues to seek redress.

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26. The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently

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become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction (see *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122; *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 23-24, para. 38; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 129, para. 37).

27. Article 36, paragraph 2, of the Statute of the Court provides:

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> *(a)* the interpretation of a treaty;
> *(b)* any question of international law;
> *(c)* the existence of any fact which, if established, would constitute a breach of an international obligation;
> *(d)* the nature or extent of the reparation to be made for the breach of an international obligation."

On 17 October 2000, the date that the Congo's Application instituting these proceedings was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with the above provision: Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case.

Moreover, it is not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. Such a dispute was clearly a legal dispute within the meaning of the Court's jurisprudence, namely "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" in which "the claim of one party is positively opposed by the other" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 22; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Juagment, I.C.J. Reports 1998*, pp. 122-123, para. 21).

28. The Court accordingly concludes that at the time that it was seised

of the case it had jurisdiction to deal with it, and that it still has such jurisdiction. Belgium's first objection must therefore be rejected.

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29. The second objection presented by Belgium is the following:

> "That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . Government [of the Congo], the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case."

30. Belgium also relies in support of this objection on the *Northern Cameroons* case, in which the Court considered that it would not be a proper discharge of its duties to proceed further in a case in which any judgment that the Court might pronounce would be "without object" (*I.C.J. Reports 1963*, p. 38), and on the *Nuclear Tests* cases, in which the Court saw "no reason to allow the continuance of proceedings which it knows are bound to be fruitless" (*I.C.J. Reports 1974*, p. 271, para. 58; p. 477, para. 61). Belgium maintains that the declarations requested by the Congo in its first and second submissions would clearly fall within the principles enunciated by the Court in those cases, since a judgment of the Court on the merits in this case could only be directed towards the clarification of the law in this area for the future, or be designed to reinforce the position of one or other Party. It relies in support of this argument on the fact that the Congo does not allege any material injury and is not seeking compensatory damages. It adds that the issue and transmission of the arrest warrant were not predicated on the ministerial status of the person concerned, that he is no longer a minister, and that the case is accordingly now devoid of object.

31. The Congo contests this argument of Belgium, and emphasizes that the aim of the Congo — to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered — remains unachieved at the point in time when the Court is called upon to decide the dispute. According to the Congo, in order for the case to have become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have to have been obtained.

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32. The Court has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon (see *Questions of Interpretation and Application of the 1971 Mont-*

*real Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 46; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 131, para. 45).

However, it considers that this is not such a case. The change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo's submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium's second objection must accordingly be rejected.

* *

33. The third Belgian objection is put as follows:

> "That the case as it now stands is materially different to that set out in the [Congo]'s Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

34. According to Belgium, it would be contrary to legal security and the sound administration of justice for an applicant State to continue proceedings in circumstances in which the factual dimension on which the Application was based has changed fundamentally, since the respondent State would in those circumstances be uncertain, until the very last moment, of the substance of the claims against it. Belgium argues that the prejudice suffered by the respondent State in this situation is analogous to the situation in which an applicant State formulates new claims during the course of the proceedings. It refers to the jurisprudence of the Court holding inadmissible new claims formulated during the course of the proceedings which, had they been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (see *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 447-448, para. 29). In the circumstances, Belgium contends that, if the Congo wishes to maintain its claims, it should be required to initiate proceedings afresh or, at the very least, apply to the Court for permission to amend its initial Application.

35. In response, the Congo denies that there has been a substantial amendment of the terms of its Application, and insists that it has presented no new claim, whether of substance or of form, that would have transformed the subject-matter of the dispute. The Congo maintains that it has done nothing through the various stages in the proceedings but "condense and refine" its claims, as do most States that appear before the Court, and that it is simply making use of the right of parties to amend their submissions until the end of the oral proceedings.

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36. The Court notes that, in accordance with settled jurisprudence, it "cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character" (*Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173; cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80; see also *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 264-267, in particular paras. 69 and 70). However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international law. The Congo's final submissions arise "directly out of the question which is the subject-matter of that Application" (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72; see also *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 36).

In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence, or that the requirements of the sound administration of justice were infringed. Belgium's third objection must accordingly be rejected.

* *

37. The fourth Belgian objection reads as follows:

> "That, in the light of the new circumstances concerning Mr. Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being pro-

tected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

38. In this respect, Belgium accepts that, when the case was first instituted, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name in respect of the alleged violation by Belgium of the immunity of the Congo's Foreign Minister. However, according to Belgium, the case was radically transformed after the Application was filed, namely on 15 April 2001, when Mr. Yerodia ceased to be a member of the Congolese Government. Belgium maintains that two of the requests made of the Court in the Congo's final submissions in practice now concern the legal effect of an arrest warrant issued against a private citizen of the Congo, and that these issues fall within the realm of an action of diplomatic protection. It adds that the individual concerned has not exhausted all available remedies under Belgian law a necessary condition before the Congo can espouse the cause of one of its nationals in international proceedings.

39. The Congo, on the other hand, denies that this is an action for diplomatic protection. It maintains that it is bringing these proceedings in the name of the Congolese State, on account of the violation of the immunity of its Minister for Foreign Affairs. The Congo further denies the availability of remedies under Belgian law. It points out in this regard that it is only when the Crown Prosecutor has become seised of the case file and makes submissions to the Chambre du conseil that the accused can defend himself before the Chambre and seek to have the charge dismissed.

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40. The Court notes that the Congo has never sought to invoke before it Mr. Yerodia's personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies.

In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application (see *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 26; *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 42, para. 49). Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed

(see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 43-44; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-43). Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium's fourth objection must accordingly be rejected.

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41. As a subsidiary argument, Belgium further contends that "[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, . . . the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo]'s final submissions". Belgium points out that, while the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge's lack of jurisdiction, and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs, the Congo no longer claims in its final submissions that Belgium wrongly conferred upon itself universal jurisdiction *in absentia*. According to Belgium, the Congo now confines itself to arguing that the arrest warrant of 11 April 2000 was unlawful because it violated the immunity from jurisdiction of its Minister for Foreign Affairs, and that the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

42. The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the "exercise of an excessive universal jurisdiction" being in this connection only a secondary consideration. The Congo asserts that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at the request of the Congo but, rather, by virtue of the defence strategy adopted by Belgium, which appears to maintain that the exercise of such jurisdiction can "represent a valid counterweight to the observance of immunities".

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43. The Court would recall the well-established principle that "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (*Asylum, Judgment, I.C.J. Reports 1950*,

p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

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44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo's Application, that the Application is not without object and that accordingly the case is not moot and that the Application is admissible. Thus, the Court now turns to the merits of the case.

* * *

45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo's submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

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47. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability

and to immunity from criminal process being "absolute or complete", that is to say, they are subject to no exception. Accordingly, the Congo contends that no criminal prosecution may be brought against a Minister for Foreign Affairs in a foreign court as long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under customary international law simply in order to enable the foreign State representative enjoying such immunity to perform his or her functions freely and without let or hindrance. The Congo adds that the immunity thus accorded to Ministers for Foreign Affairs when in office covers *all* their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterized or not as "official acts".

48. The Congo states further that it does not deny the existence of a principle of international criminal law, deriving from the decisions of the Nuremberg and Tokyo international military tribunals, that the accused's official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a "ground of exemption from his criminal responsibility or a ground for mitigation of sentence". The Congo then stresses that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. It concludes that immunity does not mean impunity.

49. Belgium maintains for its part that, while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.

50. Belgium further states that, in the circumstances of the present case, Mr. Yerodia enjoyed no immunity at the time when he is alleged to have committed the acts of which he is accused, and that there is no evidence that he was then acting in any official capacity. It observes that the arrest warrant was issued against Mr. Yerodia personally.

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51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain

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holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

52. A certain number of treaty instruments were cited by the Parties in this regard. These included, first, the Vienna Convention on Diplomatic Relations of 18 April 1961, which states in its preamble that the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing States". It provides in Article 32 that only the sending State may waive such immunity. On these points, the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations of 24 April 1963, to which the Congo and Belgium are also parties.

The Congo and Belgium further cite the New York Convention on Special Missions of 8 December 1969, to which they are not, however, parties. They recall that under Article 21, paragraph 2, of that Convention:

> "The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law."

These conventions provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, for

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example, Article 7, paragraph 2 *(a)*, of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that chargés d'affaires are accredited.

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

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56. The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the *Pinochet* and *Qaddafi* cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the *Pinochet* decision recognizes an exception to the immunity rule when Lord Millett stated that "[i]nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose", or when Lord Phillips of Worth Matravers said that "no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime". As to the French Court of Cassation, Belgium contends that, in holding that, "under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State", the Court explicitly recognized the existence of such exceptions.

57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the *Pinochet* and *Qaddafi* cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the *Pinochet* case, the Congo cites Lord Browne-Wilkinson's statement that "[t]his immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . .". According to the Congo, the

French Court of Cassation adopted the same position in its *Qaddafi* judgment, in affirming that "international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State".

As regards the instruments creating international criminal tribunals and the latter's jurisprudence, these, in the Congo's view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

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58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus,

although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the

official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

* * *

62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and declare that:

> "[B]y issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States."

63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a "coercive legal act" which violates the Congo's immunity and sovereign rights, inasmuch as it seeks to "subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach" and is fully enforceable without special formality in Belgium.

The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.

64. As regards the international circulation of the said arrest warrant, this, in the Congo's view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium "thus cast upon one of the most prominent members of its Government". The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo's former President. In the Congo's view, Belgium "[thus] manifests an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition". The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly

"no further consideration need be given to the specific responsibility which a State executing it might incur, or to the way in which that responsibility should be related" to that of the Belgian State. The Congo observes that, in such circumstances, "there [would be] a direct causal relationship between the arrest warrant issued in Belgium and any act of enforcement carried out elsewhere".

65. Belgium rejects the Congo's argument on the ground that "the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the [Congo]".

With regard to the legal effects under Belgian law of the arrest warrant of 11 April 2000, Belgium contends that the clear purpose of the warrant was to procure that, if found in Belgium, Mr. Yerodia would be detained by the relevant Belgian authorities with a view to his prosecution for war crimes and crimes against humanity. According to Belgium, the Belgian investigating judge did, however, draw an explicit distinction in the warrant between, on the one hand, immunity from jurisdiction and, on the other hand, immunity from enforcement as regards representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium. Belgium further contends that, in its effect, the disputed arrest warrant is national in character, since it requires the arrest of Mr. Yerodia if he is found in Belgium but it does not have this effect outside Belgium.

66. In respect of the legal effects of the arrest warrant outside Belgium, Belgium maintains that the warrant does not create any obligation for the authorities of any other State to arrest Mr. Yerodia in the absence of some further step by Belgium completing or validating the arrest warrant (such as a request for the provisional detention of Mr. Yerodia), or the issuing of an arrest warrant by the appropriate authorities in the State concerned following a request to do so, or the issuing of an Interpol Red Notice. Accordingly, outside Belgium, while the purpose of the warrant was admittedly "to establish a legal basis for the arrest of Mr. Yerodia . . . and his subsequent extradition to Belgium", the warrant had no legal effect unless it was validated or completed by some prior act "requiring the arrest of Mr. Yerodia by the relevant authorities in a third State". Belgium further argues that "[i]f a State had executed the arrest warrant, it might infringe Mr. [Yerodia's] criminal immunity", but that "the Party directly responsible for that infringement would have been that State and not Belgium".

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67. The Court will first recall that the "international arrest warrant *in absentia*", issued on 11 April 2000 by an investigating judge of the Brussels Tribunal de première instance, is directed against Mr. Yerodia,

stating that he is "currently Minister for Foreign Affairs of the Democratic Republic of the Congo, having his business address at the Ministry of Foreign Affairs in Kinshasa". The warrant states that Mr. Yerodia is charged with being "the perpetrator or co-perpetrator" of:

"— Crimes under international law constituting grave breaches causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)
— Crimes against humanity (Article 1, paragraph 2, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)."

The warrant refers to "various speeches inciting racial hatred" and to "particularly virulent remarks" allegedly made by Mr. Yerodia during "public addresses reported by the media" on 4 August and 27 August 1998. It adds:

> "These speeches allegedly had the effect of inciting the population to attack Tutsi residents of Kinshasa: there were dragnet searches, manhunts (the Tutsi enemy) and lynchings.
>
> The speeches inciting racial hatred thus are said to have resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials."

68. The warrant further states that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The investigating judge does, however, observe in the warrant that "the rule concerning the absence of immunity under humanitarian law would appear . . . to require some qualification in respect of immunity from enforcement" and explains as follows:

> "Pursuant to the general principle of fairness in judicial proceedings, immunity from enforcement must, in our view, be accorded to all State representatives welcomed as such onto the territory of Belgium (on 'official visits'). Welcoming such foreign dignitaries as official representatives of sovereign States involves not only relations between individuals but also relations between States. This implies that such welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against its guest and the invitation cannot become a pretext for ensnaring the individual concerned in what would then have to be labelled a trap. In the contrary case, failure to respect this

undertaking could give rise to the host State's international responsibility."

69. The arrest warrant concludes with the following order:

"We instruct and order all bailiffs and agents of public authority who may be so required to execute this arrest warrant and to conduct the accused to the detention centre in Forest;

We order the warden of the prison to receive the accused and to keep him (her) in custody in the detention centre pursuant to this arrest warrant;

We require all those exercising public authority to whom this warrant shall be shown to lend all assistance in executing it."

70. The Court notes that the *issuance*, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The fact that the warrant is enforceable is clearly apparent from the order given to "all bailiffs and agents of public authority . . . to execute this arrest warrant" (see paragraph 69 above) and from the assertion in the warrant that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The Court is bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

71. The Court also notes that Belgium admits that the purpose of the international *circulation* of the disputed arrest warrant was "to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium". The Respondent maintains, however, that the enforcement of the warrant in third States was "dependent on some further preliminary steps having been taken" and that, given the "inchoate" quality of the warrant as regards third States, there was no "infringe[ment of] the sovereignty of the [Congo]". It further points out that no Interpol Red Notice was requested until 12 September 2001, when Mr. Yerodia no longer held ministerial office.

The Court cannot subscribe to this view. As in the case of the warrant's issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed Mr. Yero-

dia's immunity as the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo's conduct of its international relations. Since Mr. Yerodia was called upon in that capacity to undertake travel in the performance of his duties, the mere international circulation of the warrant, even in the absence of "further steps" by Belgium, could have resulted, in particular, in his arrest while abroad. The Court observes in this respect that Belgium itself cites information to the effect that Mr. Yerodia, "on applying for a visa to go to two countries, [apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium", adding that "[t]his, moreover, is what the [Congo] . . . hints when it writes that the arrest warrant 'sometimes forced Minister Yerodia to travel by roundabout routes'". Accordingly, the Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

* * *

72. The Court will now address the issue of the remedies sought by the Congo on account of Belgium's violation of the above-mentioned rules of international law. In its second, third and fourth submissions, the Congo requests the Court to adjudge and declare that:

> "A formal finding by the Court of the unlawfulness of [the issue and international circulation of the arrest warrant] constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
>
> The violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
>
> Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

73. In support of those submissions, the Congo asserts that the termination of the official duties of Mr. Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continue to exist. It argues that the warrant is unlawful *ab initio*, that "[i]t is fundamentally flawed" and that it cannot therefore have any legal effect today. It points

out that the purpose of its request is reparation for the injury caused, requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It states that, inasmuch as the wrongful act consisted in an internal legal instrument, only the "withdrawal" and "cancellation" of the latter can provide appropriate reparation.

The Congo further emphasizes that in no way is it asking the Court itself to withdraw or cancel the warrant, nor to determine the means whereby Belgium is to comply with its decision. It explains that the withdrawal and cancellation of the warrant, by the means that Belgium deems most suitable, "are not means of enforcement of the judgment of the Court but the requested measure of legal reparation/restitution itself". The Congo maintains that the Court is consequently only being requested to declare that Belgium, by way of reparation for the injury to the rights of the Congo, be required to withdraw and cancel this warrant by the means of its choice.

74. Belgium for its part maintains that a finding by the Court that the immunity enjoyed by Mr. Yerodia as Minister for Foreign Affairs had been violated would in no way entail an obligation to cancel the arrest warrant. It points out that the arrest warrant is still operative and that "there is no suggestion that it presently infringes the immunity of the Congo's Minister for Foreign Affairs". Belgium considers that what the Congo is in reality asking of the Court in its third and fourth final submissions is that the Court should direct Belgium as to the method by which it should give effect to a judgment of the Court finding that the warrant had infringed the immunity of the Congo's Minister for Foreign Affairs.

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75. The Court has already concluded (see paragraphs 70 and 71) that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

> "[t]he essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the conse-

quences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47).

In the present case, "the situation which would, in all probability, have existed if [the illegal act] had not been committed" cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy: in particular, the Court cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment's implications might be for third States, and the Court cannot therefore accept the Congo's submissions on this point.

* * *

78. For these reasons,

THE COURT,

(1) (A) By fifteen votes to one,

*Rejects* the objections of the Kingdom of Belgium relating to jurisdiction, mootness and admissibility;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(B) By fifteen votes to one,

*Finds* that it has jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 17 October 2000;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(C) By fifteen votes to one,

*Finds* that the Application of the Democratic Republic of the Congo is not without object and that accordingly the case is not moot;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren,

Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(D) By fifteen votes to one,

*Finds* that the Application of the Democratic Republic of the Congo is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(2) By thirteen votes to three,

*Finds* that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Al-Khasawneh; *Judge* ad hoc Van den Wyngaert;

(3) By ten votes to six,

*Finds* that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated.

IN FAVOUR: *President* Guillaume; *Vice-President* Shi *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; *Judge* ad hoc Van den Wyngaert.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourteenth day of February, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Demo-

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cratic Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

*(Signed)* Gilbert GUILLAUME,
President.

*(Signed)* Philippe COUVREUR,
Registrar.

President GUILLAUME appends a separate opinion to the Judgment of the Court; Judge ODA appends a dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a declaration to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judges HIGGINS, KOOIJMANS and BUERGENTHAL append a joint separate opinion to the Judgment of the Court; Judge REZEK appends a separate opinion to the Judgment of the Court; Judge AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* BULA-BULA appends a separate opinion to the Judgment of the Court; Judge *ad hoc* VAN DEN WYNGAERT appends a dissenting opinion to the Judgment of the Court.

*(Initialled)* G.G.

*(Initialled)* Ph.C.

# Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited

DIRE TLADI*

ABSTRACT: The article re-visits the AU-ICC tension from the lens of the hero-villain trend. It considers the main themes in the AU-ICC debate, namely whether the International Criminal Court is targeting Africans and the question of immunity, in the light of the arguments made by the respective interlocutors of the ICC and the African Union. It adopts, as a starting point, the position that the idea that one side is wrong and the other side is right (referred to as the hero-villain approach), is overly simplistic and proceeds to show how complex the issues relating to the AU-ICC tension are. In sum, the article questions both the ICC's claim to neutrality and the AU's claim of champion of decolonisation. The article concludes with a postscript to account for the Prosecutor's recent decision to seek an investigation into the situation in Afghanistan.

KEYWORDS: Immunity, AU-ICC, Self-Referrals, Jurisdiction, Non-Cooperation, *Al-Bashir*

## I. Introduction

When asked by the editors of the German Yearbook of International Law to make a contribution to the discussion on the International Criminal Court (ICC)-Africa relations in this Forum Section, my immediate reaction was that the African-ICC relations question has been largely overshadowed in the last two years by the ICC-South Africa relations and was thus *passé*.[1] Yet, in many ways the South

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[1] The author served as lead counsel for South Africa during its non-cooperation hearing. See International Criminal Court (ICC), Pre-Trial Chamber II, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir,* ICC-02/05-01/09-302, Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court of the Arrest and Surrender of Omar Al-Bashir of 6 July 2017. For the author's personal views on the South Africa cases see *Dire Tladi,* The Duty on South Africa to Arrest and Surrender Al Bashir under International and South African Law: A Perspective from International Law, Journal of International Criminal Justice (JICJ) 13 (2015),

Africa-ICC relationship is a microcosm of the Africa-ICC tensions. I have thus gladly accepted to make a contribution.

In previous contributions on this subject, I have questioned the dominant trend in which the debate on ICC-African Union (AU) is characterised by an ideological chasm that has villains pitted against protagonists.[2] In this characterisation, both sides (and their respective interlocutors) describe themselves as heroes fighting the good fight and the other side as evil villains intent on wanton destruction.[3] In the context of the AU-ICC debate, the ICC and its interlocutors present themselves as the defenders of accountability and justice while depicting the AU and its interlocutors as promoting impunity. They claim that, in the pursuit of justice, the ICC does not bend to politics and concerns itself with only law.[4] The AU and its interlocutors, on the other hand, see themselves as the defenders of sovereign equality of States and the ICC and its interlocutors as promoting neo-imperialism and the dominance of the weak by the powerful. They argue that the ICC's claim of objective application of law is nothing more than a cloak to cover the politically motivated bias of the ICC.

My view is that this hero-villain trend is overly simplistic. A dispassionate review of the accounts, decisions, literature, and facts surrounding the ICC will reveal that

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1027; *id.,* Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga, African Human Rights Law Journal 16 (2016), 310.

[2] *Dire Tladi,* When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Debate, African Journal of Legal Studies 7 (2014), 381, 381.

[3] *Ibid.,* 381–382. *Kelly-Jo Bluen* has made a similar observation: "[…] many liberal advocates of the ICC criticise the AU's conflation of law and politics (yet suspiciously ignore the similar conflation of others) […]", *Kelly-Jo Bluen,* Imperfect ICC Can Play a Critical Role, Mail & Guardian Online, 3 February 2017, available at: https://mg.co.za/article/2017-02-03-00-imperfect-icc-can-play-a-critical-role (accessed on 17 August 2017).

[4] The idea of the ICC acting only in accordance with the law is reflected in a number of statements by members of the ICC. In a recent article, Judge *Sanji Monageng* made the following observation: "[…] the Court cannot cure any defects of the Rome Statute – our job is to interpret and apply the Statute. After all, the International Criminal Court is a court, a judicial body that must respect its legal framework. Anything else would be unthinkable for judges", *Sanji Monageng,* Africa and the International Criminal Court: Then and Now, in: Gerhard Werle/Lovell Fernandez/Moritz Vormbaum (eds.), Africa and the International Criminal Court (2014), 18. Furthermore, shortly after his election to the position of Prosecutor, *Luis Moreno-Ocampo,* the first Prosecutor, stated that the "ICC was totally independent and impartial", *Luis Moreno-Ocampo,* Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC, 16 June 2003. The current Prosecutor, shortly after election, emphasised that the "Prosecutor does not take into account any political considerations", *Fatou Bensouda,* Introductory Remarks, The International Conference: 10 Years in Review of the ICC – Justice for All?, 15 February 2012. The first President of the ICC, *Philippe Kirsch,* suggested that the ICC was a response to the "bargaining away of justice" for "short-term political gain", Judge *Philippe Kirsch,* Address to the United Nations General Assembly, 30 October 2008. See for discussion, *Sarah Nouwen/Wouter G. Werner,* Doing Justice to the Political: The International Criminal Court in Uganda and Sudan, European Journal of International Law 21 (2011), 941; *David Kaye,* Who is Afraid of the International Criminal Court: Finding the Prosecutor Who Can Set it Straight, Foreign Affairs 90 (2011), 11.

the ICC-AU debate is far more complex than the hero-villain trend suggests. It will reveal that there are no white hats and black cloaks; it will reveal that what we have are international actors whose eager pursuit of their respective mandates and objectives leads them to adopt particular positions on both law and politics. There are a variety of angles from which the nuances of the ICC-AU relationship can be considered. One angle, not considered in this article but addressed in *Moritz Vormbaum's* article,[5] concerns the adoption by the African Union of the Malabo Protocol to establish a criminal chamber in the African Court, which was, at least in part, fuelled by the tension between the ICC and the African Union.[6] A postscript to address the recent decision of the Office of the Prosecutor to request authorisation for opening investigations in Afghanistan subsequent to the writing of the article is also provided.

In this article, I propose to consider the AU-ICC tension from two angles, namely selectivity in investigations and prosecutions and the rules relating to immunity under international law. I have selected these two broad themes because it has been largely through these themes that the ICC-AU tension, and consequently the hero-villain trend, has played itself out. But other equally relevant angles from which the tension could be studied are cooperation and complementarity. I begin, in the next section, by considering the first theme – selectivity in prosecutions, or whether the ICC is 'targeting' Africa. I consider, in particular, the arguments and counter-arguments made by both sides with the aim of showing that neither side comes to the table with clean hands.[7] I then consider the arguments concerning immunity. Various arguments are made by both sides of the divide. Yet, by and large, both sides ignore important aspects of international law and gloss over the details of the legal rules in order to arrive at the conclusion that justifies their image as white hat-wearing heroes and the other as 'black-cloaked' evil villains. I then offer some concluding remarks.

Since this article is, in some sense, about the objectivity of the players in the AU-ICC debate, a word or two about my own objectivity is warranted. I have, on account of my association with the South African position, been presented (mainly

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[5] See *Moritz Vormbaum,* African States, the African Union, and the International Criminal Court: A Continuing Story, German Yearbook of International Law 60 (2017), xx.

[6] Protocol on the Amendments to the Protocol on the Statute of the Africa Court of Justice and Human Rights, 27 June 2014, available at: https://au.int/sites/default/files/treaties/7804-treaty-0004_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf (accessed on 7 December 2017).

[7] See for a description *Tim Murithi,* Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court, in: Werle/Fernandez/Vormbaum (eds.) (note 4), 181.

in private) of adopting positions to protect South Africa. Yet my position has been fairly consistent, even before South Africa was catapulted into the limelight by the *Al Bashir* saga. In 2009 I wrote an article admonishing the AU's 'neo-colonialism' rhetoric.[8] I make this point to dispel any notion that my views are predetermined by my relationship with the South African government or the AU. My only loyalty, in these discussions, is to the law.

## II. The ICC Targets Africa

### A. General

Perhaps the best starting point for the vexed question of whether the ICC is targeting Africa is a look at the gross numbers: At the time of writing, the ICC is seized with ten situations.[9] Of these situations, nine are on the African continent. Indeed, until recently, nine out of nine situations under investigation by the ICC concerned African situations.[10] According to the ICC website, the Court is currently seized with 25 cases, all of which are against Africans.[11] The proportion of African cases in the ICC is even larger if one includes cases that have been discontinued such as that against *Muammar Gaddafi* and *El Senussi* of Libya, and if one considers that some of these cases have multiple accused, so that the number of persons that have been indicted by the ICC stands at 41, all of whom are African. The proportion of situations, cases, and indictments from Africa is quite frankly staggering. These numbers, and the high proportion of Africans reflected in them, are not in dispute. What is in dispute is what these numbers mean. Do these numbers indicate that the Court cares for Africa? Are they rather an indication that the Court is targeting Africans, while permitting impunity elsewhere in the world? Arguments back and forth have been made about the meaning of the empirically incontrovertible high proportion of African situations, cases, and indictees in the ICC.

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[8] *Dire Tladi,* The African Union and the International Criminal Court: The Battle for the Soul of International Law, South African Yearbook of International Law 34 (2009), 57.

[9] These are Uganda, the Democratic Republic of the Congo, Darfur (Sudan), Central African Republic, Kenya, Libya, Côte d'Ivoire, Mali, Central African Republic (II), and Georgia. Information available at: https://www.icc-cpi.int/pages/situation.aspx (accessed on 24 August 2017).

[10] The ICC opened investigations in the situation in Georgia in January 2016.

[11] See information available at: https://www.icc-cpi.int/Pages/cases.aspx (accessed on 24 August 2017). While the situation in Georgia has been under ICC investigation since January 2016, to date there has not been a single case opened.

The legal dictum *res ipsa loquitor* – the facts speak for themselves – would seem to suggest that, unless arguments are advanced to show that there is not a targeting of Africans, then we ought to accept that there is a targeting of Africans. It is useful, therefore, to proceed by identifying the common arguments that have been advanced by the ICC (and its interlocutors) for the lopsided proportion of cases on the African continent. While there are several arguments that have been advanced,[12] the main arguments are, first, that most of the situations that the ICC is seized with have been self-referred and, second, that the ICC is constrained by its jurisdictional mandate.

There is an argument that is rarely (if ever) made in writing but that does emerge from time to time. It is sometimes suggested that it is factually incorrect to state that the ICC is only seized with the situations on the African continent because it is also seized with the situation in Afghanistan, Colombia, Iraq, and others.[13] The argument, however, obfuscates a very real distinction between situations under investigations and situations under preliminary analysis. The latter are not active investigations. These are merely situations that the Court is keeping an eye on and considering whether to investigate. There are no legal consequences flowing from, and certainly no actual cases concerning these situations. Some of these situations have been under preliminary analysis for around ten years without any actual investigations.[14] It is thus disingenuous to suggest that these preliminary analysis can be equated with the Court being seized with a situation.

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[12] Other, more political, arguments include the contention that if we focus more on the victims, then the lopsidedness is indicative of a concern for Africa. See, *e.g., Kenneth Roth,* Africa Attacks the International Criminal Court, Human Rights Watch, available at: https://www.hrw.org/news/2014/01/14/africa-attacks-international-criminal-court (accessed on 24 August 2017), where the following question is posed: "What are we to make of the fact that in its eleven-year history, the International Criminal Court (ICC) has prosecuted only Africans? Should the court be condemned for discrimination – for taking advantage of Africa's weak global position – as some African leaders contend? Or should it be applauded for giving long-overdue attention to atrocities in Africa –a sign that finally someone is concerned about the countless ignored African victims, as many African activists contend?" This argument concerning a focus on victims does not take us very far. Assuming that crimes within the jurisdiction of the Court are being perpetrated elsewhere and the Court *chooses* to focus on African victims at the expense of other victims, this would give off a smell of patronisation that I do not think the ICC would want to be associated with – it would suggest that others can take care of themselves but Africa cannot.

[13] During a Wayamo Foundation-sponsored South African-German Dialogue held in Pretoria from 27 to 28 March 2017, one participant, who cannot be named as the dialogue took place under the Chatham House Rule, made this assertion.

[14] According to the ICC website, for example, the situation in Afghanistan "was made public in 2007" suggesting that it was being considered even before that, *cf.* https://www.icc-cpi.int/afghanistan (accessed on 24 August 2017).

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### B. Africans Have Referred the Situations Themselves

The first of the main arguments in response to the claim that the ICC is targeting Africans is that African States have, by and large, referred themselves to the ICC.[15] This contention, also made in the article by *Vormbaum,* is empirically true. Uganda, Mali, Central African Republic, and Democratic Republic of Congo were all 'self-referred' situations.[16] The situation in Côte d'Ivoire, which is reflected on the ICC website as one which was initiated by the Prosecutor of her own volition (*proprio motu*), might also be counted as a 'self-referral' because the investigations were begun on account of a declaration by Côte d'Ivoire recognising the Court's jurisdiction though it was not, at the time, a State party. Yet, it is well known that these 'self-referrals' were, in reality, generated by the Office of the Prosecutor.[17] Indeed the Office of the Prosecutor has itself conceded that the Prosecutor encouraged States to refer situations in their own country.[18] While the fact that these self-referrals were pursued by the Office of the Prosecutor does not, in itself, minimise the legal value of the self-referrals and does not suggest any bias, it certainly casts doubt on the image of African States eager for justice running to the ICC to provide that justice. It is also interesting that in *all* – not some, not many, but all – these self-referred situations, the accused persons that find themselves in the dock are all rebels in conflicts against the government that made the self-referral. This has raised the suspicion whether these self-referrals were based on some kind of *quid pro quo* – the self-referral serves to malign the enemies of the government while raising the legitimacy of the ICC.[19]

In many ways, the arguments concerning 'self-referrals' are neither here nor there. On the one hand, whether the self-referrals are a result of pressure, encouragement, or requests from the ICC, their legal value as State referrals cannot be diminished. On the other hand, even if these 'self-referrals' were genuine, it does not change the fact that the Court's work is disproportionately focused on African States. Discounting self-referred situations (including Côte d'Ivoire), the ICC has, in total, indicted 21 individuals, all of whom are African. The

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[15] See *Monageng* (note 4), 17.

[16] Although the phrase 'self-referral' is *en vogue,* the Statute itself does not use that phrase. The Rome Statute of the International Criminal Court, 17 July 1998, UNTS 2187, 3 (Rome Statute), only contemplates State referrals, which would include situations in the territory of one State party referred by another State party.

[17] See, *e.g., Sarah Nouwen,* Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan (2013), 13; *Andreas Müller/Ignaz Stegmiller,* Self-Referrals on Trial: From Panacea to Patient, JICJ 8 (2010), 1267. See also *Bluen* (note 3).

[18] *Müller/Stegmiller* (note 17), 1267.

[19] *Nouwen* (note 17), 116.

disproportion thus remains extremely high. The real argument in response to the disproportionate number of prosecutions of African persons must, therefore, be the jurisdictional constraints on the ICC.

### C. Jurisdictional Constraints Prevent the ICC from Looking Elsewhere

Judge *Sanji Monageng's* comments, in response to claims that the ICC is targeting Africans, succinctly captures the jurisdictional constraints arguments: "[…] the Rome Statute does not give the Court universal jurisdiction. The Court may only exercise jurisdiction over crimes committed on the territory of a State Party, or by a national of a State Party."

This argument, which is often repeated, suggests that the Court is constrained from opening investigations in other places outside of Africa where Rome Statute of the International Criminal Court (Rome Statute) crimes may have been committed because the Court does not have jurisdiction in those situations. It is certainly true that in some cases where the ICC is criticised for not acting it simply cannot act because it does not have jurisdiction. The calls for the ICC to indict *George W. Bush* and *Tony Blair*[20] and open investigations into Syria,[21] for example, ignore (or are ignorant of) the fact that the ICC would not have jurisdiction in those instances. There is thus certainly some truth to the argument that the ICC is unable to act in some cases outside of Africa.

While there are situations outside of Africa in which Rome Statute crimes are being committed but which fall beyond the reach of the ICC, the jurisdictional constraints argument is insufficient to explain the Court's lack of action outside of Africa. There are key situations that the ICC has *chosen* not to open investigations in, notwithstanding that it has jurisdiction. The situation in Afghanistan provides the first example of a situation in which serious crimes are known to have been

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[20] *Thomas Siepelmeyer,* Can the ICC Prosecute Tony Blair and Others Who Can Still Evade Prosecution Today, Alternative Information & Development Centre, 23 November 2016, available at: http://aidc.org.za/can-icc-prosecute-tony-blair-others-can-still-evade-prosecution-today/ (accessed on 25 August 2017).

[21] On possible ICC action in Syria see *Mark Kersten,* Calls to Prosecute War Crimes in Syria Are Growing: Is International Justice Possible?, Justice in Conflict, 17 October 2016, available at: https://justiceinconflict.org/2016/10/17/calls-to-prosecute-war-crimes-in-syria-are-growing-is-international-justice-possible/ (accessed on 25 August 2017). See also *Dire Tladi,* ICC and UNSC: Point Scoring and the Cemetery of Good Ideas, ISS Today, 10 October 2014, available at: https://issafrica.org/iss-today/icc-and-unsc-point-scoring-and-the-cemetery-of-good-intentions (accessed on 13 November 2017).

committed[22] and in which the ICC has yet to act though it has jurisdiction. Some of the war crimes committed in Afghanistan include possible attacks on civilian installations, such as hospitals.[23] The ICC has jurisdiction over the situation in Afghanistan because Afghanistan is a party to the Rome Statute. Indeed, the ICC has had the situation under preliminary analysis since at least 2007. Given the clear jurisdictional competence and the undeniable commission of war crimes, it is unclear why, in more than ten years, the ICC has not opened investigations, let alone cases, in the situation in Afghanistan. In 2016, concluding its report on the situation in Afghanistan, the Office of the Prosecutor declared that it "will make a final decision on whether to request a Pre-Trial Chamber authorisation to commence an investigation into the situation" in Afghanistan.[24] The Office of the Prosecutor, however, has yet to decide on investigations and has, in fact, announced that it would be delaying any decision on an investigation.[25]

Another situation in which the ICC could have, but has not, acted is the situation in Iraq. Iraq, of course is not a State party to the Rome Statute. However, the ICC can exercise jurisdiction over crimes committed by nationals of States parties for crimes committed on the territories of non-States parties.[26] It is well documented that United Kingdom (UK) soldiers – the UK is a State Party – have committed war crimes in Iraq.[27] The *Chilcot* Report, for example, noted that

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[22] *Anon.,* US Army and CIA may be Guilty of War Crimes in Afghanistan, says ICC, The Guardian, 15 November 2016, available at: https://www.theguardian.com/law/2016/nov/15/us-army-and-cia-may-be-guilty-of-war-crimes-afghanistan-says-icc (accessed on 26 August 2017).

[23] See, *e.g., Spencer Ackerman/Sune Engel Rasmussen,* Kunduz Hospital Attack: MSF's Questions Remain as US Seeks no Charges, The Guardian, 29 April 2016, available at: https://www.theguardian.com/us-news/2016/apr/29/kunduz-hospital-attack-msf-us-military-charges (accessed on 27 August 2017). See also, covering earlier cases of possible war crimes, Human Rights Watch, "Troops in Contact": Airstrikes and Civilian Deaths in Afghanistan, US and NATO Bombing and Civilian Deaths, September 2008, 12, available at: https://www.hrw.org/sites/default/files/reports/afghanistan0908web_0.pdf (accessed on 13 November 2017). It has been reported that between 2007 and 2011 "10.000 civilians have been killed in the conflict in Afghanistan", Office of the Prosecutor, 2013 Report on Preliminary Examination Activities, para. 24.

[24] Office of the Prosecutor, 2016 Report on Preliminary Examination Activities, para. 230.

[25] *Stephanie van den Berg,* ICC: New Information Delays Decision on Afghan War Crimes Investigation, Reuters, 5 July 2017, available at: https://uk.reuters.com/article/uk-warcrimes-afghanistan-icct/icc-new-information-delays-decision-on-afghan-war-crimes-investigation-idUKKBN19Q1ZW (accessed on 27 August 2017).

[26] Art. 12 (2)(b) Rome Statute.

[27] *Kevin Rawlinson,* Nearly 300 British Veterans Face Investigations over Alleged Iraq War Crimes, The Guardian, 9 January 2016, available at: https://www.theguardian.com/uk-news/2016/jan/09/nearly-300-british-veterans-face-investigation-over-alleged-iraq-war-crimes (accessed on 27 August 2017); *Tom Batchelor,* British Troops Must Face Investigations for War Crimes in Iraq, Insists Corbyn, Express, 25 September 2016, available at: http://www.express.co.uk/news/uk/714165/Jeremy-Corbyn-British-Troops-Must-Face-Investigation-Over-Alleged-Abuses-Iraq (accessed on 27 August 2017). See also *Clive Baldwin,* Time

accounts of the death toll in Iraq since the invasion of the Coalition forces are unclear, but what "is not in doubt is that, in both the military operation to overthrow the Iraqi regime and the subsequent violence, many tens of thousands of Iraqi citizens, most of them civilians, lost their lives".[28] It is also clear that the United Kingdom does not, at least for the moment, have any intention of investigating and prosecuting these alleged cases of war crimes itself.[29] It is also worth pointing out that, as with the situation in Afghanistan, the situation in Iraq has been under preliminary analysis by the Office of the Prosecutor for more than ten years.[30]

The situation in Palestine is another situation over which the ICC would have jurisdiction to act and which has been under preliminary analysis for nearly a decade. In 2012, the previous Prosecutor concluded, after a preliminary analysis spanning a period of three years, that the ICC could not exercise jurisdiction over the situation, notwithstanding Palestine's deposit of a unilateral declaration under Article 12 (3) Rome Statute, on the ground that Palestine was not a State.[31] On obtaining the collective recognition of its statehood by the United Nations General Assembly through the observer State status,[32] Palestine made another unilateral declaration and then acceded to the Rome Statute becoming a party. The ICC thus has jurisdiction. Again, the Court, after many years of preliminary analysis, has not

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to Properly Investigate UK War Crimes in Iraq: The British Military Justice System Has Shown Itself Unfit for Purpose in Handling War Crimes Committed Outside the Country, The Independent, 16 January 2014, available at: https://www.hrw.org/news/2014/01/16/time-properly-investigate-uk-war-crimes-iraq (accessed on 27 August 2017).

[28] Sir John Chilcot (ed.), The Report of the Iraq Inquiry: Report of a Committee of Privy Counsellors (2016), 170.

[29] *Damien Gayle,* May Vows to Protect UK Troops Who Fought in Iraq from Legal Abuse, The Guardian, 23 September 2016, available at: https://www.theguardian.com/uk-news/2016/sep/23/theresa-may-british-troops-uk-protect-abuse-legal-system-soldiers-war-crimes-iraq (accessed on 27 August 2017); see also *Robert Mendick,* Outrage as War Crimes Prosecutors Say Tony Blair will not be Investigated Over Chilcot's Iraq War Report – But British Soldiers Could be, The Telegraph, 2 July 2016, available at: http://www.telegraph.co.uk/news/2016/07/02/outrage-as-war-crimes-prosecutors-say-tony-blair-will-not-be-inv/ (accessed on 27 August 2017).

[30] See *Luis Moreno-Ocampo,* former Prosecutor, unaddressed letter of 9 February 2006, available at: https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (accessed on 27 August 2017).

[31] *David Davenport,* International Criminal Court Prosecutor Resists Palestinian End-Run, Forbes, 23 April 2012, available at: https://www.forbes.com/sites/daviddavenport/2012/04/23/international-criminal-court-prosecutor-resists-palestinian-end-run/#27927808660c (accessed on 27 August 2017).

[32] See GA Res. 67/19 (Status of Palestine in the United Nations) of 4 December 2012.

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opened an investigation. Again, the existence of crimes against humanity, including the crime of apartheid, and war crimes seems beyond doubt.[33]

These situations illustrate that the jurisdictional constraints argument is simply not true. What they do not tell us, though, is why the Office of the Prosecutor has, after all this time, failed to make decisions on each of these situations. The annual reports of the Office of the Prosecutor on these issues do not offer much assistance either. With respect to the situation of UK war crimes in Iraq, for example, the 2016 report states simply that the Office of the Prosecutor "is currently in the process of concluding its comprehensive factual and legal assessment of information available" so as to "establish whether there is a reasonable basis to believe that alleged crimes committed by United Kingdom nationals" in Iraq between 2003 and 2009 "fall within the subject-matter jurisdiction of the Court."[34] This 'reason' is similarly reflected in the reports on the situations in Afghanistan and Palestine.[35]

### D. The Role of Power

This begs the question why, given the existence of so much material evidencing crimes in all three situations, it has taken so long for the Office of the Prosecutor to commence actual investigations. The length of time to consider whether there is reason to launch investigations stands in stark contrast to the speed and eagerness to open investigations and issue indictments (and arrest warrants) in situations involving Africans. In the situation in Libya, for example, the jurisdiction was conferred on the ICC by virtue of UN Security Council (UNSC) Resolution 1970 on 26 February 2011. Barely five days later (not years, months, or weeks, but days), on 3 March 2011, the Office of the Prosecutor had conducted and completed its preliminary analysis to determine that there is a reasonable basis to believe that crimes under the ICC's jurisdiction had been committed. Eleven, ten, and eight years respectively in Iraq, Afghanistan, and Palestine. Is it not reasonable

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[33] See *William Schabas,* International Criminal Law and the Middle East, in: Tiya Maluwa/Max du Plessis/Dire Tladi (eds.), The Pursuit of a Brave New World: Essays in Honour of John Dugard (2017), 472; see also Office of the Prosecutor, 2015 Report on Preliminary Analysis, paras. 62–71. See further Human Rights Watch, Palestine: ICC Should Open Formal Probe, 5 June 2016, available at: https://www.hrw.org/news/2016/06/05/palestine-icc-should-open-formal-probe (accessed on 17 August 2017).

[34] Office of the Prosecutor, 2016 Report (note 24), para. 107. See for a similarly non-informative conclusion para. 230 of the same report in relation to the situation in Afghanistan. See also para. 145 of the same report in respect of the situation in Palestine.

[35] *Ibid.,* para. 230 in relation to the situation in Afghanistan, and para. 145 in relation to the situation in Palestine.

to conclude – as I have – that the Prosecutor genuinely wants to open investigations in these situations but is uncomfortable because of the political ramifications? In each of these three situations, opening up investigations would imply the real possibility of prosecuting nationals, and officials in particular, of very powerful States and their allies – the United States in the situation in Afghanistan, the United Kingdom in the situation in Iraq, and Israel (the US's closest ally) in the situation in Palestine. Could this be the reason – I believe it is – that the Office of the Prosecutor hesitates in opening up investigations?

I pause here to mention that not only do I believe that there is a reluctance on the part of the Office of the Prosecutor to open investigations which may lead to the prosecutions of nationals of the more powerful States, I also fully understand (though not necessarily agree with) such reluctance. It should be understood that any decision to prosecute nationals of the United States, United Kingdom, and/or Israel without the blessings of the powerful States (the US and the UK), would spell catastrophe for future relations between the ICC and these States. In a fictional account of the ICC by the current author, 'Blood in the Sand of the Justice', the fictional Registrar observed that the contribution of a State like the US to the operations of the ICC, including in the form of intelligence, is far greater than the contribution of States parties.[36] But more than that, any decision to prosecute nationals of the US or the UK, without the blessings of these States, would be the death knell for UN Security Council referrals. In this sense, *Vormbaum's* conclusion in his article, that the 'targeting' is not racially motivated is probably correct. What *Vormbaum* does not admit to, however, is that the system protects the powerful, and therefore 'targets' those without power, including Africans.

The conclusion from above is that the reason for the disproportionate number of African cases is not, as argued by the ICC and its interlocutors, jurisdictional constraints but, at least in part, a reluctance to prosecute nationals of powerful States. But does this mean that the ICC is the villain and the AU the hero; that the ICC is the demon and the AU the angel? The answer to that question must be no. First, it would not be true to suggest that the only reason for the 'focus' on Africa is the geopolitical considerations. There are, without question, more conflicts, more violations, and more victims on the African continent than anywhere else in the world, suggesting that the ICC should be seized with more situations on the African continent than anywhere else.[37] Second, the label of hero or angel would

[36] *Dire Tladi,* Blood in the Sand of Justice (2014), 326–327.

[37] *Shamila Batohi,* Africa and the International Criminal Court: A Prosecutor's Perspective, in: Werle/Fernandez/Vormbaum (eds.) (note 4), 50. While the conflict in Syria might affect the

not, in these circumstances, suit the AU well. After all, the AU's complaints of 'targeting' only began in 2009. Yet before 2009 – before the indictment and arrest warrant against *Al Bashir* – the AU never complained that the ICC only focused on Africans. It is only when the ICC began indicting heads of State – *Al Bashir, Kenyatta,* and *Gaddafi* – that the geopolitical concerns about the targeting of Africans emerge.[38] Thus the AU raises concern about the ICC 'targeting' Africans when indictments "touch [the] African political leaders in power or their allies, but not when such indictments are against their political opponents (or rebels)".[39]

Thus neither the AU nor the ICC can claim the label of angels, nor can either characterise the other as the demon when it comes to the question of 'targeting' of Africans. Both appear to act in the furtherance of power politics. For the ICC it is geopolitical power, while for the AU it is domestic power in each individual State that is the driving force of the respective positions.

## III. Immunity Debate

### A. General

The immunity debate is perhaps the most visible debate in the AU-ICC tension at the moment. The intention in this section is not to reproduce the whole debate. Instead, the objective in this section is limited to an illustration of how the immunity debate itself reflects the flaws of the hero-villain trend.[40] One of the most important tools that is used by actors to promote the hero-villain trend is to underplay, and often simply ignore, nuances. In the 'targeting' debate for example, the AU and its interlocutors ignore that the AU's concerns are aimed principally at protecting African leaders from the reach of the ICC while other Africans appear to be fair game. On the other hand, the ICC's defence that it is jurisdictionally

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continued validity of this statement, there the jurisdictional constrain argument advanced by the ICC is valid.

[38] *Sosteness Francis Materu,* A Strained Relationship: Reflections on the African Union's Stand Towards the International Criminal Court from the Kenyan Experience, in: Werle/Fernandez/Vormbaum (eds.) (note 4), 212, noting that prior to the indictments of heads of State, "the ICC had already started exercising jurisdiction over cases from other referrals […] By and large, it is the indictment of African politicians who are still in power which has influenced the African Union to adopt" a hostile posture towards the ICC.

[39] *Ibid.,* 213.

[40] For a comprehensive view of the author's view on the immunity question see the following: *Dire Tladi,* The ICC Decisions on Chad and Malawi: On Cooperation, Immunities and Article 98, JICJ 11 (2013), 199; *id.,* Immunity in the Era of 'Criminalisation': The African Union, the ICC and International Law, Japanese Yearbook of International Law 58 (2015), 17.

constrained and that Africans have themselves referred situations conceals the real facts, namely that the ICC has avoided initiating investigations in situations involving powerful States. In the context of immunities, both sides tend to simplify the legal rules to sweep the nuances under the proverbial carpet.

Time and space do not permit a detailed analysis of the various arguments. The purpose of this section is thus to mainly to consider the external motivations for the positions adopted. It is, however, necessary to recall that the debate concerning immunities is centred on two provisions of the Rome Statute. Article 27 provides that immunities do not apply before the ICC.[41] Article 98 of the same Statute provides an exception from the duty of States parties to cooperate with the ICC in cases where an accused person (from a non-State party) has immunities under international law.[42]

I will begin by setting out the basic positions of both sides before describing the flaws of the respective positions. For the most part, both sides have focused their battle of narratives on specific situations, for example that of *Al Bashir,* without, it seems, considering the wider ramification of the positions they adopt. The analysis below will thus begin by a description of the respective positions before isolating the particular flaws in order to reveal the limits of the hero-villain trend. In particular, the analysis below illustrates that both sides shift their position with ease in order to achieve particular objectives, so that their respective positions can hardly be described as principled.

### B. The AU's Position Concerning Immunities of Heads of State

It is useful to begin with the position of the AU and its interlocutors on the question of immunities and *Al Bashir*. The position of the African Union concerning the immunities of *Al Bashir* is based on the rules of interpretation of treaties and, in particular, on the interpretation of the Rome Statute. In 2009 the AU adopted the now famous decision in which it purported to prevent States from

[41] Art. 27 (2) Rome Statute: "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

[42] Art. 98 (1) Rome Statute: "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity".

cooperating with the Court in the arrest and surrender of *Al Bashir*.[43] The non-cooperation decision, which has since been repeated many times,[44] sometimes with minor adjustments,[45] provided, in part, that "in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate […] for [*sic*] the arrest and surrender of President Omar El Bashir". As a matter of law, the decision is based on Article 98 Rome Statute.[46] Yet Article 98 speaks only of "State or diplomatic immunity", which are, in my view, specific types of immunity covering the State as such and diplomats.[47] In fairness to the AU, however, the narrow reading of Article 98 which would exclude heads of State from the scope of the exception in Article 98 has not received much traction even from the ICC and its interlocutors.[48] It is thus perhaps understandable that the AU does not address the potentially restricted meaning of Article 98.

The AU's position on non-cooperation is purportedly based on the principles of international law as accepted in the Rome Statute, in particular Article 98. Thus, the AU does not, in its numerous decisions on non-cooperation, appear to be rejecting or contesting the rules of the Rome Statute. Rather, it seems to be saying that the ICC is not being faithful to its own instrument by ignoring the implications of Article 98. Its position appears to be based on an acceptance of the application of Article 27 which provides for no immunity of an accused before the ICC with the caveat that Article 27 "applies only in the relationship between the Court and the suspect".[49] In the AU's view – a view I share – the relationship

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[43] See AU Assembly, Decision on the Meeting of African States to the Rome Statute of the International Criminal Court (ICC), AU Doc. Assembly/AU/Dec.245 (XIII), 3 July 2009, para. 10.

[44] See, for example, *id.,* Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(VIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), AU Doc. Assembly/AU/Dec.296(XV), 27 July 2010, para 5; *id.,* Decision on the Implementation of the Decisions on the International Criminal Court (ICC), AU Doc. Assembly/AU/Dec.334 (XVI), 31 January 2011, para. 5; *id.,* Decision on the International Criminal Court, AU Doc. Assembly/AU/Dec.616(XXVII), 18 July 2016, para. 2 (iv).

[45] Perhaps the most significant adjustment was the insertion of a new paragraph in 2010 requesting AU Member States to balance their obligations under the Rome Statute with their obligations to the AU. See *id.,* Decision on the Progress Report (note 44), para. 6.

[46] AU Assembly (note 43), para. 10 provides that AU Members "shall not cooperate pursuant to the provisions of Article 98".

[47] This narrow reading of Art. 98 Rome Statute is presented more comprehensively in *Tladi,* ICC Decisions on Chad and Malawi (note 40), 213–218.

[48] For opposing views see, *e.g., Claus Kreß,* The International Criminal Court and Immunities under International Law for States Not Party to the Court's State, in: Morten Bergsmo/Ling Yan (eds.), State Sovereignty and International Criminal Law (2012), 236.

[49] See AU, Press Release No. 002/2012 on the Decision of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Non-Cooperation

between the Court and States (and one might add States *inter se*) is governed by Article 98. Yet, the AU's apparently principled position based on an interpretation of the Rome Statute begins to shift in response to newly emerging challenges.

The AU's position with respect to *Bashir* could not be applied to the crisis concerning the indictment of *Kenyatta,* the head of State of Kenya. Kenya, as a State party to the Rome Statute, was cooperating with the ICC, and *Kenyatta,* as its head of State, could not claim immunity before the ICC. The issue of the tension between Articles 27 and 98 simply did not arise in the *Kenyatta* case. *Kenyatta,* supported by the AU, however, did not want to appear before the ICC and wanted charges against him dropped. Suddenly, in the face of this new reality, the AU's position shifts and is no longer based on an apparent acceptance of the validity of Article 27. The position of the AU, in response to the trials of *Kenyatta* and his deputy, *Ruto,* now appears to be based on an assertion of immunity before the ICC. In its decision at the Extraordinary Summit of 2013, the AU reaffirmed "the principles deriving from […] international customary law by which sitting Heads of State and other senior officials are granted immunity during their tenure of office."[50] On this basis the AU decides that "no charges shall be commenced or continued before any International Court or Tribunal against any AU Head of State or anybody entitled to act in that capacity during their term of office."[51] In particular, the decision states that the trials of *Kenyatta* and *Ruto* "should be suspended until they complete their terms of office."[52]

In addition to calling for the end of the *Ruto* and *Kenyatta* trials, the AU adopted other decisions to delegitimise Article 27 Rome Statute and thus assert the existence of immunity of (African) heads of State from the jurisdiction of international courts. First, the AU has called for the amendment of the Rome Statute to recognise immunity of heads of State before the ICC.[53] Pursuant to this decision, Kenya submitted an amendment proposal, which would retain Article 27 in its current form but would add a paragraph providing that notwithstanding Article 27, "no criminal proceedings shall be instituted or continued against a

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Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al-Bashir of the Republic of Sudan, 9 January 2012, 2.

[50] AU Assembly, Decision on the Relationship with the International Criminal Court (ICC), AU Doc. Ext/Assembly/AU/Dec.1 (12 October 2013), para. 9.

[51] *Ibid.,* para. 10 (i).

[52] *Ibid.,* para. 10 (ii).

[53] *Id.,* Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court (ICC), AU Doc. Assembly/AU/Dec.493(XXII), para. 9.

sitting Head of State or Government during his or her term of office."[54] Second, the AU adopted a Protocol amending a previous Protocol (not yet in force), which would expand the jurisdiction of the African Court to cover also international crimes.[55] This amendment explicitly states that the AU Court would respect the immunities of heads of State in the context of criminal proceedings before it.[56]

The position of the AU, subsequent to the *Kenyatta* and *Ruto* trials, represent an astonishing shift in position from the time when the concern of the AU was the prosecution of *Al Bashir*. Before the *Kenyatta* and *Ruto* trials, the AU seemed to accept that the principle of immunity does not apply to trials before the ICC, although asserting (correctly in my view) that States could not be expected to cooperate with international courts in conflict with their customary international obligations (Article 98 Rome Statute). The new position, which emerges in light of the *Kenyatta* prosecutions, seems to be that heads of State cannot be prosecuted at all, even by international courts. While I do not agree with the merits of this proposition, for the purposes of the current point it is sufficient to only point out that the AU has abandoned its more principled position and has adopted a position based purely on the need to protect particular individuals. Thus the AU's position appears less intended to protect the sanctity of the law, as it seems to suggest, and more to protect particular individuals, in particular serving heads of State. In this connection, it seems that when the problem concerns a head of a non-State party, the AU derives its position from Article 98 Rome Statute. But when a case concerns a head of a State party, where Article 98 is not at issue, the AU seemed too easily ready to abandon its principled position in favour of a position to protect the head of State 'of the moment'. This oscillation of positions suggests that the AU's challenge is not based on principle and that the legal arguments advanced by it are meant only as a smokescreen for more political objectives. The AU's approach to international law on immunities, shifting positions based on the circumstances of the particular leaders indicted by the ICC illustrates that, on the question of immunities, the AU cannot be regarded as angels and cannot claim the title of hero.[57]

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[54] See ICC Working Group on Amendments, Informal Compilation of Proposals to Amend the Rome Statute (on file with the author).

[55] Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (note 6).

[56] Art. 46A*bis* Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

[57] Although, due to my legal position on immunities, I am often associated with 'protecting the AU', I have long held that the view that, whatever the merits of the AU's legal arguments, the motives of the AU are less than pure. See *Tladi* (note 8), 69: "by suggesting, even if implicitly, that the ICC is a western tool against Africa, the AU decision [implies] that the claim to universality [of

C. The ICC's Approach(es) to the Question of Immunity

The claim of the ICC (and its interlocutors), that its position on immunities is based on law and principle is equally flawed. An objective, dispassionate assessment of the facts will suggest that the only constant in the ICC's position has been that *Al Bashir* must be arrested and surrendered. The legal reasons have changed like shifting sands, but the conclusion that he must be arrested has remained constant. During South Africa's hearing on non-cooperation, I, as counsel for South Africa made the following statement:

> This case will have profound and far-reaching consequences far beyond Mr Al Bashir. It is not just about Mr Al Bashir. It is not just about the immunities of Mr Al Bashir. It is about the immunities of many other heads of State. But more than that, it is about the very integrity of our system, the very integrity of the Rome Statute. The whole world is watching. If legitimate legal arguments are ignored in order to come to a particular conclusion, this we believe will damage the integrity of the Court.[58]

The message in this quote seems clear: 'We know you will find against South Africa even though the law supports South Africa's claim.' It illustrates the scepticism of the South African legal team (and perhaps the scepticism of the political authorities) towards the ability of the Court to be objective in the matter. It is useful to contextualise the basis of the scepticism by surveying the evolution of the Court's position on immunities through the years.

The first time the Court's views on the relationship between Article 27 and Article 98 was expressed was in the *Malawi* and *Chad* decisions on non-cooperation.[59] In two identical decisions, Pre-Trial Chamber I of the Court held that, notwithstanding Article 98, there remains a duty on States parties to arrest *Al Bashir*. The Court came to this conclusion principally on the basis that immunity

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certain values was], in fact imperial wool being pulled over our collective African eyes […]", when in fact it is the AU's argument of imperialism "that attempt[s] to blind us from the truth".

[58] ICC, Transcript, Hearing under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, 7 April 2017, available at: https://www.icc-cpi.int/Transcripts/CR2017_02211.PDF (accessed on 30 August 2017), 15, paras. 2–9.

[59] *Id.,* Pre-Trial Chamber I, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir,* ICC-02/05-01/09-139, Decision Pursuant to Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al-Bashir of 12 December 2011 (*Malawi* decision); *id., The Prosecutor v. Omar Hassan Ahmad Al-Bashir,* ICC-02/05-01/09-140-tENG, Decision Pursuant to Article 87(7) on the Failure of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al-Bashir of 13 December 2011 (*Chad* decision).

before international courts is no longer recognised.[60] It is unnecessary to give a full critique of the decision because, after severe criticism from nearly all quarters,[61] the Court appears to have abandoned its reasoning in *Malawi* and *Chad* but certainly not the finding. It is sufficient merely to point out that the fundamental flaw in Pre-Trial Chamber I's reasoning is that it conflates Article 27 and 98 and essentially 'reads out of existence' Article 98 Rome Statute.

In the face of criticism, when the Court was next faced with the question of whether there was a duty on States parties to arrest and surrender *Al Bashir,* Pre-Trial Chamber II of the Court decided to adopt a different approach.[62] The Court took the approach that, as a rule, Article 27 did not apply to officials of non-States parties and therefore that, ordinarily, *Al Bashir* would have immunity *from the jurisdiction* of the Court.[63] The Court decided, however, that Paragraph 2 UN Security Council Resolution 1593 referring the situation in Darfur to the ICC, which obliged the government of Sudan to cooperate with the ICC, implicitly waived the immunity of *Al Bashir.*[64] The Court's conclusion is based on an apparent interpretation of Resolution 1593, yet it does not apply a single rule of interpretation to come to this conclusion.[65] But more importantly for the purposes of the present article, the decision appears to be motivated by the predetermined goal to find that there was a duty on the Democratic Republic of the Congo to arrest and surrender *Al Bashir.* Realising that it could not rely on the universally criticised decisions in *Malawi* and *Chad,* the Court sought an alternative approach which would maintain the idea that there was a duty to arrest and surrender *Al Bashir* notwithstanding customary international law on immunities and Article 98

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[60] See *id., Malawi* decision (note 59), para. 18. For a full analysis see *Tladi,* ICC Decisions on Chad and Malawi (note 40).

[61] See, *e.g., William Schabas,* Introductory Remarks: Annual Ben Ferencz Session, American Society of International Law Proceedings 106 (2012), 305; *Alexander K. A. Greenwalt,* Introductory Note to the International Criminal Court: Decisions Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi and the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir and African Union Response, International Legal Materials 51 (2012), 393; *Dapo Akande,* The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case, EJILTalk, 8 February 2012, available at: https://www.ejiltalk.org/the-african-unions-response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case/ (accessed on 30 November 2017); *Asad G. Kiyani,* Al Bashir and the ICC: The Problem of Head of State Immunity, Chinese Journal of International Law 12 (2013), 467.

[62] ICC, Pre-Trial Chamber II, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir,* ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court of 9 April 2014.

[63] *Ibid.,* para. 26.

[64] *Ibid.,* para. 29.

[65] *Ibid.* For a detailed critique of the decision see *Tladi,* Immunity in the Era of 'Criminalisation' (note 40), 33 *et seq.*

Rome Statute. This alternative approach was the implicit waiver of *Bashir's* immunities by Paragraph 2 UNSC Resolution 1593.

The attendance of the AU Summit in Johannesburg in June 2015 by *Al Bashir,* and the subsequent appearance of South Africa before Trial Chamber II, presented an opportunity for the Court to clarify (or confirm) the legal basis of the duty to arrest and surrender *Al Bashir*. South Africa's approach during the hearing was to illustrate to the Court why both the reasoning in *Malawi* and *Chad* and in *DRC* were flawed. With respect to the *DRC* decision, South Africa sought to show that a proper interpretation of Paragraph 2 UNSC Resolution 1593, relying on the customary international rules of interpretation, did not support the implicit waiver on the basis of which the Pre-Trial Chamber concluded that there was a duty to arrest and surrender *Al Bashir*. In its oral arguments before the Court, South Africa implied that the Court's approach in the *DRC* decision was simply to "extract implicit obligations without the application of any rules [of interpretation] whatsoever", noting that if one goes through the *DRC* decision, there is "no single rule of interpretation" that was referred to or applied.[66] It suggested that the Court's approach in the *DRC* decision was not one of interpretation – which it described as the search for the objectively correct interpretation – but rather was a "process for the justification of policy preferences."[67] Having made this point, South Africa proceeded to show that each and every single means of interpretation (ordinary meaning, context, object and purpose, and the rule that interpretation should seek a meaning consistent with existing law) led to the conclusion that Paragraph 2 UNSC Resolution 1593 retained *Al Bashir's* immunity from the jurisdiction of States parties.[68]

Faced with the systematic critique of the *DRC* decision, the Court in *South Africa* decided to adopt a new approach (again).[69] Suddenly the reliance on the duty on Sudan to cooperate in Paragraph 2 UNSC Resolution 1593, as establishing an implicit waiver of *Al Bashir's* immunity, disappeared from the Court's decision.[70] The Court now adopts the position previously proposed by *Akande,*[71] namely that the effect of a UNSC resolution – independent of its content – is to place Sudan in

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[66] ICC, Transcript (note 58), 27, paras.1–5.

[67] *Ibid.,* 27, paras. 5–9.

[68] *Ibid.,* 27–36.

[69] *Id.,* Decision on Non-Compliance by South Africa (note 1).

[70] *Ibid.,* paras. 84–97.

[71] See generally *Dapo Akande,* The Legal Nature of the Security Council Referrals to the ICC and its Impact on Bashir's Immunity, JICJ 7 (2009), 333.

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the position of a State party.[72] This fiction is purportedly based on the fact that a referral by the UN Security Council has the effect that the whole treaty, including Article 27, applies. While this is undoubtedly true, what the conclusion ignores is that the whole treaty includes Article 98, and that Article 98 would apply to Sudan as a non-State party.

I have elsewhere provided a comprehensive critique of the *Akande* fiction,[73] it is unnecessary to repeat those arguments here. It is, however, worth noting that, although the Chamber was unanimous in its conclusion, that there was a duty on South Africa to arrest *Al Bashir,* the minority opinion of Judge *Marc Perrin de Brichambaut* disagreed with the reasoning of the Court in both the *DRC* decision and the *South Africa* decision. In an extensive opinion, Judge *Perrin de Brichambaut* provided extensive reasons why the Security Council resolution-based conclusions (both the implicit waiver argument in *DRC* and the non-State becoming like a State party fiction in *South Africa*) were unsatisfactory.[74] Judge *Perrin de Brichambaut,* noting the weakness in the Court's reasoning, himself decided to base his conclusion that there was a duty on South Africa to arrest *Al Bashir* on an altogether different legal basis, namely that both South Africa and Sudan were party to the Genocide Convention[75] and that, as a consequence, they had both waived immunities of their officials in their relations with another. This conclusion is quite simply astounding. To start off with, since South Africa had been invited to the hearing, one would have expected the Judge, if he were considering this line of reasoning, to at least pose the question of the applicability of Article IV Genocide Convention to South Africa during the hearing, in order to give it an opportunity to respond and to enable him to come to a conclusion that is well-reasoned and that takes into account the view of the respondent State. Instead, the respondent State is ambushed with a completely new argument when the decision is handed down (at least in the context of the proceedings) without any opportunity to rebut the argument. Second, it is well-known, as Judge *Marc Perrin de Brichambaut* concedes, that Article IV Genocide Convention has been understood as precluding the substantive defence of official capacity, and not

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[72] ICC, Decision on Non-Compliance by South Africa (note 1), para. 88 ("for the limited purpose of the situation in Darfur, Sudan has rights and obligations analogous to those of States Parties to the Statute").

[73] See *e.g. Tladi,* ICC Decisions on Chad and Malawi (note 40), 210–212. See also *Tladi,* Immunity in the Era of 'Criminalisation' (note 40), 33.

[74] ICC, Decision on Non-Compliance by South Africa (note 1), Minority Opinion of Judge *Marc Perrin de Brichambaut,* paras. 28–45.

[75] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UNTS 78, 277.

procedural immunities.[76] However, realising the weaknesses of the majority decision, as pointed out in his own opinion, he proceeds to construct his own interpretation with virtually no authority that leads to the same conclusion as the majority in *South Africa,* Pre-Trial Chamber II in *DRC,* and Pre-Trial Chamber I in *Malawi* and *Chad.*[77]

The ICC has essentially adopted an *à la carte* approach to the applicability of immunities in the Rome Statute system, in which any approach in a wide selection of options is acceptable, as long as the option leads to the conclusion that *Al Bashir* must be arrested and surrendered. When the *Malawi* and *Chad* decisions were criticised as being incoherent and unjustified, the Court turned to an interpretation of Paragraph 2 UNSC Resolution 1593. When South Africa showed that the Court's approach to Paragraph 2 falls foul of *every* rule of interpretation, it turned to the *Akande* fiction in which Sudan is deemed to be a State party to the Rome Statute – quite frankly an incredible fiction. Finally, Judge *Marc Perrin de Brichambaut,* recognising the flaws in the majority decision, turns to another ground, namely the waiver of immunity based on the Genocide Convention. 'Anything to make it stick'!

The *à la carte* approach, incidentally, appears to also be an unwitting game of Russian Roulette. In its eagerness to 'get *Bashir*', the ICC decisions in *DRC* and *South Africa* both unduly and without any justification restrict the ordinary meaning of Article 27 Rome Statute. Both decisions proceed from the premise that, but for the UN Security Council Resolution, the ICC would be precluded from prosecuting a head of State of a non-State party – a position similar to that of the African Union after the commencement of the *Kenyatta* trial. There is no basis for this conclusion whatsoever. On its terms, Article 27 applies to any accused that is before the Court without any qualification of nationality. I have previously criticised this position and will not repeat those views here.[78] It is sufficient only to say that this view, now accepted by the ICC, is based, erroneously, on the idea that there exists in customary international law immunity before international criminal courts which cannot be excluded by a treaty for non-States parties to that treaty.

It also bears mentioning that, under the interpretation of Article 27 now advanced by the Court, it is unclear why the Court would even proceed with the preliminary assessments in Afghanistan and Palestine, since the persons likely to be

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[76] ICC, Decision on Non-Compliance by South Africa (note 1), Minority Opinion of Judge *Marc Perrin de Brichambaut,* para. 22.

[77] *Ibid.,* para. 23–37.

[78] *Dire Tladi,* The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the Normative (Chaff), JICJ 13 (2015), 3, 12–16.

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investigated and prosecuted in those situations would, under the restrictive interpretation of Article 27 advanced by the Court in the *DRC* and *South Africa* decisions, enjoy immunity from the Court. The Court thus appears to have cut off its nose to spite its face – get *Bashir* at all costs, even if doing so unduly restricts the ICC's jurisdictional reach in other cases. But then again, perhaps this was strategic thinking on the part of the Court: adopt an interpretation of Article 27 that, by definition, precludes any investigation of US and Israeli officials.

## IV. Conclusion

The contestation for the soul of international law currently being waged between the ICC (and its interlocutors) and the African Union is very often waged through misinformation, half-truths, and shifting of positions when already declared positions are inconvenient. The aim and objective of these strategies is the achievement of hero status and to paint the other side with the black brush of evil. In this context, we have seen the African Union claiming that the ICC is targeting Africans but only doing so when ICC prosecutions are no longer aimed at the enemies of African leaders but at the African leaders themselves. We have seen also the ICC (and its interlocutors), in response to the targeting claims, raising, inaccurately, the jurisdictional constraints argument or the complexity argument, when in fact the reluctance to open up proper investigations can only be explained by a 'reluctance to upset the powerful'.

The analysis above has also illustrated how both sides have shifted their legal positions to align with convenient political positions. Thus, when the only concern for the AU was the indictment of heads of non-States parties like *Al-Bashir* (and perhaps *Gaddafi*), the AU argument was based on Article 98 which ostensibly protects only officials of non-States parties. Yet, when the ICC's net spread wider to entangle heads of States parties like *Kenyatta,* the AU's position suddenly shifted to an (unwarranted) attack on Article 27 itself through the seeking of amendments to the Statute, adoption of an instrument designed to undermine Article 27, and calling for the end of prosecutions of African heads of States. The ICC, for its part, has been so determined to find that *Al Bashir must* be arrested whatever the legal constraints, that it has shifted from one legal basis to another, hoping that one, *any one,* will stick. In the final decision (the *South Africa* decision), the weaknesses were exposed with a minority Judge criticising the Court's reasoning, while he himself came up with a new, no-more well-reasoned basis for the duty to arrest and surrender.

The basic thesis advanced in this article, namely that in the battle for the soul of international criminal law, the idea that there are heroes and villains, angels and demons, white hats and black cloaks, is false, could have been advanced from any analysis of any number of issues, including cooperation and/or complementarity. However, through the chosen areas, namely the debate over targeting of Africans and the immunity debate, I hope to have shown that no one wears the white hat, that there are no heroes, and that no one is an angel in this complicated battle of wits. I hope to have shown, in this article, that all that we have are two sides (the AU and supporters, on the one hand, and the ICC and its supporters on the other), with firmly (and perhaps honestly) held beliefs,[79] that are willing to risk it all, in pursuit of pre-determined objectives.

A superficial reading of this article will conclude that it represents a criticism of the ICC and the AU. But it does not. The AU and ICC are simply doing what they must: preserve their political futures. The criticism here is really aimed at the enablers – supporters or political masters who egg them on. As long as supporters of the ICC's claim to legal neutrality are willing to turn a blind eye to the ICC's baseless interpretation of international law in order to catch one man (who may, by the way, catch a bad cold and die tomorrow), and as long as supporters of the AU's objective of independence and non-colonialism continue to turn a blind eye to the AU's apparent insistence on protecting heads of State, the AU and the ICC will continue to play hero and villain games at the expense of the African continent.

## Post-Script

Subsequent to the writing of this article, the Office of the Prosecutor announced, on 20 November 2017, that it would be seeking the authorisation of the Pre-Trial Chamber for an investigation into Afghanistan.[80] This means that there will, more than likely, be another non-African situation before the ICC by the time this article appears. More significantly, it means one of those situations with

[79] In a private conversation, which I think the ICC Prosecutor will not mind me sharing, she said to me: "I take the position that I take regardless of the consequences, because I know that history will judge me kindly". The statement is instructive both because it shows that the Prosecutor has no evil intent, but also because it signifies an almost dangerous messianic belief in the cause. I suspect the AU motives are equally honestly held and potentially as dangerously messianic.

[80] ICC, Situation in Afghanistan, ICC-02/17-7, Public redacted version of "Request for authorisation of an investigation pursuant to article 15" of 20 November 2017, available *via:* https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-7-Red (accessed on 11 December 2017).

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a potential to affect the powerful will be on the agenda of the ICC. It is worth, even if briefly, pondering whether this affects, at all, the analysis above, in particular as it pertains to the reluctance of the ICC to 'tango' with the powerful States.

The short answer is that it does not affect, at all, my analysis or conclusions. First, the issues raised above concern not whether any investigation is opened but the length of time it has taken to open these investigations. As noted above, the length of time taken in preliminary analysis suggests to me that the ICC does want to open investigations in those situations but is reluctant to do so. Opening an investigation after a ten-years preliminary analysis when it has, for all those ten years, been obvious that crimes under the jurisdiction have been perpetrated, simply illustrates the reluctance. But there is a second more insidious reason why the Afghanistan investigations do not shake my belief that the ICC is 'afraid' to mess with the powerful. If investigations into Afghanistan are opened, who will face the justice of the ICC? Not a single US official because, under the *DRC* and *South Africa* decisions, Article 27 Rome Statute does not apply to officials of non-States parties, certainly not their heads of State. The decision to seek authorisation was taken with the full knowledge that the ICC's current jurisprudence would not permit it to tango with the powerful United States by indicting its heads of State.

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# ANNUAL BEN FERENCZ SESSION: AFRICA AND THE INTERNATIONAL CRIMINAL COURT

This panel was convened at 11:00 a.m., Friday, March 30, by its moderator, William Schabas of Middlesex University, London, who introduced the panelists: Kamari Maxine Clarke of Yale University; Siba Grovogui of Johns Hopkins University; Charles C. Jalloh of the University of Pittsburgh Law School; Olivia Swaak-Goldman of the Office of the Prosecutor, International Criminal Court; and Dire Tladi of the Permanent Mission of South Africa to the United Nations.[*]

## Introductory Remarks by William Schabas[†]

When the Rome Statute was being negotiated, many participants in the process viewed the future institution as a body that would be established and controlled in the Global North, but with the function of delivering justice to the Global South.

This was reflected in debates about the threshold of ratifications necessary for entry into force. It was argued that the proposed number of 60 reflected the hidden agenda of opponents to the institution who understood that such a target was unattainable. Only countries like Ireland, Sweden, and Canada were likely to sign up. It was argued that entry into force should be premised upon 20 states; otherwise, the Rome Statute would be stillborn.

In a similar vein, many pleaded for universal jurisdiction as a basis for the Court's operation. They insisted that the Court would never be able to function in the places where it was most needed because support would be confined to noble states in northern Europe. Only if the Court could act with respect to the territories of states that had not ratified the Statute could it ever be effective, these voices insisted. This was because states with a history of conflict and civil war could never be expected to sign up.

It soon became evident that these North-centered visions of international justice were dramatically misplaced. Nowhere was this erroneous vision so apparent than in Africa, where states embraced the Court with stunning enthusiasm. If the threshold for ratifications had been set at 20 instead of 60, the Statute would have entered into force based upon African ratifications alone. Moreover, not only did states with ongoing conflicts recognize the jurisdiction of the Court, they seemed to do so precisely because they viewed the Rome Statute as a helpful new addition to the existing mechanisms of justice, accountability, and peace.

Africa's unmatched enthusiasm for the Court was an unexpected and very salutary phenomenon. Africans seemed to be rallying to the institution not only because of the perceived inadequacies of existing bodies like the Security Council, but also because this was something they would control democratically, as equals.

That relationship has soured. The turning point was the Prosecutor's application for an arrest warrant against President Bashir of Sudan in July 2008. What seems to have been decisive was not a perception that the Court was targeting Africa. It had already been doing this for several years, and Africans seemed to welcome the attention. But in July 2008, the Prosecutor responded indifferently when African political institutions, and specifically the African Union, begged for the Bashir prosecution to be reconsidered.

[*] Siba Grovogui and Charles Jalloh did not contribute remarks to the *Proceedings.*

[†] Professor of International Law, Middlesex University; Professor of Human Rights Law and Chairman, Irish Centre for Human Rights, National University of Ireland, Galway.



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The Prosecutor invoked his judicial and non-political function in dismissing the views of African states. As he said repeatedly, his role was not conditioned by the political wisdom of targeting a particular individual. Like an international Inspecteur Clouseau, his job was to ''follow the clues.'' If political input was required, the Prosecutor explained that this was provided for in Article 16 of the Statute, which authorizes the United Nations Security Council to intervene and block proceedings.

This was not a good message to send to Africa. The Court that Africans had cherished in its early days precisely because it was refreshingly independent of domination by powerful states in the North turned out to have a close functional relationship with the Security Council after all, they were told. Or at least it did based upon the Prosecutor's reading of the Statute. Pretending to be detached from the Security Council, the Prosecutor was actually doing the opposite. He was saying that the political judgment about whether to proceed in a specific case was the monopoly of the Security Council.

Many people, including the Prosecutor, seem to have forgotten that Article 16 was reluctantly included in the Rome Statute as an ugly compromise in order to engage permanent members of the Security Council. It was not part of a comprehensive, shared vision of international justice. Most states would have preferred that Article 16 (and Article 13) be eliminated altogether. Late in the Preparatory Committee sessions, the United Kingdom agreed to support what became the final text of Article 16 in a successful attempt to staunch more radical approaches.

Not surprisingly, African unhappiness has focused on Article 16. The African Union has contrived an amendment by which the authority to block prosecution is also granted to the United Nations General Assembly. This has been attacked by those who claim it would ''further politicize'' the Court. What a strange response. It seems to acknowledge the politicization of the institution, but at the same time reserve the authority to the Security Council.

For a devoted friend both of the Court and of Africa, it is saddening to see the deterioration of what was such an exciting, positive, and constructive relationship only a few years ago. The problem, as I see it, is the Prosecutor's refusal to engage genuinely with the concerns of the African Union. Africa had not protested when the first situations before the Court were situated on the continent. Nor did it object when arrest warrants were issued against senior figures in the Sudanese regime. Its voice should have been taken seriously when it felt that targeting the President of Sudan was a step too far. More deference to African political judgment would have been desirable.

It would have been better had the Prosecutor not mentioned Article 16 at all. He should have admitted the political factors involved in his own judgment about whom to prosecute. Rather than deny that he exercises such judgment, he might first have acknowledged it, and then conditioned its exercise on an attentive ear to those most concerned with peace and conflict on the African continent.

The Prosecutor's approach was greeted most warmly in the parts of the world that he has seemed determined to impress: Washington, London, and Paris. Discontent in Addis Ababa bothers him less than in New York. It seems that building the International Criminal Court is like the law of thermodynamics—for something to warm up, something else must cool down. In this global political heat exchange, when Africa was keenest on the International Criminal Court, Washington was chilly indeed. As the United States has warmed to the Court, a cold front has consumed much of Africa.

That the Court is a purely judicial body immune to international political considerations seemed a seductive idea at first, but it has proven to be profoundly unrealistic. Choices of

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targeting both situations and individuals for prosecution cannot escape the politics of the modern world. A corollary of this is that these fundamentally political determinations are the prerogative of a single individual—the Prosecutor. This is a flaw in the architecture of the Court that Africa's dissatisfaction can help us to understand better.

## Cooperation, Immunities, and Article 98 of the Rome Statute: The ICC, Interpretation, and Conflicting Norms

*By Dire Tladi*[*]

My remarks focus on the two judgments handed down by the ICC Pre-Trial Chamber on December 12–13, 2011, on non-cooperation by Malawi and Chad in the arrest and surrender of Sudan's President Omar Al Bashir.[1] The Malawi/Chad cases gave the Court the opportunity to consider the argument advanced by the African Union (AU) that Article 98 of the Rome Statute of the International Criminal Court exempts Bashir from arrest and surrender. The judgments, and the reasoning in particular, of the Court were unfortunately very disappointing and highly unsatisfactory.

This is immediately revealed when the Court asserts that the arguments raised by Malawi and Chad were disposed of when the Court confirmed the charges against Bashir. The Court then proceeds to restate the reasoning it advanced in the decision confirming the charges against Bashir. The reasoning of the Court can be summarized as follows:

- The current position of Bashir as a head of state has no effect on the Court's jurisdiction.
- International law does not afford immunity to heads of state for international crimes before international courts and tribunals or, put another way, international law creates an exception to head-of-state immunity when international courts seek to try a head of state.
- To accept the argument advanced by Malawi and the AU ''would be to disable the Court and international criminal justice.''[2]

The first two points are probably uncontroversial. The Court cites many sources in support of its contentions. The problem, however, is that none of these points or the sources cited in support of them addresses the legal question raised by the AU position. While these points address Article 27 of the Statute, they do not in any way address Article 98, which provides an exemption from cooperation on the basis of immunities. The judgment's main flaw is that it treats Article 27 (precluding immunity as defense) and Article 98(1) (creating an exemption from the obligation to arrest and surrender) as coextensive. The result is that the Court's response to a proposed interpretation of Article 98 is to refer to Article 27 without

[*] Legal Counselor, Permanent Mission of South Africa to the United Nations; Member, International Law Commission.

[1] Situation in Darfur, Sudan, Case No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Dec. 12, 2011), *available at* http://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf [hereinafter Malawi Decision]; Situation in Darfur, Sudan, Case No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Dec. 13, 2011), *available at* http://www.icc-cpi.int/iccdocs/doc/doc1384955.pdf [hereinafter Chad Decision].

[2] Malawi Decision, para. 41; Chad Decision, para. 13.

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INTRODUCTORY NOTE TO THE INTERNATIONAL CRIMINAL COURT: DECISIONS PURSUANT TO ARTICLE 87(7) OF THE ROME STATUTE ON THE FAILURE BY THE REPUBLIC OF MALAWI AND THE REPUBLIC OF CHAD TO COMPLY WITH THE COOPERATION REQUESTS ISSUED BY THE COURT WITH RESPECT TO THE ARREST AND SURRENDER OF OMAR HASSAN AHMAD AL BASHIR & AFRICAN UNION RESPONSE

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# INTRODUCTORY NOTE TO THE INTERNATIONAL CRIMINAL COURT: DECISIONS PURSUANT TO ARTICLE 87(7) OF THE ROME STATUTE ON THE FAILURE BY THE REPUBLIC OF MALAWI AND THE REPUBLIC OF CHAD TO COMPLY WITH THE COOPERATION REQUESTS ISSUED BY THE COURT WITH RESPECT TO THE ARREST AND SURRENDER OF OMAR HASSAN AHMAD AL BASHIR & AFRICAN UNION RESPONSE

BY ALEXANDER K. A. GREENAWALT*

[December 2011-February 2012]
+Cite as 51 ILM 393 (2012)+

The International Criminal Court (''ICC'') struck a nerve in African capitals when, in 2009 and 2010, it issued arrest warrants for Sudan's President Omar Hassan Ahmad Al Bashir, accused of war crimes, crimes against humanity, and genocide in Sudan's Darfur region.[1] In a series of resolutions, the Assembly of the African Union (''AU'') has criticized the warrants, maintaining that Bashir's head-of-state status entitles him to immunity from prosecution and that the charges interfere with ongoing efforts to negotiate peace in Sudan. In these resolutions, the Assembly has repeatedly (and unsuccessfully) called upon the UN Security Council to invoke its authority to defer the proceedings against Bashir pursuant to Article 16 of the ICC's governing treaty—the so-called Rome Statute of the International Criminal Court—and it has resolved that ''AU Member States shall not cooperate . . . [in] the arrest and surrender of President Omar El Bashir of The Sudan.''[2] Accordingly, in 2010 and 2011 a number of African members of the ICC—Chad, Kenya, Djibouti, and Malawi—all received Bashir on state visits without moving to arrest or extradite him. They did so despite the ICC's having issued a request for assistance in the apprehension of Bashir, and despite their obligation under Article 86 of the Rome Statute to ''cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.''[3]

In December 2011, the ICC's Pre-Trial Chamber I issued a pair of rulings determining that Chad and Malawi had violated their Article 86 cooperation obligation by failing to arrest and surrender Bashir when he visited their respective territories.[4] This outcome was no surprise: the same Chamber had previously (under differing compositions of judges) rejected any claims to immunity when it issued its original arrest warrant against Bashir,[5] and it had issued several decisions reporting Chad and other states to the Security Council for welcoming Bashir into their respective territories.[6] Nevertheless, the reasoning of the Malawi decision (endorsed by reference the following day in the Chad decision) presents the Court's most considered examination of the immunity issue. The decision is notable for identifying a broad exception to head-of-state immunity for international criminal tribunals, and for the difficulties in reconciling this broad exception with the text of the Rome Statute and the relevant case law of the International Court of Justice (''ICJ'').

At the heart of the dispute over Bashir's alleged immunity lies a tension between two provisions of the Rome Statute. First, there is Article 27, providing that ''official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute,''[7] and further that ''[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.''[8] It is uncontroversial under international law that states may waive immunities from prosecution enjoyed by their officials, and the states parties of the Rome Statute have by most accounts done so by agreeing to Article 27.[9] The problem in the case of Bashir is that he is the president of a non-party state. Sudan has not ratified the Rome Statute and thus is not bound by the waiver contained in Article 27.

Next, there is Article 98(1), which appears (despite far from lucid phrasing) to preserve personal immunities conferred by customary international law. It provides that

> the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.[10]

The Pre-Trial Chamber reconciled what it described as ''the inherent tension''[11] between these provisions by maintaining that customary international law did not, in fact, provide Bashir with immunity from ICC prosecution, and thus that Article 98 did not in this case override Article 27. In reaching this conclusion, the Court did not

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reject outright that international law extends some immunity to sitting heads of state accused of serious international crimes. Embracing that argument, whatever its intrinsic merits, would have placed the Chamber in conflict with the ICJ's 2004 *Arrest Warrant* judgment, which held that immunities conferred to heads of state and other high-level government officials prohibited Belgium from issuing an arrest warrant on charges of crimes against humanity for the sitting foreign minister of the Democratic Republic of the Congo.[12] Instead, the Pre-Trial Chamber distinguished that case on the ground that it concerned criminal proceedings in Belgium's domestic courts rather than those before an international criminal tribunal.[13]

Nor did the Pre-Trial Chamber attach importance to the fact that the UN Security Council had acted under Chapter VII of the UN Charter to refer the situation in Darfur to the ICC. This omission is noteworthy because the referral arguably makes the Bashir warrant an easy case. The Security Council has broad authority to safeguard international peace and security, a power previously invoked to override immunities when the Council established *ad hoc* international criminal tribunals for the former Yugoslavia (''ICTY'') and Rwanda (''ICTR'') respectively.[14] Although the analogy is not perfect, the Chamber might have reasoned that the Security Council's determination to refer Darfur to a court whose statute includes Article 27 had the same legal effect as the Council's prior decisions promulgating tribunal statutes containing similar language.[15] On this view, the Security Council's implicit determination that head-of-state trials will advance international peace and security trumps, on an *ad hoc* basis, the central policy consideration identified by the ICJ as underlying the doctrine of head-of-state immunity: namely, the concern that trials would impede the performance of important state functions.[16]

Instead, the Court followed the reasoning of the Appeals Chamber of the Special Court for Sierra Leone, which, in denying immunity to Liberia's former president Charles Taylor, held broadly that ''that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.''[17] Accordingly, the ICC Pre-Trial Chamber ruled that ''the principle in international law is that immunity of either former or sitting Heads of State can not be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction.''[18]

By depriving high-level perpetrators of a potential shield, this outcome has the obvious advantage of promoting accountability for the most serious international crimes. Nevertheless, it leaves unanswered perplexing questions about the coherence of the international law of immunity and of the Rome Statute itself. As for customary international law, the ICJ's *Arrest Warrant* decision did indeed limit its affirmation of immunity to the domestic context, and it further acknowledged that ''an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.''[19] The Court did quote the Rome Statute's Article 27 in this context, but it made no use of this provision other than to distinguish the situation of international trials from that of domestic trials. The Court neither delved into the significant differences among existing international criminal tribunals, nor attempted affirmatively to define the conditions under which an international court possesses the power to override immunities.[20]

What, one may ask, is so special about international tribunals as a class? Drawing upon the work of Antonio Cassese, the Pre-Trial Chamber reasoned that the policy considerations supporting the *Arrest Warrant* judgment do not apply to international tribunals because these tribunals are ''totally independent of states and subject to strict rules of impartiality''[21] and therefore do not present the risk that ''authorities might use prosecutions to unduly impede or limit a foreign state's ability to engage in international action.''[22] This focus on ''undue'' impediments is unpersuasive because it imports culpability-based reasoning into the context of immunities, which by their very nature are designed to protect interests external to the guilt or innocence of the accused. The central concern of *Arrest Warrant*—that the prosecution of important government officials will interfere with the performance of vital government functions exercised by those on trial—is hardly addressed by assurances that the interfering proceedings are impartial in nature.

The Pre-Trial Chamber's categorical distinction between domestic and international courts also ignores important differences among different types of international courts. Suppose, for example, that authorities in two states each wish to prosecute Bashir in their own respective national courts. Pursuant to *Arrest Warrant* they cannot do so without violating customary international law. May the two states bypass this obstacle simply by entering into a bilateral agreement to establish an ''international'' court, one allowing authorities from both states to jointly prosecute Bashir? Or by contrast, as the Special Court for Sierra Leone Appeals Chamber seemed to imply in the

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Charles Taylor case, is broader international participation required to ensure that the prosecuting court reflects the will of the ''international community'' as a whole?[23] If so, how does one identify this community and how does this concept operate with respect to multilateral treaties such as the Rome Statute that are not formally binding on non-party states such as the Sudan?

A second problem concerns the status of Article 98(1) under the Rome Statute. The ICC is not just any international tribunal; it is one whose governing treaty expressly includes an exemption for immunities established by customary international law. If Article 98(1) does not exempt Malawi and Chad from cooperating in the arrest and surrender of Bashir, then what does this provision do? Perhaps the drafters of the Rome Statute were uncertain, at the time of the treaty's adoption in 1998, about the state of international law, and they included Article 98(1) merely as a safeguard against the hypothetical eventuality that enforcement of Article 27 would violate customary norms. Or perhaps Article 98(1) continues to protect some class of actors other than heads of state.[24] Unfortunately, the Malawi and Chad decisions give no attention to explaining what, if any, continued relevance Article 98(1) has.

The aftermath of these decisions also highlights the limits of the ICC's enforcement powers. Lacking independent authority or ability to take measures against Malawi and Chad, the Pre-Trial Chamber referred the matter to the UN Security Council, which thus far has taken no action. The African Union, meanwhile, has persisted in its defiance of the Court. In a January 9 press release, the AU Commission ''expresse[d] its total disagreement with the decisions of the Pre-Trial Chamber I'' and declared that the earlier AU Assembly declarations urging non-cooperation with the ICC in regard to the Bashir warrants remained binding on AU member states.[25] A February 9 AU Assembly declaration likewise urged continued non-compliance and further requested the AU Commission ''to consider seeking an advisory opinion from the International Court of Justice regarding the immunities of State Officials under international law.''[26] Should the matter ever reach the ICJ—an advisory opinion requires both a request from a designated UN body and a discretionary decision by the ICJ itself—the dispute would put the ICJ in the awkward position of judging a sister international court that is not formally bound by the ICJ's rulings.

In the meantime, the most tangible accountability has come in the form of unilateral action. In March, the United States' Millennium Challenge Corporation announced that it was suspending $350 million in aid to Malawi, partly on account of the state's failure cooperate with the ICC. As of this writing, the AU has relocated its scheduled July 2012 summit from Malawi to Ethiopia—a non-member of the ICC—following Malawi's refusal to host the Sudanese leader for a return visit.

## ENDNOTES

1 Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009) (charging Bashir with war crimes and crimes against humanity); Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (July 12, 2010) (charging Bashir with genocide).

2 Assembly of the African Union, Assembly/AU/Dec.391-415(XVIII), ¶ 3 (Jan. 30, 2012); Assembly of the African Union, Assembly/AU/Dec.363-390(XVII), ¶¶ 3, 6 (July 1, 2011); Assembly of the African Union, Assembly/ AU/ Dec.332-361(XVI), ¶ 3 (Jan. 31, 2011); Assembly of the African Union, Assembly/AU/Dec.289-331(XV), ¶ 4 (July 27, 2010); Assembly of the African Union, Assembly/AU/ Dec.268 – 288 (XIV), ¶ 10 (Feb. 2, 2010); Assembly of the African Union, Assembly/AU/Dec. 243-267 (XIII) Rev.1, ¶ 9 (July 3, 2009); Assembly of the African Union, Assembly/ AU/Dec.208 – 242(XII), ¶ 10 (Feb. 3, 2009).

3 *See* Rome Statute of the International Criminal Court art. 16, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

4 Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Dec. 12, 2011) [hereinafter Malawi Decision]; Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Dec. 13, 2011) [hereinafter Chad Decision].

5 Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir (Mar. 4, 2009).

6 *See* Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute About Omar Al-Bashir's Recent Visit to Djibouti (May 12, 2011); Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision Informing the

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United Nations Security Council and the Assembly of the States Parties to the Rome Statute About Omar Al-Bashir's Recent Visit to the Republic of Chad (Aug. 27, 2010); Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute About Omar Al-Bashir's Presence in the Territory of the Republic of Kenya (Aug. 27, 2010).

7 Rome Statute, *supra* note 3, art. 27(1).

8 *Id.* art. 27(2).

9 Note, however, Paola Gaeta's argument that Article 27 addresses only the powers of the ICC itself and does not relieve arresting states of their independent obligation to recognize immunities conferred by customary international law. *See* Paola Gaeta, *Does Al Bashir Enjoy Immunity From Arrest?* 7 J. INT'L CRIM. J. 315 (2012).

10 Rome Statute, *supra* note 3, art. 98(1).

11 Malawi Decision, *supra* note 4, ¶ 37.

12 Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. (Feb. 14) [hereinafter Arrest Warrant].

13 Malawi Decision, *supra* note 4, ¶ 34.

14 *See* S.C. Res. 827, ¶ 7(2), U.N. Doc. S/RES/827 (May 25, 1993) (ICTY Statute) (''The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.''); *See* S.C. Res. 955, ¶ 6(2), U.N. Doc. S/RES/955 (Nov. 8, 1994) (ICTR Statute) (same).

15 *See, e.g.,* Dapo Akande, *ICC Issues Detailed Decision on Bashir's Immunity (. . . At long Last . . . ) But Gets the Law Wrong*, EJIL: *Talk!* (Dec. 15, 2011), *available at* http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir's-immunity-at-long-last-but-gets-the-law-wrong/.

16 *See* Arrest Warrant, *supra* note 12, ¶ 53 (''In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States.'') The Pre-Trial Chamber did note that ''[e]ven some States which have not joined the Court have twice allowed for situations to be referred to the Court by United Nations Security Council Resolutions, undoubtedly in the knowledge that these referrals might involve prosecution of Heads of State who might ordinarily have immunity from domestic prosecution,'' but the Court invoked this observation merely to support its general interpretation of Article 27 rather than to argue that the force of Article 27 ever depends on a Security Council referral. Malawi Decision, *supra* note 4, ¶ 40.

17 Malawi Decision, *supra* note 4, ¶ 35 (quoting Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-l-AR72(E), Decision on Immunity from Jurisdiction, at 31, ¶¶ 51-52 (May 31, 2004) [hereinafter Taylor Decision]).

18 *Id.* ¶ 36.

19 Arrest Warrant, *supra* note 12, ¶ 61.

20 *Id.*

21 Malawi Decision, *supra* note 4, ¶ 36 (quoting ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 312 (2008)).

22 *Id.*

23 *See* Taylor Decision, *supra* note 17, ¶ 51 (''the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.'')

24 *See*, *e.g.*, Jens Iverson, *Head of State Immunity is Not the Same as State Immunity: A Response to the African Union's Position On Article 98 of the ICC Statute*, EJIL: *Talk!* (Feb. 13, 2012), *available at* http://www.ejiltalk.org/head-of-state-immunity-is-not-the-same-as-state-immunity-a-response-to-the-african-unions-position-on-article-98-of-the-icc-statute/.

25 Press Release, African Union Commission, On The Decisions Of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant To Article 87(7) of the Rome Statute On the Alleged Failure by The Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of The Sudan, AU Comm'n Press Release No. 002/2012 (Jan. 9, 2012), *available at* http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf.

26 Assembly of the African Union, ¶ 10, Assembly/AU/Dec.391-415 (XVIII) (Jan. 2012).

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# INTERNATIONAL CRIMINAL COURT DECISIONS PURSUANT TO ARTICLE 87(7) FAILURE BY MALAWI & CHAD TO COMPLY WITH THE COOPERATION REQUESTS ISSUED BY THE COURT WITH RESPECT TO THE ARREST AND SURRENDER OF OMAR HASSAN AHMAD AL BASHIR & AFRICAN UNION RESPONSE*

ICC-02/05-01/09-370-Anx1 16-07-2018 664/140

[October 19, 2011]
+Cite as 51 ILM 397 (2012)+

**Cour Pénale Internationale**

**International Criminal Court**

Original: English

No.: **ICC-02/05-01/09**
Date: **19 October 2011**

**PRE-TRIAL CHAMBER I**

**Before:** **Judge Sanji Mmasenono Monageng, Presiding Judge**
**Judge Sylvia Steiner**
**Judge Cuno Tarfusser**

**SITUATION IN DARFUR, SUDAN**

***THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR***

**Public Document**
**Decision requesting observations about Omar Al-Bashir's recent visit to Malawi**

Document to be notified, in accordance with regulation 31 of the *Regulations of the Court, to:*

**The Office of the Prosecutor**
Mr Luis Moreno-Ocampo
Ms Fatou Bensouda

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**
Competent authorities of the Republic of Malawi

***Amicus Curiae***

**REGISTRY**

**Registrar**
Ms Silvana Arbia

**Deputy Registrar**
Mr Didier Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Others**

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ICC-02/05-01/09-370-Anx1 16-07-2018 665/1408

**Pre-Trial Chamber I** of the International Criminal Court (the ''Chamber'' and the ''Court'' respectively),

**NOTING** United Nations Security Council Resolution 1593 (2005) (''UNSC 1593''),[1] whereby the United Nations Security Council referred the situation in Darfur to the Court and ''urge[d] all States and concerned regional and other international organizations to cooperate fully'' with the Court;

**NOTING** the warrants of arrest against Omar Al-Bashir issued by the Chamber respectively on 4 March 2009 and 12 July 2010 which are yet to be executed;[2]

**NOTING** the ''Request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir'', dated 6 March 2009,[3] and the ''Supplementary request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir'', dated 21 July 2010[4] (the ''Cooperation Requests''), issued by the Registry at the Chamber's request and asking for cooperation from all States Parties in the arrest and surrender of Omar Al-Bashir pursuant to, *inter alia*, articles 89(1) and 91 of the Rome Statute (the ''Statute'');

**NOTING** the Registry's ''Report on the visit of Omar Al Bashir to Malawi'', confidentially filed on 18 October 2011 (the ''Report''),[5] whereby the Registrar informed the Chamber that

(i) various media had reported that Omar Al Bashir had visited the Republic of Malawi on 14 October 2011 and had ''attended a summit of the Common Market for Eastern and Southern Africa (COMESA) in Malawi's capital Lilongwe that took place from 4 to 15 October'';

(ii) the Registrar had sent a *note verbale* to the Embassy of the Republic of Malawi in Brussels on 13 October 2011 (''*Note Verbale*'')[6], reminding the Republic of Malawi of its legal obligations under the Statute and asking for its cooperation for the arrest and surrender of Omar Hassan Al Bashir ''in the event that the latter would enter Malawi's territory''; and

(iii) no reply had been received so far;

**NOTING** that, in its *Note Verbale*, the Registrar reminded the Republic of Malawi that the obligation to arrest and surrender persons subject to an arrest warrant issued by the Court applied ''to all persons subject to an arrest warrant including President Al Bashir'';[7]

**NOTING** that the Registrar also warned the Republic of Malawi that, pursuant to article 87(7) of the Statute, ''where a State Party fails to comply with a request for cooperation by the Court contrary to the provisions of the Statute, the Court may make a finding of non-cooperation and refer the matter to the UN Security Council'';[8]

**NOTING** furthermore that, although the *Note Verbale* invited the competent authorities of the Republic of Malawi to consult with the Court in case of any difficulty with respect to the execution of the Cooperation Requests, as provided for in article 97 of the Statute, no consultation has yet been undertaken;

**NOTING** articles 86, 87(7) and 89 of the Statute and regulations 109(2) and 109(3) of the Regulations of the Court (the ''Regulations'');

**CONSIDERING** that the Republic of Malawi, being a State Party to the Statute since 19 September 2002, is under the obligation to abide by the Cooperation Requests in accordance with articles 86 and 89 of the Statute,;

**CONSIDERING** that article 87(7) of the Statute indicates that ''[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute [...] the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'';

**CONSIDERING** regulation 109(2) of the Regulations, which allows for a Chamber who has made a request for cooperation to initiate proceedings under article 87(7) of the Statute;

**CONSIDERING** that the Republic of Malawi must be given an opportunity to be heard on this matter, pursuant to regulation 109(3) of the Regulations;

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**FOR THESE REASONS**

**ORDERS** the Registrar to transmit a copy of the Report to the competent authorities of the Republic of Malawi;

**INVITES** the competent authorities of the Republic of Malawi to submit, no later than Friday, 11 November 2011, any observations on the Report, in particular with regard to the alleged failure by the Republic of Malawi to comply with the Cooperation Requests issued by the Court.

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

[signed]

**Judge Sanji Mmasenono Monageng**
**Presiding Judge**

[signed]

**Judge Sylvia Steiner**

[signed]

**Judge Cuno Tarfusser**

Dated this Wednesday, 19 October 2011

At The Hague, The Netherlands

ENDNOTES

1 S/RES/1593 (2005).

2 ICC-02/05-01/09-1; ICC-02/05-01/09-95.

3 ICC-02/05-01/09-7.

4 ICC-02/05-01/09-96.

5 ICC-02/05-01/09-136-Conf + Conf Anx 1 to 4.

6 ICC-02/05-01/09-136-Conf, Anx 4.

7 *Ibid.*

8 *Ibid.*

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# INTERNATIONAL CRIMINAL COURT DECISIONS PURSUANT TO ARTICLE 87(7) FAILURE BY MALAWI & CHAD TO COMPLY WITH THE COOPERATION REQUESTS ISSUED BY THE COURT WITH RESPECT TO THE ARREST AND SURRENDER OF OMAR HASSAN AHMAD AL BASHIR & AFRICAN UNION RESPONSE*

[December 12, 2011]

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**Cour Pénale Internationale**

**International Criminal Court**

Original: English

No.: **ICC-02/05-01/09**
Date: **12 December 2011**

**PRE-TRIAL CHAMBER I**

**Before:** **Judge Sanji Mmasenono Monageng, Presiding Judge**
**Judge Sylvia Steiner**
**Judge Cuno Tarfusser**

**SITUATION IN DARFUR, SUDAN**

***THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR***

**Public Document**

**Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir**

Document to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**
Mr Luis Moreno-Ocampo
Ms Fatou Bensouda

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**
Competent authorities of the Republic of Malawi

***Amicus Curiae***

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**REGISTRY**

| | |
|---|---|
| **Registrar**<br>Ms Silvana Arbia | **Deputy Registrar**<br>Mr Didier Preira |
| **Victims and Witnesses Unit** | **Detention Section** |
| **Victims Participation and Reparations Section** | **Others** |

**Pre-Trial Chamber I** of the International Criminal Court (the ''Chamber'' and the ''Court'' respectively), hereby issues the present decision on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court for the arrest and surrender of Omar Hassan Ahmad Al Bashir (''Omar Al Bashir'').

**Background and submissions by the Republic of Malawi**

1. On 31 March 2005, the United Nations Security Council issued Resolution 1593 (2005),[1] whereby it referred the situation in Darfur to the Court and ''urge[d] all States and concerned regional and other international organizations to cooperate fully'' with the Court.

2. On 4 March 2009, the Chamber issued its ''Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir''[2] (the ''4 March 2009 Decision'') where it stated in relation to the position of Omar Al Bashir as Head of State:

> *41. Furthermore, in light of the materials presented by the Prosecution in support of the Prosecution Application, and without prejudice to a further determination of the matter pursuant to article 19 of the Statute, the Chamber considers that the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case.*
>
> *42. The Chamber reaches this conclusion on the basis of the four following considerations. First, the Chamber notes that, according to the Preamble of the Statute, one of the core goals of the Statute is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which ''must not go unpunished''.*
>
> *43. Second, the Chamber observes that, in order to achieve this goal, article 27(1) and (2) of the Statute provide for the following core principles:*
>
> > *(i) ''This Statute shall apply equally to all persons without any distinction based on official capacity;''*
> >
> > *(ii) ''[...] official capacity as a Head of State or Government, a member of Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence;'' and*
> >
> > *(iii) ''Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.''*
>
> *44. Third, the consistent case law of the Chamber on the applicable law before the Court has held that, according to article 21 of the Statute, those other sources of law provided for in paragraphs (1)(b) and (1)(c) of article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the Vienna Convention on the Law of the Treaties and article 21(3) of the Statute.*
>
> *45. Fourth, as the Chamber has recently highlighted in its 5 February 2009 ''Decision on Application under Rule 103'', by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework*

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*provided for in the Statute, the Elements of Crimes and the Rules as a whole.* (footnotes omitted)

3. On 4 March 2009 and 12 July 2010, respectively, the Chamber issued warrants of arrest against Omar Al-Bashir which are yet to be executed.[3]

4. On 6 March 2009 and on 21 July 2010, respectively, the Registry sent, at the Chamber's request, the ''Request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir'',[4] and the ''Supplementary request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir''[5] (the ''Cooperation Requests''), asking for cooperation from all States Parties in the arrest and surrender of Omar Al-Bashir pursuant to, *inter alia*, articles 89(1) and 91 of the Rome Statute (the ''Statute''). The Republic of Malawi has been a State Party to the Statute since 1st December 2002 and was therefore notified of the Cooperation Requests.

5. On 18 October 2011, the Registry filed its ''Report on the visit of Omar Al Bashir to Malawi'' (the ''Report''),[6] whereby the Registrar informed the Chamber that:

(i) various media had reported that Al Bashir had visited the Republic of Malawi on 14 October 2011 and had ''attended a summit of the Common Market for Eastern and Southern Africa (COMESA) in Malawi's capital Lilongwe that took place from 4 to 15 October'';

(ii) she had sent a *note verbale* to the Embassy of the Republic of Malawi in Brussels on 13 October 2011 (*''Note Verbale''*),[7] reminding the Republic of Malawi of its legal obligations under the Statute and asking for its cooperation for the arrest and surrender of Al Bashir ''in the event that the latter would enter Malawi's territory''; and

(iii) no reply had been received so far.

6. In her *Note Verbale*, the Registrar: (a) reminded the Republic of Malawi that the obligation to arrest and surrender persons subject to an arrest warrant issued by the Court applied ''to all persons subject to an arrest warrant including President Al Bashir'';[8] (b) warned the Republic of Malawi that, pursuant to article 87(7) of the Statute, ''where a State Party fails to comply with a request for cooperation by the Court contrary to the provisions of the Statute, the Court may make a finding of non-cooperation and refer the matter to the UN Security Council'';[9] and (c) invited the competent authorities of the Republic of Malawi to consult with the Court in case of any difficulty with respect to the execution of the Cooperation Requests, as provided for in article 97 of the Statute. No consultation was ever undertaken by the competent authorities of the Republic of Malawi, nor did they raise any problem with regard to the execution of the Cooperation Requests or provide any relevant information to the Court in that respect.

7. On 19 October 2011, the Chamber issued its ''Decision requesting observations about Omar Al-Bashir's recent visit to Malawi'',[10] ordering the Registrar to transmit a copy of the Report to the competent authorities of the Republic of Malawi and inviting those authorities to submit, in conformity with regulation 109(3) of the Regulations of the Court (the ''Regulations''), any observations on the Report, in particular with regard to the alleged failure by the Republic of Malawi to comply with the Cooperation Requests.

8. On 11 November 2011, the Registry filed publicly its ''Transmission of the observations from the Republic of Malawi'',[11] together with two confidential annexes. In confidential annex 2 (the ''Observations from the Republic of Malawi''), the Republic of Malawi submitted the following observations with regard to its failure to comply with the Cooperation Requests issued by the Court:

> *The Ministry [of Foreign Affairs] wishes to confirm that His Excellency President Omar Hassan Ahmad Al Bashir, the President of the Republic of Sudan attended a COMESA Summit that was held at Lilongwe in the Republic of Malawi from 14th – 15th October 2011. The Ministry wishes to state that in view of the fact that His Excellency Al Bashir is a sitting Head of State, Malawi accorded him all the immunities and privileges guaranteed to every visiting Head of State and Government; these privileges and immunities include freedom from arrest and prosecution within the territories of Malawi.*
>
> *The Ministry wishes to inform the esteemed Registry of the ICC that Malawi accorded His Excellency President Al Bashir these privileges and immunities in line with the established principles of public*

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*international law, and in accordance with the Immunities and Privileges Act of Malawi.*

*The Ministry further wishes to state that Sudan, of which His Excellency President Al Bashir is Head of State, is not a party to the Rome Statute and, in the considered opinion of the Malawi authorities, Article 27 of the Statute which, inter - alia, waives the immunity of the Heads of State and Government, is not applicable.*

*The Ministry also wishes to inform the esteemed Registry of the Court of the ICC that Malawi, as a member of the Afiican Union, fully aligns itself with the position adopted by the African Union with respect to the indictment of the sitting Heads of State and Government of countries that are not parties to the Rome Statute.*

*The Ministry accordingly wishes to inform the esteemed Registry of ICC that in view of the foregoing, Malawi could not arrest His Excellency, President Omar Hassan Ahmad Al Bashir when he visited the country to attend the COMESA Summit.*

**Applicable Law and Discussion**

9. The Chamber notes articles 13, 21, 27, 86, 87, 98 and 119 of the Statute and rule 195 of the Rules of Procedure and Evidence (the ''Rules'').

*Preliminary Issue*

10. As a preliminary matter, the Chamber notes that, although they received a warning by the Registry prior to the visit of Omar Al Bashir, the authorities of the Republic of Malawi decided neither to respond to the Court nor to arrest the suspect. This indicates to the Chamber that the Republic of Malawi did not respect its obligation, enshrined in article 86 of the Statute, to fully cooperate with the Court.

11. The Republic of Malawi did not respect the sole authority of this Court to decide whether immunities are applicable in a particular case. This is established by article 119(1) of the Statute, which provides that ''[A]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court''. Moreover, rule 195(1) states:

> *When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.*

12. Therefore the Chamber concludes that, in this respect, the Republic of Malawi did not cooperate with the Court in order to resolve the issue. The Republic of Malawi should have brought the matter to the attention of the Chamber, together with any available information, in order for the Chamber to make its determination.

*Issue Presented to the Court*

13. That said, due to the significance of the issues before the Court the Chamber will decide the issue of Malawi's non-cooperation on the merits. The Chamber considers that the arguments raised by the Republic of Malawi to justify its refusal to execute the Cooperation Requests may be summarized as follows:

i) Al Bashir is a sitting Head of State not Party to the Rome Statute and therefore Malawi accorded him immunity from arrest and prosecution in line with ''established principles of public international law'' and in accordance with the ''Immunities and Privileges Act of Malawi'' (the ''First Argument'');

ii) The Republic of Malawi, being a member of the African Union, decided to fully align itself with ''the position adopted by the African Union with respect to the indictment of sitting Heads of State and Government of countries that are not parties to the Rome Statute'' (the ''Second Argument'').

14. With respect to the Second Argument, the Chamber notes that the Republic of Malawi does not provide the Chamber with any specific document which articulates the ''position adopted by the African Union''. The

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Chamber, however, understands this argument as challenging the existence of a warrant of arrest against a sitting Head of State of a country not party to the Statute, and reminds the Republic of Malawi that it has already rejected such an argument in its 4 March 2009 Decision at the time of the *issuance* of its first warrant of arrest against Omar Al Bashir when it decided that, in accordance with article 27 of the Statute, ''the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case''.

15. The Chamber notes, however, the various African Union resolutions requiring its members not to cooperate with the Court regarding the warrant of arrest against Omar Al Bashir.[12] The sole legal justification the African Union gives for why its legal position is compatible with the Statute is by reference to ''the provisions of Article 98 of the Rome Statute of the ICC relating to immunities''.[13] The Chamber considers the specific provision referenced by the African Union to be article 98(1) of the Statute. Therefore, the Chamber's analysis, contained below, as to how article 98(1) of the Statute relates to the present circumstances will also address the legal viability of the African Union position relied upon by the Republic of Malawi.

16. The Chamber is of the view that the First Argument presented by the Republic of Malawi raises the following issue: under the Statute, namely whether sitting Heads of States not parties to the Statute enjoy immunity with respect to the *enforcement* of a warrant of arrest issued by the Court, by national authorities.

17. The Chamber considers that, although not expressly referred to in the Observations from the Republic of Malawi, article 98(1) of the Statute is the applicable article in this respect. This article reads as follows:

> *The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.*

18. The Chamber notes the Observations from the Republic of Malawi where they say that ''Sudan, of which His Excellency President Al Bashir is Head of State, is not a party to the Rome Statute and, in the considered opinion of the Malawi authorities, Article 27 of the Statute which, inter - alia, waives the immunity of the Heads of State and Government, is not applicable''. The remarks suggests that Malawi concedes, and the Chamber agrees, that a waiver of immunity would obviously not be necessary with respect to a third State which has ratified the Statute. Indeed, acceptance of article 27(2) of the Statute, implies waiver of immunities for the purposes of article 98(1) of the Statute with respect to proceedings conducted by the Court. However, for the reasons set out below, the Chamber rejects the argument presented by the Republic of Malawi, with respect to States not parties to the Statute, that international law affords immunity to Heads of States in respect of proceedings before international courts.

*Irrelevance of Internal Law*

19. The Chamber notes that the First Argument raised in the Observations from the Republic of Malawi seems to have two parts: the first part refers to established principles of international law and the second part refers to the national law of the Republic of Malawi.

20. The Chamber will not consider the second part of the First Argument as article 98(1) of the Statute only refers to international law and thereby excludes any possibility for the requested State to rely on its national law, in order not to comply with a cooperation request sent by the Court. This is furthermore in line with established principles of international law as embodied in article 27 of the 23 May 1969 Vienna Convention on the Law of Treaties which states:

> *A Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*

21. Therefore, to the extent the Republic of Malawi refers to its internal law in order to justify its failure to comply with the Cooperation Requests, such an argument is rejected by the Chamber *in limine.*

Immunity of Heads of States in International Proceedings

22. The Chamber will now assess whether, under international law, either former or sitting heads of States enjoy immunity in respect of proceedings before international courts.

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23. The Chamber notes that as early as March 1919, in the aftermath of the First World War, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties[14] recommended the establishment of a High Tribunal rejecting the idea of immunities even for Heads of States:

> *In theses circumstances, the Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of States. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a State. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.*

24. In the aftermath of the Second World War, two international tribunals were established, respectively in Nuremberg and in Tokyo. Article 7 of the Charter of the International Military Tribunal[15] states as follows:

> *The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.*

25. The International Military Tribunal sitting in Nuremberg reaffirmed such a principle in its judgment issued on 1st October 1946[16]:

> *The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.*

26. Article 6 of the Charter of the International Military Tribunal for the Far East, sitting in Tokyo, established on 19 January 1946 by the Supreme Commander for the Allied Powers, states as follows:

> *Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.*

27. In its judgment, the International Military Tribunal sitting in Tokyo[17] convicted defendant Hiroshi Oshima, the Japanese Ambassador in Berlin, despite his assertion that he was protected by his diplomatic immunity:

> *OSHIMA's special defence is that in connection with his activities in Germany he is protected by diplomatic immunity and is exempt from prosecution. Diplomatic privilege does not import immunity from legal liability, but only exemption from trial by the Courts of the State to which an Ambassador is accredited. In any event this immunity has no relation to crimes against international law charged before a tribunal having jurisdiction. The Tribunal rejects this special defence''.*

28. In 1950, the United Nations General Assembly adopted[18] the ''Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal''. Principle III states:

> *The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.*

29. Article 7(2) of the International Tribunal for the Former Yugoslavia[19] Statute likewise states:

> *The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.*

30. In several occasions, especially after the transfer of Slobodan Milosevic, the International Tribunal for the Former Yugoslavia (''ICTY'') stated that article 7(2) was declaratory of customary international law:

> *Individuals are personally responsible, whatever their official position, even if they are heads of State or*

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*government ministers: Article 7(2) of the Statute and article 6(2) of the Statute of the International Criminal Tribunal for Rwanda [...] are indisputably declaratory of customary international law.*[20]

31. Article 6(2) of the International Tribunal for Rwanda (''ICTR'') Statute[21] is identical to article 7(2) of the ICTY Statute.

32. In its Draft Code of Crimes against the Peace and Security of Mankind[22], the International Law Commission adopted the same principle. Article 7 of this Draft Code, entitled ''Official position and Responsibility'' indeed states:

*The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as Head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.*

33. The International Court of Justice (''ICJ'') held, in the ''Arrest Warrant Case'',[23] that although customary international law provided for immunity with regard to *national courts*, for certain officials such as the incumbent Minister of Foreign Affairs, and *a fortiori* for Heads of State and Government, even in the case of a suspected commission of war crimes or crimes against humanity, such immunities could not be opposed by a criminal prosecution of an international court:

*Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council Resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in article 27, paragraph 2, that ''immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.*

34. The ICJ in the ''Arrest Warrant Case'' is concerned solely with immunity across national jurisdictions. The ICJ majority referenced the international tribunal provisions addressing immunity, including article 27 of the Statute, and concluded that these provisions ''do not enable it to conclude that any such an exception exists in customary international law *in regard to national courts.''*[25] The ICJ majority discussion of customary international law immunity is therefore distinct from the present circumstances, as here an *international court* is seeking arrest for international crimes. This distinction is meaningful because, as argued by Antonio Cassese, the rationale for foreign state officials being entitled to raise personal immunity before national courts is that otherwise national authorities might use prosecutions to unduly impede or limit a foreign state's ability to engage in international action.[26] Cassese emphasised that this danger does not arise with international courts and tribunals, which are ''totally independent of states and subject to strict rules of impartiality''.[27]

35. Following the ICJ ruling in the ''Arrest Warrant Case'', the Appeals Chamber of the Special Court for Sierra Leone, applying article 6(2) of its Statute[28] which is identical to article 6(2) of the ICTR Statute and article 7(2) of the ICTY Statute, held that ''the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court''.[29] As explained by that Court:

*A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.*

36. Therefore, the Chamber finds that the principle in international law is that immunity of either former or sitting Heads of State can not be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction. In this particular case, the Chamber notes that it is exercising jurisdiction following a referral by the United Nations Security Council made under Chapter VII of the United Nations Charter, in accordance with article 13(b) of the

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Statute.

*Immunity of Heads of State With Respect to Requests for Arrest and Surrender*

37. The Chamber notes that there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State. The Chamber considers that Malawi, and by extension the African Union, are not entitled to rely on article 98(1) of the Statute to justify refusing to comply with the Cooperation Requests.

38. First, as described above, immunity for Heads of State before international courts has been rejected time and time again dating all the way back to World War I.[30]

39. Second, there has been an increase in Head of State prosecutions by international courts in the last decade. Only one international prosecution of a Head of State had been initiated when the judgment in the ''Arrest Warrant Case'' was rendered; this trial (Slobodan Milosevic) began only two days before this judgment was issued and its existence is not even referenced by the ICJ majority. Subsequent to 14 February 2002, international prosecutions against Charles Taylor, Muammar Gaddafi, Laurent Gbagbo and the present case show that initiating international prosecutions against Heads of State have gained widespread recognition as accepted practice.

40. Third, the Statute now has reached 120 States Parties in its 9 plus years of existence, all of whom have accepted having any immunity they had under international law stripped from their top officials. All of these states have renounced any claim to immunity by ratifying the language of article 27(2): ''[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising jurisdiction over such a person''.[31] Even some States which have not joined the Court have twice allowed for situations to be referred to the Court by United Nations Security Council Resolutions, undoubtedly in the knowledge that these referrals might involve prosecution of Heads of State who might ordinarily have immunity from domestic prosecution.[32]

41. Fourth, all the States referenced above have ratified this Statute and/or entrusted this Court with exercising ''its jurisdiction over persons for the most serious crimes of international concern''.[33] It is facially inconsistent for Malawi to entrust the Court with this mandate and then refuse to surrender a Head of State prosecuted for orchestrating genocide, war crimes and crimes against humanity. To interpret article 98(1) in such a way so as to justify not surrendering Omar Al Bashir on immunity grounds would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute Malawi has ratified.

42. The Chamber considers that the international community's commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass. If it ever was appropriate to say so, it is certainly no longer appropriate to say that customary international law immunity applies in the present context.

43. For the above reasons and the jurisprudence cited earlier in this decision, the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.

*Consequences of the Chamber's findings for States Parties*

44. Furthermore, the Chamber is of the view that the unavailability of immunities with respect to prosecutions by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions.

45. Indeed, the cooperation regime between the Court and States Parties, as established in Part IX of the Statute, can not in any way be equated with the inter-state cooperation regime which exists between sovereign States. This is evidenced by the Statute itself which refers in article 91 of the Statute to the ''distinct nature of the Court'', and in article 102 of the Statute which makes a clear distinction between ''surrender'', meaning the delivering up of a person by a State to the Court, and ''extradition'', meaning the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

46. Indeed, it is the view of the Chamber that when cooperating with this Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the *jus puniendi* of the international community whose

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exercise has been entrusted to this Court when States have failed to prosecute those responsible for the crimes within its jurisdiction.

47. The Chamber therefore finds, in accordance with article 87(7) of the Statute that the Republic of Malawi has failed to comply with the Cooperation Requests contrary to the provisions of the Statute and has thereby prevented the Court from exercising its functions and powers under this Statute. The Chamber decides to refer the matter both to the United Nations Security Council and to the Assembly of States Parties.

**FOR THESE REASONS, THE CHAMBER**

**FINDS,** in accordance with articles 86, 87(7) and 89 of the Statute, that the Republic of Malawi: (i) failed to comply with its obligations to consult with the Chamber by not bringing the issue of Omar Al Bashir's immunity to the Chamber for its determination and (ii) failed to cooperate with the Court by failing to arrest and surrender Omar Al Bashir to the Court, thus preventing the Court from excising its functions and powers under the Statute; and

**ORDERS** the Registrar to transmit the present decision to the Security Council through the Secretary General of the United Nations and, to the Assembly of States Parties to the Statute.

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

[signed]

**Judge Sanji Mmasenono Monageng**
**Presiding Judge**

[signed]

**Judge Sylvia Steiner**

[signed]

**Judge Cuno Tarfusser**

Dated this Monday, 12 December 2011

At The Hague, The Netherlands

ENDNOTES

1 S/RES/1593 (2005).

2 ICC-02/05-0l/09-3.

3 ICC-02/05-01/09-1; ICC-02/05-01/09-95.

4 ICC-02/05-01/09-7.

5 ICC-02/05-01/09-96.

6 ICC-02/05-01/09-136-Conf and Conf Anx 1 to 4.

7 ICC-02/05-01/09-136-Conf, Anx 4.

8 *Ibid*.

9 *Ibid*.

10 ICC-02/05-01/09-137.

11 ICC-02/05-01/09-138 with confidential annexes 1 and 2.

12 African Union, Assembly, ''Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) Doc. Assembly/AU/13(XIII)'', 3 July 2009, Assembly/AU/Dec.245(XIII) Rev.1 (''3 July 2009 AU Decision''), para. 10; African Union, Assembly, ''Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/lO(XV)'', 27 July 2010, Assembly/AU/Dec.296(XV), paras 5-6; African Union, Assembly, ''Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX.CL/639(XVIII)'', 30-31 January 2011, Assembly/AU/Dec.334(XVI), para. 5; African Union, Assembly, ''Decision on the Implementation of the Assembly Decisions on the International Criminal Court - Doc. EX.CL/670(XIX)'', 30

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June-1 July 2011, Assembly/AU/Dec.366(XVII) (''30 June-1 July 2011 AU Decision''), para. 5.

13 3 July 2009 AU Decision, para. 10; 30 June-1 July 2011 AU Decision Decision, para. 5.

14 American Journal of International Law, 1920 (14), at 116.

l5 Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Signed at London on 8 August 1945, United Nations - Treaty Series, 1951, n° 251, at 279.

l6 The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Part 22 (22nd August, 1946 to 1st October, 1946), at 447.

l7 The Tokyo Judgment, The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948, Volume I, Röling and Rüter(eds), APA, University Press Amsterdam BV, Amsterdam 1977, at 456.

l8 Genera1 Assembly, Official Records, 5th session, Supp. No 12, U.N. Doc.A/1316 (1950).

19 Statute 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, adopted by Resolution 827 of the United Nations Security Council (25 May 1993).

20 ICTY, the Prosecutor v. Anton Furundzija, case n° IT-95-17/1-T, Judgement, 10 December 1998, para. 140; see also ICTY, the Prosecutor v. Slobodan Milosevic, Case n° IT-99-37-PT, Decision on Preliminary Motions, 8 November 2001, para. 28.

21 Statute of the International 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 1994 and 31 December 1994, adopted by Resolution 955 of the United Nations Security Council on 8 November 1994.

22 International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, adopted by the Commission at its forty-eight session, from 6 May to 26 July 1996, General Assembly, Official Records, 51st Session, Supp. N° 10; U.N. Doc. A/51/10.

23 Arrest warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 14 February 2002, I.C.J. Reports 2002.

24 *Ibid*., at para. 61.

25 *Ibid*., at para. 58 (emphasis added).

26 A. Cassese, *International Criminal Law* (Oxford University Press, 2nd ed., 2008), at 312.

27 *Ibid.*

28 Statute of the Special Court for Sierra Leone, annex to the Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution 1315(2000) of 14 August 2000, signed at Freetown, on 16 January 2002.

29 Special Court for Sierra Leone, Appeals Chamber, The Prosecutor v. Charles Ghankay Taylor, Case Number SCSL-2003-1-AR72(E), Decision on Immunity from Jurisdiction, 31 May 2004, paras 51-52.

30 *Supra*, paras 23-35.

31 Statute, art. 27(2).

32 S/RES/1593 (2005); S/RES/1970 (2011).

33 Statute, art. 1.

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ICC-02/05-01/09-370-Anx1 16-07-2018 677/1408

# INTERNATIONAL CRIMINAL COURT DECISIONS PURSUANT TO ARTICLE 87(7) FAILURE BY MALAWI & CHAD TO COMPLY WITH THE COOPERATION REQUESTS ISSUED BY THE COURT WITH RESPECT TO THE ARREST AND SURRENDER OF OMAR HASSAN AHMAD AL BASHIR & AFRICAN UNION RESPONSE*

[December 13, 2011]

+Cite as 51 ILM 410 (2012)+

**Cour Pénale Internationale**

**International Criminal Court**

Original: French

No.: **ICC-02/05-01/09**
Date: **13 December 2011**

**PRE-TRIAL CHAMBER I**

**Before:** **Judge Sanji Mmasenono Monageng, Presiding Judge**
**Judge Sylvia Steiner**
**Judge Cuno Tarfusser**

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF**
***THE PROSECUTOR v. OMAR HASSAN AHMAD AL BASHIR***

**Public Document**

**Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir**

**Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:**

**The Office of the Prosecutor**
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**
The competent authorities of the Republic of Chad

***Amicus Curiae***

**Other**
The President of the Court

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**REGISTRY**

**Registrar**
Ms Silvana Arbia
**Deputy Registrar**
Mr Didier Preira

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

**PRE-TRIAL CHAMBER I** (''the Chamber'') of the International Criminal Court (''the Court'') hereby renders a decision on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir (''Omar Al Bashir'').

**Background and submissions by the Republic of Chad**

1. Where applicable to the present case, the Chamber refers to the background in its *Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir* (''Decision on Malawi'').

2. On 6 March 2009 and 21 July 2010, respectively, the Registry transmitted to the States Parties to the Statute, at the request of the Chamber, the ''Request to all States Parties to the Rome Statute for the arrest and surrender of Omar Al Bashir''[1] and the ''Supplementary request to all States Parties to the Rome Statute for the arrest and surrender of Omar Al Bashir''[2] (''Cooperation Requests''). The Republic of Chad has been a State Party to the Statute since 1 January 2007 and was accordingly notified of the Cooperation Requests. It has already allowed Omar Al Bashir to enter its territory, around 21-23 July 2010, without arresting him. The Chamber informed the United Nations Security Council and the Assembly of States Parties of this visit in a decision rendered on 27 August 2010.[3]

3. The Registry informed the Chamber in its ''Report on the second visit of Omar Al Bashir to Chad'' dated 9 August 2011 (''First Report of the Registry'')[4] that, according to media reports, Omar Al Bashir had visited the Republic of Chad on 7 and 8 August 2011 for the purposes of attending the inauguration ceremony of Chad's Head of State, Idriss Deby Itno. In her note verbale, annexed to the First Report of the Registry, the Registrar reminded the Republic of Chad on 5 August 2011 that it had the ''[TRANSLATION] obligation to arrest and surrender to the Court persons against whom a warrant of arrest has been issued by the International Criminal Court, an obligation which applies as much for President Al Bashir as for any other person against whom a warrant of arrest has been issued by the Court''.[5]

4. On 18 August 2011, the Chamber rendered its *Decision requesting observations about Omar Al-Bashir's recent visit to the Republic of Chad,*[6] in which it requested the competent authorities of the Republic of Chad to submit observations no later than Friday, 9 September 2011, on the First Report of the Registry, in particular on their alleged failure to meet the obligation to comply with the Cooperation Requests issued by the Court.

5. In her confidential ''*Rapport du Greffe relatif aux observations de la République du Tchad*'' submitted on 9 September 2011 (''Second Report of the Registry''),[7] the Registrar informed the Chamber (i) that the Embassy of Chad in Brussels had transmitted the observations of the Ministry of Foreign Affairs to the Registry on 7 September 2011; (ii) that the Republic of Chad's observations proved to be in reference to the note verbale of 5 August 2011 transmitted by the Registrar in advance of Omar Al Bashir's visit to Chad and not to the Chamber's 18 August 2011 decision; and (iii) that, on 9 September 2011, the authorities of the Republic of Chad had indicated informally that they sought an extension of time to respond to the Chamber's 18 August 2011 decision.

6. On 21 September 2011, the Chamber rendered the *Decision amending the time limit for the submission of observations on Omar Al Bashir's recent visit to the Republic of Chad,*[8] in which it decided to extend until 30 September 2011 the time limit for the competent authorities of the Republic of Chad to submit their observations.

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7. On 30 September 2011, the Registry submitted its ''*Rapport du Greffe relatif aux observations de la République du Tchad*'',[9] classified as public with a public annex. In the annex (''Observations of the Republic of Chad''), the Republic of Chad submitted the following considerations:

> [TRANSLATION] Recalling the provisions of article 87(1) regarding requests for cooperation and legal assistance;
>
> Considering the common position adopted by the African Union in respect of the international warrant of arrest issued by the Prosecutor against Mr Omar Al Bashir;
>
> Considering further that in this case, as a member of the African Union, the Republic of Chad cannot accede to the Prosecutor's request and that, under regulation 109(3) of the Regulations, the Republic Chad is entitled to the opportunity to be heard;
>
> Therefore, the provisions of article 87(7) of the Statute referred to in report ICC-02/05-01/09 of 18 August 2011, which stipulate, ''Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'' are not triggered.[10]

**Applicable law and discussion by the Chamber**

8. The Chamber notes articles 13, 21, 27, 86, 87, 89 and 119 of the Statute and rule 195 of the Rules of Procedure and Evidence (''the Rules'').

9. At the outset, the Chamber notes that the Chadian authorities, although they received a warning from the Registry prior to the visit of Omar Al Bashir, nevertheless decided neither to respond to the Court nor to arrest the suspect. The Chamber thus concludes that the Republic of Chad failed to comply with its obligation under article 86 of the Statute to cooperate fully with the Court.

10. The Republic of Chad did not respect the sole authority of the Court to decide whether immunities are applicable in a particular case. This is established by article 119(1) of the Statute, which provides that ''[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court''. Moreover, rule 195(1) states:

> When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.

11. Therefore, the Chamber concludes that, in this respect, the Republic of Chad did not cooperate with the Court in order to resolve the matter, which it should have brought to the Chamber's attention, together with any available information, in order to assist the Chamber to make its decision.

12. Nonetheless, owing to the significance of the issues before the Court, the Chamber will decide the issue of the Republic of Chad's non-cooperation on the merits. The Republic of Chad does not state what position of the African Union it is referring to, but various African Union resolutions have required its members not to cooperate with the Court regarding the warrant of arrest issued against Omar Al Bashir.[11] The sole legal justification the African Union advances for why its position is compatible with the Statute is a reference to ''the provisions of article 98 of the Rome Statute of the ICC relating to immunities''.[12] The Chamber considers the specific provision referenced by the African Union to be article 98(1) of the Statute.

13. The Chamber notes that the Republic of Malawi also invoked the aforementioned position of the African Union to explain why it had not arrested Omar Al Bashir. In the Decision on Malawi, the Chamber held that the Republic of Malawi and the African Union could not rely on article 98(1) of the Statute. The Chamber includes herein the reasoning from the relevant paragraphs of the Decision on Malawi,[13] notably:

> 36. [ . . . ] the Chamber finds that the principle in international law is that immunity of either

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former or sitting Heads of State can not be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction [ . . . ]

37. The Chamber notes that there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State. The Chamber considers that Malawi, and by extension the African Union, are not entitled to rely on article 98(1) of the Statute to justify refusing to comply with the Cooperation Requests.

38. First, [ . . . ] immunity for Heads of State before international courts has been rejected time and time again dating all the way back to World War I.

39. Second, there has been an increase in Head of State prosecutions by international courts in the last decade. Only one international prosecution of a Head of State had been initiated when the judgment in the ''Arrest Warrant Case'' was rendered; this trial (Slobodan Milosevic) began only two days before this judgment was issued and its existence is not even referenced by the ICJ majority. Subsequent to 14 February 2002, international prosecutions against Charles Taylor, Muammar Gaddafi, Laurent Gbagbo and the present case show that initiating international prosecutions against Heads of State have gained widespread recognition as accepted practice.

40. Third, the Statute now has reached 120 States Parties in its 9 plus years of existence, all of whom have accepted having any immunity they had under international law stripped from their top officials. All of these states have renounced any claim to immunity by ratifying the language of article 27(2): ''[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising jurisdiction over such a person''. Even some States which have not joined the Court have twice allowed for situations to be referred to the Court by United Nations Security Council Resolutions, undoubtedly in the knowledge that these referrals might involve prosecution of Heads of State who might ordinarily have immunity from domestic prosecution.

41. Fourth, all the States referenced above have ratified this Statute and/or entrusted this Court with exercising ''its jurisdiction over persons for the most serious crimes of international concern''. It is facially inconsistent for Malawi to entrust the Court with this mandate and then refuse to surrender a Head of State prosecuted for orchestrating genocide, war crimes and crimes against humanity. To interpret article 98(1) in such a way so as to justify not surrendering Omar Al Bashir on immunity grounds would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute Malawi has ratified.

42. The Chamber considers that the international community's commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass. If it ever was appropriate to say so, it is certainly no longer appropriate to say that customary international law immunity applies in the present context.

43. [ . . . ] [T]he Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.

14. The Chamber is of the view that the Republic of Chad may not validly rely on article 98(1) of the Statute to justify its failure to comply with the Cooperation Requests. The Chamber therefore notes, in accordance with article 87(7) of the Statute, that the Republic of Chad has failed to comply with the Cooperation Requests contrary to the provisions of the Statute and has thereby prevented the Court from exercising its functions and powers under the Statute. The Chamber decides to refer the matter both to the United Nations Security Council and to the Assembly of States Parties.

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**FOR THESE REASONS, THE CHAMBER**

**NOTES**, in accordance with articles 86, 87(7) and 89 of the Statute, that the Republic of Chad: (i) failed to comply with its obligations to consult with the Chamber by not bringing the issue of Omar Al Bashir's immunity to the Chamber for its determination and (ii) failed to cooperate with the Court by failing to arrest and surrender Omar Al Bashir to the Court, thus preventing the Court from exercising its functions and powers under the Statute; and

**REFERS**, pursuant to regulation 109(4) of the Regulations of the Court, the present decision to the President of the Court for transmission to the Security Council, through the Secretary General of the United Nations, and to the Assembly of States Parties.

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

[signed]

**Judge Sanji Mmasenono Monageng**
**Presiding Judge**

[signed]

**Judge Sylvia Steiner**

[signed]

**Judge Cuno Tarfusser**

Dated this 13 December 2011

At The Hague, The Netherlands

ENDNOTES

1 ICC-02/05-01/09-7.

2 ICC-02/05-01/09-96.

3 ICC-02/05-01/09-109.

4 ICC-02/05-01/09-131-Conf.

5 ICC-02/05-01/09-131-Conf, Annex 2.

6 ICC-02/05-01/09-132.

7 ICC-02/05-01/09-133-Conf.

8 ICC-02/05-01/09-134-tENG.

9 ICC-02/05-01/09-135, with public annex 1.

10 ICC-02/05-01/09-135, annex 1, p. 3.

11 African Union, Assembly, ''Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) Doc. Assembly/AU/13(XIII)'', 3 July 2009, Assembly/AU/Dec.245(XIII) Rev. 1 (''3 July 2009 AU Decision''), para. 10; African Union, Assembly, ''Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV)'', 27 July 2010, Assembly/AU/Dec.296(XV), paras. 5-6; African Union, Assembly, ''Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX.CL/639(XVIII)'', 30-31 January 2011, Assembly/AU/Dec.334(XVI), para. 5; African Union, Assembly, ''Decision on the Implementation of the Assembly Decisions on the International Criminal Court -Doc. EX.CL/670(XIX)'', 30 June-1 July 2011, Assembly/AU/Dec.366(XVII) (''30 June-1 July 2011 AU Decision''), para. 5.

12 3 July 2009 AU Decision, para. 10; 30 June-1 July 2011 AU Decision Decision, para. 5.

13 Decision on Malawi, paras. 22-43.

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ICC-02/05-01/09-370-Anx1 16-07-2018 682/140

# INTERNATIONAL CRIMINAL COURT DECISIONS PURSUANT TO ARTICLE 87(7) FAILURE BY MALAWI & CHAD TO COMPLY WITH THE COOPERATION REQUESTS ISSUED BY THE COURT WITH RESPECT TO THE ARREST AND SURRENDER OF OMAR HASSAN AHMAD AL BASHIR & AFRICAN UNION RESPONSE*

[January 9, 2012]
+Cite as 51 ILM 415 (2012)+

**AFRICAN UNION** **UNIÃO AFRICAN** **UNION AFRICAINE**

**PRESS RELEASE Nº 002/2012**

**ON THE DECISIONS OF PRE-TRIAL CHAMBER I OF THE INTERNATIONAL CRIMINAL COURT (ICC) PURSUANT TO ARTICLE 87(7) OF THE ROME STATUTE ON THE ALLEGED FAILURE BY THE REPUBLIC OF CHAD AND THE REPUBLIC OF MALAWI TO COMPLY WITH THE COOPERATION REQUESTS ISSUED BY THE COURT WITH RESPECT TO THE ARREST AND SURRENDER OF**
**PRESIDENT OMAR HASSAN AL BASHIR OF THE REPUBLIC OF THE SUDAN**

**Addis Ababa, 9 January 2012 -** The African Union Commission has noted with grave concern the decisions ICC-02/05-01/09-139 and ICC-02/05-01/09-140 of 12 and 13 December 2011, respectively, of Pre-Trial Chamber I of the International Court (ICC) on the alleged failure of the Republic of Malawi and the Republic of Chad to comply with the cooperation requests issued by the ICC with respect to the arrest and surrender of President Omar Al Bashir of the Republic of Sudan.

In its decision on Malawi, and *mutatis mutandis* on Chad, the Chamber asserts to have found,

> '*in accordance with article 87(7) of the Rome Statute,* that the Republic of Malawi has *failed to comply with the cooperation requests contrary to the provisions of the Statute and has thereby prevented the Court from exercising its functions and powers under this Statute. The Chamber decides to refer the matter both to the United Nations Security Council and to the Assembly of States Parties.'*

With respect to the immunity of Heads of State in relation to requests for arrest and surrender, the Chamber noted that

> ''*there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State. The Chamber considers that Malawi, and by extension the African Union, are not entitled to rely on article 98(1) of the Statute to justify refusing to comply with the Cooperation Requests.''*

Following these Decisions of ICC Pre-Trial Chamber I, the African Union Commission expresses its deep regret that the decision has the effect of:

(i) Purporting to change customary international law in relation to immunity *ratione personae*;

(ii) Rendering Article 98 of the Rome Statute redundant, non-operational and meaningless;

(iii) Making a decision *per incuriam* by referring to decisions of the African Union while grossly ignoring the provisions of Article 23 (2) of the Constitutive Act of the African Union, to which Chad and Malawi are State Parties, and which obligate all AU Member States ''***to comply with the decisions and policies of the Union''.***

In this regard, the AU Commission wishes to point out that Article 27(2) of the Statute provides that ''Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person''. However, this Article

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27 appears under the part of the Statute setting out 'general principles of criminal law' and applies only in the relationship between the Court and the suspect. In the relationship between the Court and states, article 98(1) applies. This Article provides: ''The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity''.

As a general matter, the immunities provided for by international law apply not only to proceedings in foreign domestic courts but also to international tribunals: states cannot contract out of their international legal obligations vis-à-vis third states by establishing an international tribunal. Indeed, contrary to the assertion of the ICC Pre-Trial Chamber I, article 98(1) was included in the Rome Statute establishing the ICC out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute. This is because immunities of State officials are rights of the State concerned and a treaty only binds parties to the treaty. A treaty may not deprive non-party States of rights which they ordinarily possess. In this regard, it is to be recalled that the immunity accorded to senior serving officials, *ratione personae*, from foreign domestic criminal jurisdiction (and from arrest) is absolute and applies even when the official is accused of committing an international crime. The International Court of Justice (ICJ) made this clear in the *Arrest Warrant Case (Democratic Republic of Congo v. Belgium)*. The ICJ stated that *''it has been unable to deduce . . . that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.''*

The Security Council has not lifted President Bashir's immunity either; any such lifting should have been explicit, mere referral of a ''situation" by the UNSC to the ICC or requesting a state to cooperate with the ICC cannot be interpreted as lifting immunities granted under international law. The consequence of the referral is that the Rome Statute, including article 98, is applicable to the situation in Darfur.

Additionally, the African Union Commission expresses its total disagreement with the decisions of the Pre-Trial Chamber I which did not take cognisance whatsoever of the obligations of AU Member states arising from Article 23 (2) of the Constitutive Act of the African Union, to which Chad and Malawi are State Parties, and which obligate all AU Member States ***''to comply with the decisions and policies of the Union''***. Moreover, by decision Assembly/AU/Dec. 245(XIII) adopted by the 13th Ordinary Session of the Assembly of Heads of State and Government, the Assembly ***''Decide[d] that in view of the fact that the request by the African Union has never been acted upon (by UN Security Council), the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan''***. This decision adopted by the AU policy organs pursuant to the provisions of Rule 33 of the Rules of Procedure of the Assembly is binding on Chad and Malawi and it would be wrong to seek to coerce them to violate or disregard their obligations to the African Union.

The African Union Commission recalls that by virtue of their membership of the African Union, Chad and Malawi, and indeed all other African States parties to the Constitutive Act, have committed themselves under Article 4 of the Constitutive Act to ''*condemnation and rejection of impunity*'' and voluntarily negotiated the Rome Statute and joined the ICC with a view to enhancing the fight against impunity. Indeed, all Member States of the then Organization of African Unity were party to the adoption of decision CM/Dec.399 (LXVII) during the 67th Ordinary Session of the Council of Ministers held in Addis Ababa, Ethiopia from 25 to 28 February 1998, urging all Member States to support and participate in the Rome Process, along with a representative of the OAU General Secretariat, in the firm belief that the proposed international Criminal Court would be a unique and independent mechanism in the fight against impunity.

The African Union will continue to fight against impunity as required by Article 4 of the Constitutive Act and the relevant Assembly decisions and shall oppose any ill-considered, self-serving decisions of the ICC as well as any pretensions or double standards that become evident from the investigations, prosecutions and decisions by the ICC relating to situations in Africa. Indeed, the African Union believes that the fight against impunity is too important to be left to the ICC alone.

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The African Union believes that issues of peace and justice should be addressed comprehensively and in a holistic manner and will continue to pursue in respect of The Sudan the interconnected, mutually interdependent and equally desirable objectives of peace, justice and reconciliation. It also requests all African Union Member States and Friends of Africa to reject any draft resolution that may be tabled before the UN Security Council as well as the Assembly of the States Parties to the Rome Statute with the intention of sanctioning the Republic of Malawi and Chad.

**Addis Ababa, 9 January 2012**

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# The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case?

ejiltalk.org/the-african-unions-response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case/

Dapo Akande Published on February 8, 2012

After deciding the *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* case (about which I and others will have more to say on the blog soon), there is the prospect of the International Court of Justice (ICJ) being asked to decide another immunity case. At the summit of the Assembly of the African Union held last week in Addis Ababa, Ethiopia, African Heads of States and Heads of Government requested:

> "the [AU] Commission to consider seeking an advisory opinion from the International Court of Justice regarding the immunities of state officials under international law."

As has been the pattern over the past three or four years, the AU Assembly has, at its biannual meetings, adopted a number of decisions regarding cases at the International Criminal Court. In the latest meeting, the AU Assembly reiterated its request that the UN Security Council defer the proceedings against Sudanese President Bashir in accordance with Article 16 of the Rome Statute. It also " urge[d] all [AU] Member States to comply with [AU] Assembly Decisions on the warrants of arrest issued by the ICC against President Bashir of the Sudan pursuant to Article 23(2) of the [AU] Constitutive Act and Article 98 of the Rome Statute of the ICC." Those prior decisions had called on African States not to comply with the request by the ICC for the arrest and surrender of Bashir.

The AU Assembly's latest decision on the ICC proceedings are different from prior decisions in that this time around, there is no call for deferral of the ICC proceedings arising out of the situations in Kenya or in Libya (as had been called for in earlier decisions). This absence should be seen as improving the tone of the African reaction to ICC proceedings. It is now clear that the AU's objections, at least at present, are really only with respect to one case – the *Bashir* case. The other difference in the AU Assembly decision is the call for an advisory opinion from the ICJ on the immunities of State officials under international law. Although the AU decision does not make this clear, presumably what the AU wants is an opinion that would clarify the immunity (or otherwise) of State officials from prosecution by the ICC and from enforcement action taken by States acting at the request of the ICC. Given the context of the decision, it does not seem to be the case that the AU wants the ICJ to rule on the immunity of state officials from the jurisdiction of other States that are not acting at the behest of the ICC. In any case, the ICJ, in the *Arrest Warrant Case (DRC v Belgium),* has already set out its view on aspects of immunity of state officials from the jurisdiction of other States.

The ICC Pre-Trial Chamber ruled, just last December, on the immunity of President Bashir from ICC Prosecution and from arrest in ICC State parties (see my comments on those decisions here). Asking the ICJ to provide an advisory opinion on this issue would be akin to trying to appeal the decisions of the ICC Pre-Trial Chamber to the ICJ rather than to the

ICC Appeals Chamber. It would be an express invitation for judicial confrontation. I discuss below whether there is any real prospect of the ICJ rendering an advisory opinion on the immunity of State officials from ICC prosecution or arrest for the purposes of ICC prosecution. In my view, there is no legal bar to the Court deciding on this issue. The main obstacle would be whether African States can muster enough political support within the United Nations to get the request for an advisory opinion.

## AU Commission Press Release on ICC Pre-Trial Chamber's Decisions on Bashir's Immunity

Prior to the AU Summit, the AU Commission issued a press release on January 9 reacting to the decisions of the ICC regarding the immunity of Bashir. In the Press Release,

> "the African Union Commission expresses its deep regret that the decision has the effect of:
>
> (i) Purporting to change customary international law in relation to immunity *ratione personae*;
>
> (ii) Rendering Article 98 of the Rome Statute redundant, non-operational and meaningless;
>
> (iii) Making a decision per incuriam by referring to decisions of the African Union while grossly ignoring the provisions of Article 23 (2) of the Constitutive Act of the African Union, to which Chad and Malawi are State Parties, and which obligate all AU Member States 'to comply with the decisions and policies of the Union'."

With regard to point (1) the AU Commission takes exception to the ICC Pre-Trial Chamber's decision that "that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes." The AU Commission argues that:

> "As a general matter, the immunities provided for by international law apply not only to proceedings in foreign domestic courts but also to international tribunals: states cannot contract out of their international legal obligations vis-à-vis third states by establishing an international tribunal. Indeed, contrary to the assertion of the ICC Pre-Trial Chamber I, article 98(1) was included in the Rome Statute establishing the ICC out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute. This is because immunities of State officials are rights of the State concerned and a treaty only binds parties to the treaty. A treaty may not deprive non-party States of rights which they ordinarily possess. In this regard, it is to be recalled that the immunity accorded to senior serving officials, *ratione personae*, from foreign domestic criminal jurisdiction (and from arrest) is absolute and applies even when the official is accused of committing an international crime."

As I explained in my post in December commenting on the ICC decision, I agree with these points regarding the applicability of international law immunities before international tribunals. However, I have also argued that the ICC Pre-Trial Chamber could simply have said that the effect of the referral of the Darfur situation by the UN Security Council has the consequence that Sudan is bound by the Statute (including by the removal of immunity in Art. 27). The effect of this would mean that Sudan is to be regarded as being in the same position as a State party to the Rome Statute. In its press release, the AU Commission engages with this argument of mine, and disagrees with me. They argue that:

> "The Security Council has not lifted President Bashir's immunity either; any such lifting should have been explicit, mere referral of a "situation" by the UNSC to the ICC or requesting a state to cooperate with the ICC cannot be interpreted as lifting immunities granted under international law. The consequence of the referral is that the Rome Statute, including article 98, is applicable to the situation in Darfur.

## Can the ICJ Decide on Immunity of State Officials Sought by the ICC?

The ICC Pre-Trial Chamber's Decisions and the AU Commission response form the background to the AU summits call for an advisory opinion by the ICJ. The AU summit asks the AU Commission to consider seeking an advisory opinion from the ICJ. Under Article 96 of the UN Charter and Art. 65 of the Statute of the ICJ, only organs of the United Nations or UN specialised agencies may be authorised by the UN General Assembly to request advisory opinions. So the AU Commission cannot itself seek an advisory opinion from the ICJ. For a request to be made, it would most likely have to come from either the General Assembly or the Security Council. It is unlikely that the Security Council would seek an advisory opinion on this question since the advisory opinion is an attempt to do what the Security Council has thus far failed to do (to stop the case against Bashir). Any request would more likely come from the General Assembly, where African States might be able to muster greater support for an ICJ advisory opinion.

A significant issue that would arise in seeking an advisory opinion would be what question or questions should be put to the ICJ. Christopher Gevers in an interesting post at the War and Law blog notes that:

> "If an advisory opinion is sought it could address a broad range of legal issues such as (i) immunity before international courts under international law (although this was addressed obiter in the Arrest Warrant case, it might be further clarified), (ii) immunity under the Rome Statute, both generally and in respect of cooperation obligations on states in particular, and (iii) the effect (if any) of Security Council resolutions referring matters to the Court on (i) and (ii)."

Christopher also explores the different options for taking the matter ot the ICJ and notes that in addition to the advisory opinion route, "Sudan could bring a case against an ICC state party – in particular those countries subject to PTC decisions such as Kenya and Malawi." The problem with this option is that if the decision goes against Sudan, that State would be bound by the adverse decision.

A further option is that the matter is referred to the ICC Assembly of States Parties under Art. 119(2) of the Rome Statute under which any dispute relating to the interpretation or application of the ICC Statute, other than those concerning the judicial functions of the ICC, may be referred to the Assembly of States Parties. The Assembly may either seek to settle the dispute itself or make recommendations as to how it may be settled, including referral to the ICJ. One issue that arises here is whether the dispute should be regarded as concerning a judicial function of the ICC, in which case the Assembly does not have

competence to deal with it. In any case, the Assembly cannot itself refer a matter to the ICJ. All that this provision means is that the Assembly may recommend that disputing parties refer a dispute under the Rome Statute to the ICJ.

Assuming that a request for an advisory opinion is made by the UN General Assembly, the ICJ would undoubtedly have jurisdiction to render the opinion since the request would deal with a legal question. However, as the ICJ has stressed in several advisory opinions, the fact that it has jurisdiction to render an advisory opinion does not mean that it will. The Court has a discretion to refuse to render an advisory opinion since Article 65 of its Statute only says that it "may" give an advisory opinion requested of it. Though the Court has this discretion it is one that is very rarely exericised. *I think* I am right in saying that the ICJ has never exercised this discretion though the PCIJ did refuse to render an opinion in the *Eastern Carelia* case. The Court has stated in many cases that giving advisory opinions requested by UN organs represents the Court's participation in the activities of the UN and, that in principle, such a request should not be refused. The ICJ has gone on to say that there must be "compelling reasons" for it to exercise this discretion. Even if the request came from the General Assembly, the fact that Bashir case arises out of a Security Council referral to the ICC or that the case would involve interpretation of UN Security Council resolutions referring the situation would not be sufficient grounds for the Court to refuse to give the opinon (see the *Kosovo Advisory Opinion*).

One issue that might lead the Court to refuse to render an opinion on this question might be considerations of judicial comity. In other words, it remains to be seen whether the Court would be happy to be used as a form of appellate court over the ICC. Some might feel it inappropriate for the ICJ to be used in this way. There have been different views among ICJ judges as to whether steps can and should be made to put the ICJ at the apex of a judicial structure involving international courts. Judge Guillaume, former ICJ President, was of the view that steps should be taken to allow other internationl courts to request advisory opinions from the ICJ on question of general international law (Guillaume 'The Future of International Judicial Institutions' (1995) 44 ICLQ 848 and 'Advantages and Risks of Proliferation: A Blueprint for Action' (2004) 2 Journal of Intl Criminal Justice 300). However, Judge Higgins, also a former ICJ President, thought that the suggestion of institutionalising the ICJ as a sort of appeals court (or court to whom others referred questions of general international law) was unworkable (see Higgins, "A Babel of Judicial Voices? Ruminations from the Bench", (2006) 55 ICLQ 791). It remains to be seen whether there would be political will to use the ICJ in this way. However, if such will did exist, I would not have thought that it is inconsistent with the ICJ's role as a Court of Justice for it to decide on matters that have been decided on by other tribunals. For one thing, the ICJ would be able to decide on the matter from the perspective of customary international law without being specifically tied to the provisions of the Rome Statute.

# The ICC Decisions on Chad and Malawi

## On Cooperation, Immunities, and Article 98

Dire Tladi*


## Abstract

*The decision of the African Union (AU) not to cooperate with the International Criminal Court (ICC) with respect to President Al Bashir has attracted attention particularly as far as the political aspects of the decision are concerned. While the AU decision is overtly political, it raises an important legal question, namely the relationship between Articles 98 and 27 of the ICC Statute, in particular in situations referred to the Court by the Security Council. On 12 and 13 December 2011, the Court had the opportunity to clarify this relationship when it delivered decisions on non-cooperation against Malawi and Chad. Unfortunately, while the Court recognized the tension between Article 98 and Article 27, it did little to resolve the conflict. Instead the Court proceeded to decide the cases as if Article 98 was not included in the Statute. This article considers possible approaches to resolving the tension between Article 98 and 27 of the Statute. It argues that this tension should be resolved through a deliberate process of interpretation using the ordinary meaning of words, in good faith, and in accordance with the object and purpose of the Statute. It considers that the oft-cited argument that referral by the Security Council places the situation country in a position analogous to that of states parties thus nullifying Article 98 is unconvincing. It proposes that closer attention to the different types of immunities in Article 98 is the key to understanding the relationship between Article 27 and Article 98.*


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## 1. General Remarks

On 12 and 13 December 2011, the Pre-Trial Chamber of the International Criminal Court ('ICC' or the 'Court') delivered two decisions on the failure, respectively, of Malawi and Chad to comply with the cooperation request issued by the ICC for the arrest and surrender of Omar Hassan Al Bashir ('*Malawi* and *Chad* decisions', '*Malawi* decision' or *'Chad* decision').[1] In both cases the Court held that Malawi and Chad ('requested states') were, respectively, in breach of their obligations to cooperate with the Court under the ICC Statute.

The decisions of the Court come in the midst of the much publicized tension between the African Union ('AU') and the ICC over, inter alia, the enforcement of the arrest warrant against the President of Sudan, Omar Hassan Ahmed Al Bashir.[2] The decisions also come at a time when there is contestation between the adherents of state sovereignty promoting the respect for immunity, on the one hand, and the proponents of a new value-based international law championing the fight against impunity, on the other.[3] The AU-ICC tension is reflected in, inter alia, the various decisions of the AU on non-cooperation of African states with the ICC and the calls for cooperation by the ICC Assembly of States Parties ('ASP').[4] The contestation over values referred to above is best illustrated in the varying opinions of the judges of the International Court of Justice ('ICJ') in the *Arrest Warrant* case.[5] The ICC Statute also reflects this

1 Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court With Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December 2011; Décision rendue en application de l'article 87-7 de le Statut de Rome concernant le refus de la République du Tchad d'accéder aux demandes de coopération délivrées par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 13 December 2011.

2 See D. Tladi, 'The African Union and the International Criminal Court: The Battle for the Soul of International Law', 34 *South African Yearbook of International Law* (2009) 57–69.

3 See e.g. B. Stephens, 'Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses', 44 *Vanderbilt Journal of Transnational Law* (2011) 1163–1183, at 1172; S. Humes-Schulz, 'Limiting Sovereign Immunity in the Age of Human Rights', 21 *Harvard Human Rights Journal* (2008) 105–142.

4 The various African Union (AU) decisions on non-cooperation are contained in e.g. AU Assembly Decision on the Meeting of States Parties to the Rome Statute of the International Criminal Court, Assembly/AU/Dec.245(XIII), 3 July 2009, § 10, AU Decision on the Progress Report of the Commission on the Implementation of AU Decision on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court, Assembly/AU/Dec.296(XV), 27 July 2010, § 5 and AU Assembly Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.397(XVIII), 30 January 2012, §§ 6 and 8. For ICC ASP decisions on cooperation see e.g. ICC Resolution on Cooperation, ICC-ASP/10/Res.2, 20 December 2011 and ICC Resolution on the Strengthening of the International Criminal Court and the Assembly of States Parties, ICC-ASP/10/Res.5, 21 December 2011, § 6. See also ICC Kampala Declaration, Declaration RC/Decl.1, 1 June 2010, § 7 and generally the Kampala Declaration on Cooperation, Declaration RC/Decl.2., 8 June 2010.

5 Cf. *Case Concerning the Arrest Warrant of 11 April 2000 (DRC v. Belgium)*, judgment of 14 February 2002, ICJ Reports (2002) 3 (*'Arrest Warrant'*). See in particular the dissenting opinions of Judges Oda, Al-Khasawneh and Van den Wyngaert, respectively, and the joint separate opinion

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contestation in that while Article 27 provides that immunity is not a bar to the Court's jurisdiction, Article 98(1) carves out an exemption from cooperation based on immunity. While the contestation over values is very much policy-driven and the AU-ICC tension has very clear political undertones, both nevertheless are grounded in legal doctrinal complexities.

The *Malawi* and *Chad* decisions provided the Court with an opportunity to deliver an authoritative interpretation of the obligations of states parties under the ICC Statute consistent with current international law and the values underpinning it. The Court's decisions, however, fail to interact with and respond to the very real legal question raised by the failure of Malawi and Chad to cooperate with the request of the ICC to arrest and surrender Al Bashir. The result of the failure to address the legal question undermines the legitimacy of the Court and creates the risk that the Court will be seen as a political tool whose legal judgments are grounded in political expediency rather than in law.[6]

The purpose of this article is to assess the two decisions and to provide an alternative interpretation taking into account the context in which the decisions were given, including the AU-ICC tensions as well as the contestation over values. Furthermore, an evaluation of the decisions is presented, including pointing at the flaws which flow from the complete disregard of Article 98 of the Statute.

## 2. The AU and the ICC on a Collision Course

The AU-ICC tension revolves around the indictment of Al Bashir, a sitting African head of state, by the ICC. The investigation by the Prosecutor of the ICC leading to the eventual issuance of an arrest warrant was done pursuant to United Nations Security Council Resolution 1593 (2005) which referred the

of Judges Higgins, Kooijmans and Buergenthal. See also *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, iudgment of 3 February 2012 available online at http://www.icj-cij.org/docket/files/143/16883.pdf (visited 5 December 2012) ('*Germany v. Italy*'). See in particular the dissenting opinions of Judges Cançado Trindade, Yousuf and Judge ad hoc Gaja.

6 See AU Commission Press Release on the Decisions of the Pre-Trial Chamber of the ICC on the Alleged failure by the Republics of Chad and Malawi to Comply with the Cooperation Request issued by the Court with respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of Sudan, 9 January 2012 in which the Commission declares that the AU shall 'oppose any ill-considered, self-serving decisions of the ICC, as well as any pretensions or double standards that become evident from the investigations, prosecutions and decisions by the ICC relating to situations in Africa'. For an interesting analysis of the role of politics in the work of the ICC see S.M.H. Nouwen and W.G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', 21 *European Journal of International Law* (*EJIL*) (2011) 941–965 and D. Kaye, 'Who is Afraid of the International Criminal Court: Finding the Prosecutor Who Can Set it Straight', 90 *Foreign Affairs* (2011) 118–129.

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situation in Darfur to the ICC.[7] In the resolution the Security Council decided that 'the Government of Sudan and all other parties to the conflict in Darfur, *(sic)* shall cooperate fully' and at the same time 'urge[d] all states and concerned regional and other international organizations to cooperate fully' with the ICC.[8]

The ICC circulated a request to cooperate with the ICC in the arrest and surrender of Al Bashir on 6 March 2009 and 21 July 2010 ('requests for cooperation').[9] Under the ICC Statute, states parties have a legal obligation to cooperate with the Court to arrest and surrender persons against whom an arrest warrant has been issued where the Court so requests.[10]

Already in 2008, even before the issuance of the arrest warrant, the AU Peace and Security Council had made known its displeasure at the ICC investigations against the President of Sudan and called for a process 'that does not impede or jeopardize efforts aimed at promoting lasting peace'.[11] To this end the Communiqué famously called for the Security Council to use the powers granted by Article 16 of the Statute to defer proceedings against Al Bashir.[12] In July 2009 the AU Summit adopted the following decision:[13]

> In view of the fact the [Article 16] request by the African Union has never been acted upon, the AU member states shall not cooperate pursuant to the provision of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender President Omar Al Bashir of The Sudan.[14]

Given the political and policy message underlying the AU's calls for an Article 16 deferral and non-cooperation by African states — i.e. the peace and justice debate and the neo-colonialism insinuation laced in the arguments — it is tempting to assess the validity of the AU requests solely from political and policy perspectives.[15] However, such an approach may conceal the fact that

7 See SC Res. 1593 (2005). Art. 13(b) ICCSt. makes provision for the exercise of jurisdiction where the Security Council, acting under Chapter VII, refers a situation.

8 SC Res. 1593 (2005), § 2.

9 See Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Situation in Darfur* (ICC-02/05-01/09-7 1/6 EO PT), Registry, 6 March 2009 and Supplementary Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Situation in Darfur* (ICC-02/05-01/09-96 1/6 RH PT), Registry, 12 July 2010.

10 See Art. 89(1) ICCSt.

11 See AU Peace and Security Council Communiqué PSC/Min/Comm. (CXLII) 21 July 2008 § 10. See also §§ 4 and 11.

12 *Ibid.*, § 11.

13 For a detailed chronology of events leading to the AU decision see Tladi, *supra* note 2, at 59 *et seq.*

14 AU/Dec 245 (XIII), *supra* note 5, § 10. Contrary to popular belief, the Security Council did in fact consider the AU's request. In 2008, South Africa and Libya proposed an Art. 16 deferral in a draft resolution on the extension on the UN Mission in Darfur (UNAMID). France, the United Kingdom and the United States did not support the amendment however. As a compromise, SC Res. 1828 (2008) noted the request of the AU, the concerns raised by members of the Council 'regarding potential developments subsequent to the application of the Prosecutor' and also expressed its 'intention to consider these matters further.'

15 See e.g. Tladi, *supra* note 2.

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the AU request is based on a meritorious legal basis — whether one accepts the politics behind it or not. The AU position is based on the customary international law rules relating to immunity which, it appears from Article 98(1), are recognized by the ICC Statute. Article 98(1) of the Statute provides that the

> Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under customary international law with respect to the State or diplomatic immunity of a person or property of third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

On the other hand, the ICC Statute is equally explicit about the irrelevance of official capacity for the exercise of its jurisdiction.[16] In particular, Article 27(1) provides that an individual's capacity as, for example, a 'Head of State or Government' shall 'in no case exempt a person from criminal responsibility'. Furthermore, the ICC Statute provides that immunities 'shall not bar the Court from exercising its jurisdiction' over persons with such immunities.[17] While Articles 27 and 98 are not necessarily in conflict, there is definitely tension between them.[18]

The tension between Articles 27 and 98(1) generally mirrors a contestation over values.[19] The new vision of international law promotes concepts such as *ius cogens* and *erga omnes* obligations, adopts an aggressive approach against impunity and views the promotion of immunities as an obstacle to the effective fight against impunity.[20] The preservation of immunities, on the other hand, reflects an attachment to state sovereignty and the promotion of stable relations between sovereigns. [21]

It was against this background that President Al Bashir attended a Summit of the Common Market for Eastern and Southern Africa (COMESA) in Malawi in October 2011 and a Summit of the Sahel-Saharan States in Chad in August

16 Art. 27 ICCSt.

17 Art. 27(2) ICCSt.

18 See also D. Akande, 'The Legal Nature of the Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', 7 *Journal of International Criminal Justice* (*JICJ*) (2009) 333–352, at 337.

19 See on the tussle between the two visions of international law D. Tladi, 'South African Lawyers, Values and New Vision of International Law: The Road to Perdition is Paved with the Pursuit of Laudable Goals', 33 *South African Yearbook of International Law* (2008) 167–184. See also E. Jouannette, 'Universalism and Imperialism: The True-False Paradox of International Law', 18 *EJIL* (2007) 379–409; J. Dugard, 'The Future of International Law: A Human Rights Perspective – With Some Comments on the Leiden School of International Law', 20 *Leiden Journal of International Law* (2007) 729–739; J. Petman, 'The Problem of Evil and International Law', in J. Petman and J. Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff Publishers, 2003) 111–140, at 111.

20 See *Arrest Warrant*, *supra* note 5, especially dissenting opinion of Al-Khasawneh, at § 7, dissenting opinion of Judge Van den Wyngaert, at § 27 and the joint separate opinion of Higgins, Kooijmans and Buergenthal, §§ 73 and 74.

21 See *Arrest Warrant*, *supra* note 5, especially at §§ 53, 54 and 55. See also International Law Commission, *Second report on the immunity of State officials from foreign criminal jurisdiction* (report by Special Rapporteur Roman Anatolevich Kolodkin), UN Doc. A/CN.4.631, 10 June 2010 ('*Second Report*'), §§ 17.

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2011. These visits lead to the decisions of 12 and 13 December 2011. The *Malawi* and *Chad* decisions provided the Court with an opportunity not only to respond to the legal questions posed by the AU's decision on non-cooperation, but to do so in the context of the broader contestations in international law. However, as is argued below, the Court failed to address the legal question raised by the non-compliance of the two states to arrest Al-Bashir with the result that the Court missed an opportunity to contribute to the clarification and development of international law.

## 3. Overview of the *Chad* and *Malawi* Decisions

The Court begins, as a preliminary issue, by pointing out that in both situations the requested states could have informed the ICC about any impediment to complying with the request to cooperate.[22] By not even responding to the Court (nor complying with the request for cooperation), the requested states were formally in breach of their obligations irrespective of the validity of any arguments that could be raised concerning Article 98(1) or the AU decisions. The Court could have ended on this technical note. To its credit, the Court recognized the significance of the issues before it and decided to address the merits of the argument put forward by the requested states.

With respect to the merits, the Court summarized the submissions by the relevant states as follows: First, the requested states accorded Al Bashir immunity from arrest in line with principles of international law; second, the requested states are members of the African Union and, consistent with the AU decisions on non-cooperation, could not enforce the arrest warrant against Al Bashir. The two arguments are in reality intertwined since immunities of heads of state under international law are, as described above, respected in the context of cooperation in Article 98(1) of the Statute and the AU policy decisions, which are not legally binding per se, are based on Article 98(1) of the ICC Statute. What the Court determines to be two arguments can thus probably be seen as one argument, namely that in accordance with Article 98(1) of the Statute, there is no obligation on the requested state to comply with the request of the ICC as acceding to the request would require violation of the immunities owed to Al Bashir under customary international law.

The Court's attitude towards the argument — and the fundamental flaw in its reasoning — is apparent when the Court recalls that it '*has already* rejected such an argument' when it issued the decision on the arrest warrant for Al Bashir and held that under Article 27 of the Statute 'the current position of Omar Al Bashir as Head of a state which is not party to the Statute, has *no effect on the Court's jurisdiction over the present case*.'[23] Continuing along the same lines, the Court states that it rejects the argument that, with respect to

22 *Malawi decision*, *supra* note 1, § 10. For its conclusions in the *Chad* decisions, the Court relies on its reasoning in the *Malawi decision*. See in this regard *Chad* decision, *supra* note 1, § 13. For this reason, reference will be made only to the *Malawi* decision.

23 *Malawi* decision, *supra* note 1, § 14 (emphasis added).

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states that are not party to the Statute, 'international law affords immunity to Heads of States in respect of proceedings before international courts'.[24] For this conclusion, the Court cites the Commission on the Responsibility of the Authors of the First World War, the Nuremberg and Tokyo Tribunals, the UN ad hoc Tribunals for Rwanda and Yugoslavia and the *Arrest Warrants* case.[25]

Having decided that international law does not afford immunity to heads of state in respect of proceedings before international courts, the Court then concedes that 'there is an inherent tension between articles 27(2) and 98(1) of the Statute'.[26] The Court nonetheless considers that the requesting states and the AU 'are not entitled to rely on article 98(1) of the Statute to justify' their non-cooperation and for this conclusion the Court advances four reasons.[27] First, the Court asserts that immunity for heads of state before international courts has been rejected time and time again.[28] Second, the Court notes that there has been an increase in prosecutions against heads of state in international tribunals.[29] Third, by virtue of Article 27(2), 120 states parties to the ICC Statute have renounced claims of immunity for heads of state.[30] Finally, the Court observes that the requested states themselves have ratified the ICC Statute (and Article 27(2)) and to interpret Article 98(1) of the Statute to justify failure to cooperate with the arrest and surrender of the Al Bashir 'would disable the Court and the international criminal justice in ways completely contrary to the Statute'.[31]

Consequently the Court determines that customary international law on immunity is not applicable to the case against Al Bashir and, in particular, that customary international law 'creates an exception to Heads of State immunity when international courts seek a Head of State's arrest for the commission of international crimes'.[32] The Court asserts that the unavailability of immunities with respect to prosecutions applies to any act of cooperation.[33]

## 4. Observations on the (Lack of) Interpretation of Article 98

### *A. Articles 27 and 98(1) are not Coextensive*

While I do not share the AU's interpretation of Article 98(1), I find the Court's response to the argument disappointing and unsatisfactory. The response

24 *Malawi* decision, *supra* note 1, § 18.
25 See *Malawi* decision, *supra* note 1, §§ 22–37.
26 *Malawi* decision, *supra* note 1, § 37.
27 *Ibid.*
28 *Malawi* decision, *supra* note 1, § 38.
29 *Malawi* decision, *supra* note 1, § 39.
30 *Malawi* decision, *supra* note 1, § 40.
31 *Malawi* decision, *supra* note 1, § 41.
32 *Malawi* decision, *supra* note 1, §§ 42 and 43.
33 *Malawi* decision, *supra* note 1, § 44.

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from the Court is fundamentally flawed and in essence avoids the legal question raised by the invocation of Article 98. The fundamental flaw in the reasoning of the Court is revealed early when the Court declares that 'it has already rejected' the argument in its decision of 4 March 2009.[34] This suggests that in the Court's assessment, the legal question is whether it can exercise jurisdiction over a head of state. Whether the Court can exercise jurisdiction over a head of state is a question definitively disposed of in Article 27 of the ICC Statute. However, the legal question raised by the AU decisions on non-cooperation with the ICC is not about the Court's exercise of jurisdiction but rather about the scope of a request for cooperation given that Article 98(1) provides that the Court 'may not proceed with a request for surrender' if compliance with the request would cause the requested state to act inconsistently with its obligations on immunity. Thus if the request for cooperation requires that immunity be set aside contrary to Article 98 (1), the request would be flawed and there would be no duty to cooperate.[35]

None of the sources cited by the Court are authority for the view that a state has an obligation to arrest and surrender a head of state of a non-state party to an international tribunal.[36] These sources, rather, are concerned with the exercise of jurisdiction over heads of state and not with the duty to cooperate for arrest and surrender purposes. The statement by the ICJ relied on by the Court that immunity does not imply impunity since persons with immunity could still be tried by international courts cannot, for example, be taken to imply anything about the duty of states to arrest an indicted individual.[37] While the ICJ refers to Article 27 of the ICC Statute in its dictum, no reference is made to Article 98(1) confirming that the ICJ is not concerned at all with the obligation to arrest and surrender. Similarly, the ICTY decisions in the *Milošević* and *Furundžija* cases and the Special Court for Sierra Leone decision in the *Taylor* case referred to by the Court were concerned, not with the duty to cooperate to facilitate the exercise of jurisdiction, but rather with the question of immunity as a defence from jurisdiction.

34 *Malawi* decision, *supra* note 1, § 14.

35 Of course, the requested state is not entitled to itself make the final determination that the request is invalid. This is a matter to be determined in accordance with the consultations envisaged in Art. 97 ICCSt., failing which the Court can make a final determination in accordance with Art. 119. As noted above, the Court could, in the *Malawi* and *Chad* decisions, simply have decided that by not cooperating or initiating consultations with the Court, the two states had breached their obligations. See in this regard, W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2010), at 1039.

36 For its conclusions, the Court cites, in addition to the *Arrests Warrants* case, Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998; Decision on Preliminary Motions, *Milošević* (IT-99-37-PT), Trial Chamber, 8 November 2001; Decision on Preliminary Motion Based on Lack of Jurisdiction, *Taylor* (SCSL-2003-1-AR72(E)), Appeals Chamber, 31 May 2004, amongst others. For an even stronger case for limiting the impact of immunities for crimes of international concern, see the dissenting opinion of Judge Van den Wyngaert and the joint separate opinion of Judges Higgins, Buergenthal and Kooijmans in *Arrest Warrant*, *supra* note 5. See also Stephens, *supra* note 3, at 1172.

37 See *Arrest Warrant*, *supra* note 5, § 61.

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The fundamental flaw of the Court's approach is thus that it treats the subject of the unavailability of immunity as a defence before the ICC under Article 27 of the Statute as co-extensive with the question of immunity as a limit to cooperation under Article 98(1). The subject of Article 98(1), to the extent that it refers to immunities, is obviously related to the subject of Article 27 but it is not the same.[38] There is obvious tension between the two provisions, which the Court concedes.[39] However instead of addressing the tension between Articles 98(1) and 27, the Court simply proceeds to decide the case as if Article 27 is dispositive of the issue, ignoring completely Article 98(1). The Court asserts, for example, that the requested states cannot raise immunities as they ratified Article 27 of the Statute, as if the requested states did not, at the same time, ratify Article 98.

The complete disregard of Article 98(1) of the ICC Statute by the Court cannot be remedied by the Court's assertion that the unavailability of immunities with respect to prosecution 'applies to cooperation'[40] — the argument simply does not follow. By the same token, the Court's statement that to interpret Article 98(1) as allowing the requested states to refuse to arrest and surrender heads of state 'would disable the Court and the international criminal justice' similarly does not justify ignoring Article 98(1).[41] The approach of the Court amounts, in fact, to imagining Article 98(1) out of the ICC Statute. For better or worse, Article 98(1) is part of the ICC Statute and the duty of the Court, as the judicial institution charged with the interpretation of the Statute, is to give meaning to all the provisions of the Statute and not only those provisions supportive of conclusion favourable to a particular objective, no matter how laudable it may be.[42] The approach of the Court is dangerous and may embolden those who view a value-laden approach to law as 'as a facade for politics, [or] a tool for the powerful'.[43]

### *B. AU Interpretation of Article 98 does not Render the ICC Statute Meaningless*

Before providing an alternative interpretation, it is useful to dispel a myth put forward by the Court to justify the failure to account for Article 98(1) in

38 In this regard see AU Press Release on Malawi/Chad decision, *supra* note 6, in which the AU, correctly, observes that Art. 27 applies in the relationship between the suspect and the Court while Art. 98 applies as between the Court and relevant states. See D. Akande, 'International Law Immunities and the International Criminal Court', 98 *American Journal of International Law* (*AJIL*) (2004) 407–433, at 420.

39 *Malawi* decision, *supra* note 1, § 37.

40 *Malawi* decision, *supra* note 1, § 44.

41 *Malawi* decision, *supra* note 1, § 41.

42 See on the need, in judicial decision-making, to revise, sometimes reject 'preliminary conclusions before settling upon definitive ones'. W.M. Reisman 'A Judge's Judge: Justice Florentino P Feliciano's philosophy of the Judicial Function', in S. Charnovitz, D.P. Steger and P. van den Bossche (eds), *Law of the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (CUP, 2005) 3–10, at 5.

43 See R. Higgins, 'The Benign First Mate', in Steger, Peter and den Bossche (eds), *ibid.*, 11–13, at 11.

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determining the obligations of Chad and Malawi under the ICC Statute. The Court implies that it has not accounted for Article 98(1) of the Statute because to do so would 'disable the Court and international criminal justice'.[44] The argument may suggest that interpreting Article 98(1) in the manner implied by the AU decisions and put forward by the requested states may render the ICC Statute meaningless. Put differently, this assertion seems to be suggesting that the AU interpretation of Article 98(1) would lead to an absurd or unreasonable result within the meaning of Article 32 of the Vienna Convention on the Law of Treaties ('Vienna Convention').[45] However, the approach of the Court is legally problematic for several reasons. First, the application of Article 32 of the Vienna Convention presupposes that the normal rules of interpretation under Article 31 have resulted in an absurd or unreasonable interpretation. Nowhere in the *Malawi* or *Chad* decisions does the Court undertake any interpretation of Article 98(1) of the Statute and so the Court cannot reasonably reach the conclusion that an interpretation under Article 31 of the Vienna Convention would lead to an absurd or unreasonable conclusion. Second, even assuming that the interpretation of Article 98(1) proposed by the AU leads to an absurd or unreasonable result, Article 32 does not mandate the disregard of a provision but rather permits the interpreter to have recourse to supplementary means of interpretation such as the *travaux préparatoires* in order to establish an alternative interpretation. The Court, however, does not engage in the use of any supplementary means of interpretation to come to an alternative interpretation of Article 98(1). It simply makes a decision as if Article 98(1) was not part of the ICC Statute.

It is also simply not accurate to suggest that the interpretation of Article 98(1) offered by the African Union would render the ICC Statute meaningless. Such a broad brush assessment would suggest that the *sole* purpose of the ICC Statute was the prosecution of heads of state or other individuals with immunities specified under Article 98. The ICC cases against Kony, Lubanga Dyilo, Ntagnda, Abu Garda and Banda amongst other cases involving individuals without immunity illustrate that the Court's usefulness is not limited to the prosecution of person's with immunities. Moreover, even with the interpretation of Article 98(1) proposed by the African Union there are still avenues for the arrest, surrender and subsequent prosecution of heads of state. In particular in cases of Security Council referrals, the Security Council could decide that all states have an obligation to cooperate with the ICC in the arrest and surrender of suspects such that states would have the obligation to arrest and surrender heads of state notwithstanding the AU interpretation of Article 98(1). Under Article 25 read with Article 103 of the Charter, an obligation to cooperate with the Court flowing from a Security Council resolution would supersede the provisions of Article 98(1) of the ICC Statute and whatever right

44 *Malawi* decision, *supra* note 1, § 41.

45 Art. 32 of the Vienna Convention on the Law of Treaties allows recourse to supplementary means to determine the meaning of a provision where the normal rules of interpretation would lead an absurd or unreasonable result.

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not to cooperate that could be inferred from it.[46] While the Council is unlikely in the near future to agree to such universal obligation to cooperate due to the opposition of the United States, Russia and China, Council dynamics cannot serve as justification for interpreting the ICC Statute in a manner that ignores the existence of Article 98(1).

While I believe the judgment delivered by the Court, and in particular the approach to Article 98(1) of the Statute, is unsatisfactory, I do not necessarily share the interpretation proposed by the AU and advanced by the requested states — although I must hasten to add that it is a legally plausible interpretation. As the Court recognized there is a tension between Article 27 and Article 98(1) of the ICC Statute. Article 27 is intended to ensure that official capacity and immunities can neither be used as justification for avoiding responsibility nor for preventing the Court from exercising jurisdiction. Article 98(1) of the Statute, on the other hand, limits the avenues for surrendering individuals to the Court to enable the exercise of jurisdiction precisely on the grounds of immunity. There is, however, no conflict between the two provisions because the mere failure to secure presence does not impact on the criminal responsibility of the individual nor does it grant a head of state a legal defence against the jurisdiction of the Court. While the Court fails to adequately account for Article 98(1) of the Statute, it is argued below that a proper interpretation of Article 98 would still not justify the non-cooperation of Malawi and Chad under the Statute.

### *C. Article 98 does not Justify the Non-Cooperation of Malawi and Chad*

The starting point for interpreting Article 98(1) of the Statute should be Article 31 of the Vienna Convention.[47] Thus Article 98(1) of the Statute should be interpreted 'in good faith' and 'in accordance with the ordinary meaning' of the words contained therein, 'in their context and in light of [the Statute's] object and purpose'.[48] Moreover the interpretation should take into account 'relevant rules of international law' such as those on the scope of immunities.[49] If,

46 For a discussion of the UN's 'supremacy clause' see R. Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter', 57 *International and Comparative Law Quarterly* (2008) 583–612. See also I. Canor, 'The European Courts and the Security Council: Between *Dédoublement Fonctionnel* and Balancing Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci', 20 *EJIL* (2009) 870–887, especially at 873.

47 See *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, judgment of 20 April 2010, ICJ Reports (2010) 14, § 65. While the Vienna Convention has not entered into force, it is generally considered as a codification of customary international law. See, e.g. § 18 of the *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment of 13 December 1999, ICJ Reports (1999) 1045.

48 Art. 31(1) Vienna Convention. See e.g. *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections*, judgment of 1 April 2011 available at http://www.icj-cij.org/docket/files/140/16398.pdf (visited 5 December 2012), § 136 where the Court employs the different methods of interpretation.

49 Art. 31(3)(c) Vienna Convention.

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having applied these rules of interpretation, the meaning of Article 98(1) remains ambiguous or unclear, or leads to absurd or unreasonable results, then recourse could be had to supplementary methods of interpretation.[50] What is clear is that there are numerous, legally plausible interpretations of Article 98(1) that could be arrived at on the basis of the customary rules of interpretation.

The difficulty with the Court's approach is that not only does it not account for Article 98(1) of the Statue but it also ignores academic scholarship setting out alternative interpretations of Article 98.[51] Already in 2004, even before the Security Council had referred the situation in Darfur to the ICC, Dapo Akande considered the complex relationship between Article 27 and Article 98.[52] First, Akande adopts the view that Article 98(1) of the Statute protects officials of non-states parties but not officials of states parties.[53] In his view, to hold that officials of states parties are also protected by Article 98(1) would be 'to deprive the Statute' of its purpose.[54] Secondly, Akande argues that the 'removal' of immunity in Article 27 of the Statute applies not only to the relationship between the accused and the ICC but also to the relationship between states parties and the ICC in respect of cooperation.[55] Put differently by agreeing to Article 27 of the ICC Statute, states parties waived the immunities of their officials such that, not only is the official barred from pleading immunity, but states parties themselves are barred from claiming the immunity of their officials in the context of Article 98. Finally, Akande advances the practice of states, within the meaning of Article 31(b) of the Vienna Convention, which he suggests supports the idea that Article 98(1) applies only to states parties.[56]

The ill that Akande attempts to address by the extensive interpretation of Article 27, i.e. the object of Article 27 would be defeated if states parties could claim protection of their officials under Article 98, could be addressed by interpreting 'third states' in Article 98 as referring to non-states parties so that

50 Art. 32 Vienna Convention.

51 P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' 7 *JICJ* (2009) 315–332; Akande, *supra* note 18; T.M. Dralle, 'The Legal Nature of Security Council Referrals to the ICC and Muammar Gaddafi's Immunity from Arrest', available at http://tilman-dralle.de/pdf/Gaddafi.Immunity.International.Criminal.Court.Security.Council.Referral.July2011.pdf (visited 20 February 2012); Akande, *supra* note 38; C. Kreβ, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute', in Bergsmo and Ling (eds), *State Sovereignty and International Criminal Law* (Torkel Opsahl Academic EPublisher, 2012) 223–265. See also D. Liu, 'Has Non-Immunity for Heads of State Become a Rule of Customary International Law?' in Bergsmo and Ling (eds), *ibid.*, 55–74, especially at 71, although the latter contribution is concerned primarily on the question as a defence.

52 Akande, *supra* note 38.

53 Akande, *supra* note 38, at 423 *et seq.* especially at 425. See also Akande, *supra* note 18, at 340 *et seq.*

54 Akande, *supra* note 18, at 424.

55 *Ibid.*, at 425.

56 *Ibid.* As examples he refers to the legislation of the United Kingdom, Canada, Malta, Ireland, Samoa and South Africa.

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states parties would be barred from relying on Article 98 in respect of nationals of states parties.[57] The second argument of Akande ignores the plain meaning of Article 27 which clearly applies to defences, substantive or jurisdictional, that an individual *may raise before the ICC*. It does not, in any way, address the relationship between states nor does it address the relationship between the ICC and states parties. More importantly, once the Court is seized with jurisdiction under Article 13, the jurisdiction of the Court is not affected by nationality of the defendant and applies regardless of the basis of the jurisdiction. It is precisely for this reason that the Security Council, both in Resolution 1593 on Darfur and Resolution 1970 on Libya, decided to expressly exclude nationals and *officials* of non-states parties other than those of the situation countries referred to the Court from the jurisdiction of the ICC.[58] On the third argument, by Akande's own admission only a minority of states parties have legislation limiting the applicability of Article 98(1) to states parties. Indeed, the vast majority of legislation implementing the ICC Statute does not, for the purposes of immunities, make a distinction between nationals of states parties and nationals of non-states parties.[59]

An important point to make is that Akande's argument on Article 98(1) is essentially the same one advanced by the AU and both are legally plausible interpretations. Under this argument, Article 98(1) protects officials of non-state parties and since Bashir is the head of non-state party, he would be protected from arrests under Article 98(1). This approach, in essence, *a priori* exempts officials of non-state parties from being the subject of a cooperation requests. In a more recent contribution specifically directed at the case of Al Bashir, however, Akande concludes that there is an obligation on states parties to cooperate with the Court in the arrest of Al Bashir on account of the fact that the situation in Sudan was referred to the ICC by the Security Council.[60] Crudely put, Akande's argument is that, because the situation was referred to the Court by the Security Council, the 'Statute, including Article 27, must be regarded as binding on Sudan' and Sudan should be treated as state party.[61] The construction that the Security Council referral makes Sudan a state party to the ICC does not follow. The effect of the Security Council is to confer *on the ICC the mandate* to investigate and, if necessary, prosecute those deemed to have committed Statute crimes in Darfur — put differently, the referral grants the Court jurisdiction under Article 13 and does nothing more. As expressed

57 See Schabas, *supra* note 35, at 1041. Cf. Kreβ, *supra* note 51, at 233 who argues that 'third states' in Art. 98(1) refers to any state other than the requested state.

58 See SC Res. 1970 (2011), at § 6 and SC Res. 1593 (2005), at § 6.

59 See e.g. the Mauritius International Criminal Court Act of 2011 (in particular section 14), the Kenya International Crimes Act of 2004 (in particular section 62), the Trinidad and Tobago International Criminal Act of 2006 (in particular section 66). The South African Implementation of the Rome Statute Act of 2002, which Akande refers to as an example supporting the distinction, does not even make provision for the Art. 98(1) exclusion.

60 See Akande, *supra* note 18.

61 See Akande, *supra* note 18, at 340 *et seq.* especially at 342. See also Kreβ, *supra* note 51, at 242. See for a contrary position, Gaeta, *supra* note 51 and Dralle, *supra* note 51.

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above, once the Court has jurisdiction under Article 13, the nationality of any defendant becomes irrelevant, with the effect that indeed, Article 27 would be applicable to Al Bashir but not because Sudan becomes a party to the Statute but rather because the Court has jurisdiction under Article 13. However, because Article 27 is not coextensive with Article 98(1), the fact that Al Bashir cannot himself raise immunities under Article 27 does not negate the applicability of Article 98(1).

The interpretation that a referral by the Security Council of a situation in a non-state party does not make the latter into a state party is supported by the text of both Security Council Resolution 1593 on Darfur and Security Council Resolution 1970 on Libya — it bears reminding that 10 members of the Council were party to the ICC Statute when both resolutions were adopted. In both resolutions, the Security Council *creates* specific obligations on Sudan and Libya respectively to cooperate with the Court.[62] If indeed the members of the Council, including the 10 states parties, interpreted Article 13(b) as having the effect of making the situation country a state party it would hardly have been necessary for the Council to *decide* that the Sudan had an obligation to cooperate. The Council could have, as it did with respect to states parties in Resolution 1970, simply reaffirmed or recognized the existing duty to cooperate or even remain silent. It is apposite to mention, in the context of what Security Council Resolution 1593 does or does not do, that paragraph 5 of the resolution creates an obligation on Sudan to cooperate but not on other states, including states parties. The obligation on states parties to cooperate flows from the ICC Statute and the extent and limits of such an obligation must be determined on the basis of an interpretation of the ICC Statute, which brings us back to Article 98.

While I do not share Akande's assessment of the relationship between Article 98(1) and Article 27 — which *a priori* excludes officials of non-states parties from being the object of a cooperation of arrest to arrest and surrender except in situations of Security Council referrals — as well as his assessment that a Security Council referral effectively turns a non-state party into a state party, I do accept that on both counts his views are plausible. What distinguishes Akande's approach from the Court's is that Akande is aware of the complexities and attempts to address them through methodical, multi-layered interpretation. The Court does not do this. Moreover, the Court did not have to reinvent the wheel and could have accounted for the complexities by reflecting on the academic literature on the subject, including Akande's contribution and the contribution of those with different views such as Gaeta.[63] I take a different approach from Akande simply because the interpretation he offers does not sufficiently take into account the text of the ICC Statute.

The ordinary meaning of Article 98 of the ICC Statute prohibits the Court from making a request for cooperation from states if such a request would require the requested state to act inconsistently with its obligations on state

62 See SC Res. 1970, at § 4 and SC Res. 1593, at § 2.
63 See literature cited, *supra* note 51.

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or diplomatic immunities under customary international law. In the context of the present case, the Court may not request either Malawi or Chad to arrest Al Bashir if arresting him would require Malawi and Chad to be in breach of their obligations on state or diplomatic immunities under customary international law. The key question to consider, therefore, is whether Chad and Malawi have an obligation under customary international law on state or diplomatic immunity not to arrest Al Bashir. Article 98, of course, has to be read in the context of the ICC Statute as a whole, including Article 27. Moreover, the provision has to be interpreted in a manner that does not negatively impact on the object and purpose of the Statute, namely ending impunity and holding those responsible for the commission of grave crimes accountable.[64]

That Al Bashir, as head of state of Sudan, is entitled to heads of state immunity under customary international law cannot be contested.[65] Notwithstanding the impression that may be created by the *Chad* and *Malawi* decisions, it is also not contested that under customary international law the said immunities are absolute in the sense that while in office, a head of state is immune both for personal and official acts.[66] Of relevance to the interpretation of Article 98(1), however, is whether the phrase 'diplomatic immunity' has the precise meaning as 'heads of state immunity'. As Judge Oda observed in his dissenting opinion in the *Arrest Warrant* case, diplomatic immunity 'is the immunity which an individual *holding diplomatic status*' enjoys.[67] The ICJ, in the *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* ('*Mutual Assistance* case'), appears to suggest that diplomatic immunities are the same as heads of state immunities.[68] Similarly, the ICJ in the *Arrest Warrant* case likens immunities of 'diplomatic and consular agents' to immunities of 'certain holders of high ranking office in a State'.[69]

However, the differences between 'individuals holding diplomatic status' or diplomats and ministers of foreign affairs, as pointed out by Judge ad hoc Van den Wyngaert in her dissenting opinion in the *Arrest Warrant* case, are equally applicable to heads of state.[70] First, while diplomats are accredited by, reside

64 The Preamble to the ICC Statute, for example, provides that the states parties, in adopting the Statute, were mindful of the 'unimaginable atrocities' that had been suffered by humanity in the last century and were determined to 'put an end to impunity' for such atrocities.

65 See *Arrest Warrant*, *supra* note 5. See also the *Institut de Droit International*'s 2001 Resolution on Immunities from Jurisdiction and Execution of Heads of State and Government in International Law.

66 See *Arrest Warrant*, *supra* note 5. See also *Second Report*, *supra* note 21.

67 Dissenting opinion of Judge Oda, *Arrest Warrant*, *supra* note 5, at § 14 (emphasis added).

68 See *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, judgment of 4 June 2008, ICJ Reports (2008) 177 ('*Mutual Assistance*'), § 174 where the Court 'recalls that the rule of customary international law reflected in Article 29 of the Vienna Convention on Diplomatic Relations, while addressed to diplomatic agents, is necessarily applicable to Heads of State.' See especially separate opinion of Judge ad hoc Yusouf, at § 34. See also *Second Report*, *supra* note 21, § 37 where the Special Rapporteur opines that the scope of heads of state immunity 'is the same' as diplomatic immunity.

69 See *Arrest Warrant*, *supra* note 5, at § 51.

70 Dissenting opinion of Judge Van den Wyngaert, *Arrest Warrant*, *supra* note 5, at § 15.

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and exercise their functions in the territory of the receiving state, this is not the case for heads of state. Furthermore, a receiving state may decide whether or not to accredit a diplomat, but will have no say on whether an individual becomes a head of another state. Moreover, while the majority judgments in the *Arrest Warrant* and the *Mutual Assistance* cases could be read to suggest that heads of state immunities have the same content as diplomatic immunity, they do not necessarily imply that the concept of diplomatic immunity is the same as head of state immunity. A closer reading of both judgments suggests that the Court refers to diplomatic immunities by way of analogy to other forms of immunity.[71] In the *Arrest Warrant* case, for example, the Court recognizes that the Vienna Convention on Diplomatic Relations, which is reflective of customary international law on diplomatic immunities, while providing 'useful guidance on certain aspects of the question of immunities', does not contain provisions relevant to immunities of Foreign Ministers, which, according to the judgment is based on heads of state immunity.[72] Similarly, the Court in *Mutual Assistance* case makes a clear distinction between state immunity, diplomatic immunity and 'other personal immunities' with the latter referring to immunities of high-ranking officials such as heads of state.[73]

The International Law Commission, when adopting the Draft Articles on Diplomatic Intercourse and Immunities was fully aware that while there was a relationship between diplomatic immunities and other forms of immunities, diplomatic immunities were covered by a different set of rules.[74] That the concepts of 'diplomatic immunities' and 'heads of state immunities' are, though related, different is also reflected in the separate treatment in Draft Article 3 of the ILC's Draft Articles on Jurisdictional Immunities of States and their Property.[75] Diplomatic immunities are granted to diplomatic agents to enable them to perform their functions in the receiving state.[76] Heads of state immunity, on the other hand, derives from the fact that heads of state *were seen as* the personification of the state itself and his or her immunity is therefore based on status.[77]

71 See also I. Brownlie, *Principles of Public International Law* (6th edn., OUP, 2003), at 322 similarly states that while diplomatic immunities and immunities 'of sovereigns and states' developed separately 'the two doctrines are closely linked'.

72 *Arrest Warrant*, *supra* note 5, § 52.

73 *Mutual Assistance*, *supra* note 68, § 193.

74 See ILC *Yearbook of the International Law Commission: Vol II* (1958), § 51.

75 See Art. 3, ILC Draft Articles on Jurisdictional Immunities of States and Their Property (1991), with Commentaries.

76 See L.S. Farhangi, 'Insuring Against Abuse of Diplomatic Immunity', 38 *Stanford Law Review* (1986) 1517–1547, at 1517. See also J. Dugard, *International Law: A South African Perspective* (3rd edn., Juta and Company Ltd, 2005), at 257.

77 See joint separate opinion of Higgins, Buergenthal and Kooijmans, *Arrest Warrant*, *supra* note 5, § 81; dissenting opinion of Judge Van den Wyngaert, *Arrest Warrant*, *supra* note 5, § 16. See also K.R. O'Donnell, '*Certain Criminal Proceedings in France (Republic of Congo v. France)* and Head of State Immunity: How Impenetrable Should the Immunity Veil Remain?' 26 *Boston University International Law Journal* (2008) 375–416, at 376.

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State immunity, also provided for in the Article 98(1) exemption, is similarly distinct from heads of state immunity.[78] Heads of state immunities are personal immunities attaching to the person of the head of state by virtue of the office he or she holds, while state immunity attaches to the state itself. Moreover, while international law accepts that heads of state immunity is absolute — although precisely what 'absolute' means is somewhat unclear — states make a clear distinction between acts *jure imperii* and acts *jure gestionis* for the purposes of state immunity, with the former acts benefiting from immunity and the latter not benefitting from immunity.[79] This clear substantive difference suggests that it would be inappropriate to treat state immunity as being the equivalent of heads of state immunity. The immunities of Al Bashir can thus also not be said to be covered by the phrase state immunity.

Given that Article 98 is most closely associated with arrest and surrender, the relevance of immunity attaching to the state may not be obvious — as one scholar asked, under what circumstance could sovereign state immunity be violated by an ICC request on cooperation?[80] The implication behind the question was that state immunity must be given a meaning other than sovereign state immunity. Leaving aside that this interpretation would be at odds with both the ordinary meaning of the text and object and purpose of the Statute, it should be recalled that Article 98(1) speaks not only of arrests but also of 'assistance' which could include, for example, assistance in the forfeiture of assets or even provision of information under Article 93 of the Statute. It is not impossible, as was arguably the case in the situation in Libya, that the assets of the state are indistinguishable from the assets of the individual such that the freezing and attaching of the assets of the individual could raise questions of sovereign state immunity.

Claus Kreβ, while acknowledging the distinction between state immunity and personal immunity, asserts that *for the purposes* of Article 98 the distinction is inapplicable.[81] Kreβ advances three arguments for this proposition. First, he argues that state immunity applies primarily in civil proceeding while Article 98 operates in 'the framework of criminal proceedings'.[82] Second, he suggests that the fact that Article 98 applies to 'immunity of a person' makes applicability of state immunity in the classical sense inapplicable to Article 98.[83] Finally, he contends that to accept the distinction

78 *Mutual Assistance*, *supra* note 68, § 193. See also *Samantar v. Yousuf*, 130 S.Ct. 2278 (2010) as discussed in Stephens, *supra* note 3 and S. Knuchel, 'State Immunity and the Promise of *Jus Cogens*', 9 *Northwestern Journal of International Human Rights* (2011) 149–183. See also J Finke, 'Sovereign Immunity: Rule, Comity or Something?' 21 *EJIL* (2011) 853–881 on state immunity.

79 See Draft Arts 10–17 of the ILC Draft Articles on Jurisdictional Immunities of States and Their Property. See also Dugard, *supra* note 76, at 239 and Brownlie, *supra* note 71, at 323.

80 Question from the floor posed by Vincent Nmehielle during the presentation of this paper.

81 Kreβ, *supra* note 51, at 236 *et seq.*

82 *Ibid.*

83 *Ibid.*

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between state and personal immunity in the context of Article 98(1) 'would have the odd consequence that the most powerful international law immunity, and so the one most likely to give rise to the conflict of duties that Article 98(1) of the Statute seeks to avoid … remain uncovered.'[84] Leaving aside that none of these arguments, on their own or read together, would be sufficient reason from departing from the clear text of Article 98(1), each argument raises problems. First, while it is true that the ICC Statute provides a framework for criminal proceedings, as explained above, the possibility of assets freeze as the subject of a cooperation request makes state immunity in the classical sense relevant. With respect to the second argument, it should be borne in mind that Article 98(1) refers to 'State or diplomatic immunity of a person *or property of* third state.' While the drafting is clumsy, and this applies even under Kreβ's construction, the 'property' qualifies 'state immunity' and applies to questions such as assets freeze or the provision of information. Finally, with respect to the third argument, it should be recalled that immunities of high ranking officials, whilst the most 'powerful' in international law, are also the most controversial such that while the ILC has been able to produce Draft Articles on other forms of immunities, it has not been able (yet) to produce Draft Articles on immunities on these types of immunities. Indeed, the argument only serves to buttress the point that the immunities covered in Article 98(1) are those for which Conventions based on the work of the ILC have been elaborated.[85]

As Stephens notes, the various categories of immunities differ.[86] Reference to one category should not be assumed to include another. Article 98(1) of the ICC Statute includes both state and diplomatic immunity but excludes so called immunities of high-ranking officials. If the intention of the drafters was to broadly include all immunities it would be unnecessary to qualify the phrase immunities with 'state or diplomatic'. If Article 98(1) does not cover heads of state immunity, then it cannot be said that the request to arrest and surrender Al Bashir would require the requested state to act inconsistently with its obligations under customary international law on state or diplomatic immunity. This interpretation of Article 98(1), based on the ordinary meaning of the phrase 'state or diplomatic immunity', is consistent with a contextual interpretation, taking into account Article 27 and the object and purpose of the Statute, namely to end impunity and hold those responsible for the most egregious crimes accountable. There is, given the clear inclination of the ICC Statute against immunities as fully described by the Court, no reason to apply a broad interpretation of the phrase 'state or diplomatic immunity' to include immunities of heads of state.

84 *Ibid.*

85 See e.g. United Nations Convention on Jurisdictional Immunities of States and their Property (2004) and the Vienna Convention on Diplomatic Relations (1961).

86 Stephens, *supra* note 3, at 1165.

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The narrow interpretation of 'state or diplomatic immunity' can also be reconciled with the drafting history of the ICC Statute.[87] It appears that Article 98 was not the subject of too much negotiation – this certainly appears to be the case for the phrase 'state or diplomatic immunity'. As Schabas observes, 'Article 98 "did not absorb too much negotiation time" and "was not considered to be of utmost sensitivity by the participants" '.[88] In what is perhaps a slight overstatement, Schabas adds definitively that there is 'nothing in the Official Records of the Conference to assist in construing' Article 98.[89] Similarly, Bassiouni only identifies two versions of the current Article 98, namely the current text and draft Article 90 *quater*.[90]

While there is *little* in the official records to guide in the interpretation of Article 98, there are some helpful indicators. The text transmitted to the Rome Conference by the ad hoc committee on the establishment of the International Criminal Court provided options for consideration by the Rome Conference on justifications for non-cooperation.[91] The first option provided that there would be no exceptions to the duty to cooperate. The second option consisted of several grounds for denying a request for cooperation, including that 'compliance with the request would' put the requested State Party 'in breach of an existing [international law][treaty] obligation undertaken to another [state][non-state Party].'[92] While the text does not show that much consideration was given to the types of immunity, the two options do show that a primary concern to states was how wide or narrow the provision should be. During the Rome Conference, some states argued that there should be no

87 Unfortunately, there is no standard *travaux préparatoire* of the ICC Statute. Summary UN records (available on the Official Document System) of the Rome Conference cover only the plenary debates and main committee discussions. A researcher trying to trace the development of a provision often has to try to piece these together on the basis of unsystematic and incomplete records of the evolution of the text. Although there are a number of publications dedicated to the negotiating history, these are not sufficiently comprehensive to qualify as *travaux*. See in this regard R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to the International Criminal Law and Procedure* (2nd edn, CUP, 2010) at 148 who state: 'The lack of standard *travaux préparatoire* [on the Rome Statute] means those seeking for help with meaning of a difficult or controversial provision of the Statute will have to place more reliance than would normally be the case on commentaries and books about the ICC: if these records are the recollections of the negotiators at the conference they are the nearest thing *travaux* that we have …'. Excellent examples of useful books and commentaries in this regard include Schabas, *supra* note 35; M.C. Bassiouni, *The Legislative History of the International Criminal Court. Vol 2: An Article by Article Evolution of the Statute* (Brill, 2005) and R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Springer, 1999).

88 Schabas, *supra* note 35, at 1037 (footnotes omitted). Similarly, Kreβ, *supra* note 51, at 232 notes that in Rome 'there was simply no time' for a debate on immunities and cooperation.

89 *Ibid.*, at 1038.

90 Bassiouni, *supra* note 87, at 703 *et seq.* The text of draft Art 90*quater* is identical to the current text of Art. 98.

91 Draft Art. 90(2) of the Draft Statute for the International Criminal Court (A/Conf.183/2/Add.1).

92 Draft Art. 90(2) (option 2) of the Draft Statute, *ibid.*

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exceptions to the duty to cooperate.[93] Many states stressed the importance of a restrictive approach to exceptions and, in particular, stressed that exceptions should be specifically enumerated.[94] The calls for the broadest possible system of cooperation coupled with the insistence on limited and specified grounds for refusing cooperation further lends support to a restrictive interpretation of Article 98(1), including the phrase 'state or diplomatic immunity'. Thus, what is not expressly included should not be read into Article 98(1).

### *D. The Conflict between Statute Obligations and Obligations under General International Law*

While the interpretation I have proposed above may resolve the conflict between Articles 27 and 98(1) and addresses the obligations of states parties under the Statute, it does raise another complex problem concerning the relationship between the obligation of the requested states to arrest and surrender Al Bashir under Article 89 of the Statute (since the Article 98 exception is inapplicable) and the customary international law obligations owed by the requested states to Sudan to respect the immunities of its head of state. Resolving the internal conflict between Articles 27 and 98(1) of the ICC Statute does not resolve this question of the normative conflict between a treaty obligation and a customary obligation.

While a treaty norm *can* prevail over a pre-existing customary international law norm, this would apply as between the parties to the Statute.[95] As between state parties the conflict between the obligation to arrest and surrender under Article 89 of the Statute and the obligation to respect the immunities of head of state are resolved by applying tools for resolving conflicts between conflicting obligations such as *lex posterior derogat priori*.[96] These rules however, cannot be applied to customary obligations owed to non-states parties. This leads to the unsatisfactory situation that the requested states owe an obligation

93 See e.g. the statement of the Czech Republic stressing that the importance of cooperation necessitated that 'no exceptions should be allowed' from the duty to cooperate (A/Conf.183/SR.3). See also the statement of the Netherlands (A/Conf.183/SR.6).

94 See e.g. the statement of Peru which stressed the broadest possible cooperation (A/Conf.183/SR.3). Similarly, Austria stated that a 'mandatory system of cooperation was a prerequisite' and that 'any ground for refusal would have to be explicitly enumerated' (A/Conf.183/SR.4). Japan also stressed the need for a 'clear definition of the grounds on which a request by the Court' could be declined (A/Conf.183/SR.20).

95 See e.g. C. Greenwood, 'Sources of International Law: An Introduction', available online at untreaty.un.org/cod/avl/pdf/ls/Greenwood.outline.pdf (visited 25 December 2012). See also P. Malanczuk, *Akehurst's Modern Introduction to Modern International Law* (7th edn., Routledge, 1997), at 56. Cf. D. Tladi and P. Dlagnekova, 'The Will of State, Consent and International Law: Piercing the Veil of Positivism', 21 *South Africa Public Law* (2006) 111–122, at 116 and P. Sands, 'Sustainable Development: Treaty, Custom and the Cross-Fertilization of International Law', in A. Boyle and D. Freestone (eds), *International Law and Sustainable Development* (OUP, 1990) 39–60, at 50.

96 See Malanczuk, *supra* note 95, at 56.

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under the ICC Statute to arrest and surrender Al Bashir while at the same time owing an obligation to Sudan to respect the immunities of Al Bashir.

The conflict between the obligation to arrest and surrender, on the one hand and the obligation to respect the immunities of Al Bashir on the other is reflective of contestation over values outlined earlier.[97] There are, of course, always possibilities for resolving these conflicts and developing hierarchies between the norms.[98]

The first possible approach, accepting the classical notion of international law as a bundle of bilateral rights and obligations between sovereigns, would postulate that the ICC Statute has not affected *at all* the rights and obligations persisting between states parties and non-states parties. Thus regardless of the obligation to arrest and surrender Al Bashir under Article 89 of the Statute, the requested states remain under an obligation under customary international law not to arrest him. The legal options open to states parties under this scenario include engaging in consultations with the Court under Article 97, breaching their obligations under the ICC Statute, or violating the immunity of heads of state owed to the non-state party resulting in state responsibility. The practical approach open to states parties under this approach would include the approach currently favoured by many African states, namely not inviting the indicted head of state to the territory of states parties — or inviting him but encouraging him not accept the invitation.

Yet another approach, still under the classical bundle of rights and obligations approach, could have the opposite effect. Classical international law sees customary international law, like treaty law, as based on the will of the state.[99] If this is true then surely states can withdraw their consent to a custom or at least modify their consent such that the obligation to respect the immunities of heads of state is inapplicable to cooperation with international tribunals.[100] This withdrawal of consent would not just be illustrated by the ratification of the ICC Statute by 120 states — close to two-thirds of the membership of the United Nations — but would include all the events and authorities cited in the Court's decision in the *Malawi* and *Chad* decisions.[101]

97 See literature cited, *supra* note 19. See further J.H.H. Weiler and A.L. Paulus, 'The Structure of Change in International Law or is there a Hierarchy of Norms in International Law?' 8 *EJIL* (1997) 545–565, at 562 and J.A.C. Salcedo, 'Reflections on the Existence of a Hierarchy of Norms in International Law', 8 *EJIL* (1997) 583–595, at 587. Also see joint separate opinion of Higgins, Kooijmans and Buergenthal, *Arrest Warrant*, *supra* note 5, §§ 73, 74 and 75, dissenting opinion of Al-Khasawneh also in *Arrest Warrant*, *supra* note 5, § 4 and the dissenting opinion of Judge Van den Wyngaert, *Arrest Warrant*, *supra* note 5, §§ 23, 27, 28.

98 Cf. M. Koskenniemi, 'Hierarchy in International Law: A Sketch', 8 *EJIL* (1997) 566–5812.

99 See famously *SS Lotus Case (France v. Turkey)*, 1927 PCIJ Ser. A no. 10, at 18 where the Permanent Court of International Justice stated that the rules of international law 'emanate from their own free will as expressed in Conventions and Usages generally accepted as expressing the principles of law'.

100 See Tladi and Dlagnekova, *supra* note 95. See also S. Hall, 'The Persistent Spectre: Natural Law, International Order and the limits of Legal Positivism', 12 *EJIL* (2001) 269–307, at 283.

101 See *Malawi* decision, *supra* note 1, §§ 22–35 where the Court considers, inter alia, First World War Commission on the Responsibility of Authors of the War, the Nuremburg and Tokyo

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Another approach, which would assert the new value-laden approach to international law, would highlight that the prevention of international crimes such as genocide falls within the remit of *ius cogens* resulting in *erga omnes* obligations. These obligations necessarily trump the lower order obligation to respect immunity.[102] The argument that the *ius cogens* nature of international crimes can trump rules relating to immunity has been rejected by the International Court of Justice, although in respect of immunities of the state and not personal immunities.[103] Finke, for example, asserts that this argument too easily accepts that the duty to respect immunity itself is not *ius cogens*.[104] The argument, to the extent that it suggests that the transition from a state-centred idea of international law to a value-based idea is complete, may be overly optimistic. Nonetheless, to fail to take into account the implications of *ius cogens*, would also reflect an unrealistic assumption that international law is not in the midst of a transformation.

Yet another approach, which recognizes that while international law is now more multi-form and characterized by the pursuit of the common good and values, it is still essentially state-centric and operates within the framework of sovereignty, might call for a solution seemingly in line with the majority judgment and the joint separate opinion of Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case. The majority decision in the *Arrest Warrant* case could be read to suggest that once the holder of immunity *ratione personae* leaves office, then he is no longer entitled to the cover of protection offered by immunities.[105] From the perspective of adherents to the customary international law obligations, the solution would be unsound as immunities of heads of state are said to be absolute with respect to all acts performed while in office. At the same time, this solution leaves the state party in the unenviable position of having to decide which of competing obligations to violate in the meantime — or simply to avoid inviting the indicted head of state since there is no *legal* obligation to invite.

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Tribunals and the Yugoslavia and Rwanda Tribunals. For a more detailed assessment, including literature, see dissenting opinion of Judge Van den Wyngaert, *Arrest Warrant*, *supra* note 5, § 27.

102 Cf. Dissenting opinion of Judge Van den Wyngaert, *Arrest Warrant*, *supra* note 5, § 28. See also Salcedo, *supra* note 97.

103 See *Germany v. Italy*, *supra* note 5, § 95. See dissenting opinion of Judge Yousuf, §§ 21, 22 and 23 as well as generally, Judge Cançado Trindade's dissenting opinion. See Finke, *supra* note 78, at 867 *et seq.* See also D. Akande and S. Shah, 'Immunities of State Officials, International Crimes and Foreign Courts', 21 *EJIL* (2011) 815–852, at 833 *et seq.*

104 Finke, *supra* note 78, at 868. This notion, however, would probably go against the very essence of what Alfred Von Verdross had in mind with the idea of 'forbidden treaties' in the 1930s. See A. Von Verdross, 'Forbidden Treaties in International Law: Comment on Professor Garner's Report on "The Law of Treaties" ', 31 *AJIL* (1937) 571–577.

105 See *Arrest Warrant*, *supra* note 5, § 61 where the Court states that 'a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of *acts committed during that period of office in private capacity*.'

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## 5. Concluding Remarks

The *Malawi* and *Chad* decisions gave the ICC an opportunity to address a complex legal question while at the same time contributing to the development of international law relating to immunities in the context of the fight against impunity. The Court, however, failed to undertake a rigorous assessment of the law relating to immunity and Article 98(1). Instead the Court chose to focus on the uncontroversial — at least for states parties — Article 27, and resorted to restating well-known developments on the position of heads of state before international courts and tribunals. What was needed was a rigorous interpretation of Article 98(1) of the Statute, an assessment of its relationship with Article 27, and an analysis of its interaction with general international law on immunities. Instead the Court relayed general developments relating to the criminal jurisdiction of international tribunals without interacting with the complex legal issues raised. The Court's choice not to consider fully the implications of Article 98(1) is all the more perplexing given the existence of a wealth of literature on the subject.

The *Malawi* and *Chad* decisions, however, do not only represent a missed opportunity but also provide those opposed to the ICC with ammunition against the Court and the fight against impunity, more generally. The AU has described the decisions as 'ill-conceived' and 'self-serving',[106] suggesting that they were based not on objective determination of the law but rather on a predetermined intention to arrive at a (politically-) convenient decision. Indeed, this only increases the possibility that the Court will be seen as an active participant in political battles and as such as willing to ignore even the clear text of its own constitutive instrument to achieve the political objectives set for it.

106 See AU Press Statement, *supra* note 6.

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# Al-Bashir & the ICC: The Problem of Head of State Immunity

Asad G. Kiyani*

## Abstract

This article considers the law of head of State immunity through an analysis of the indictment of Sudanese President Omar al-Bashir by the International Criminal Court (ICC). Contrary to most commentaries, this essay argues that al-Bashir remains protected by head of State immunity, and that ICC jurisdiction over him can only be maintained through one of two controversial claims: either that the Security Council can override customary international law rules of treaties and immunities, or that the law of immunities already provides an exception that invalidates al-Bashir's protection. This article provides a detailed explanation of why both propositions are unsustainable and require considerable revision of public international law. While the desire to prosecute al-Bashir is understandable, the ICC's legal arguments actually threaten the Court's ability to protect victims by alienating some States Parties and prompting those States and others to reduce co-operation with the Court. It concludes by suggesting that the Court's arguments represent a problematic assertion of its position as an institution of global governance.

## I. Introduction

1. In spite of its noble aspirations, international criminal law has not been exempted from regular warnings about the danger of international judicial institutions

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abandoning the rule of law.[1] This concern has been raised again with the contentious indictment of Sudanese President Omar al-Bashir by the International Criminal Court (ICC).[2] This controversy arises because, for all the agreement that al-Bashir *should* be prosecuted,[3] there is little agreement on *why* the ICC has the authority or jurisdiction to do so.[4] In an effort to bring some order to this widespread uncertainty, this article

1 Two important pieces in this body of literature that are of relevance to the positions taken in this article are Georg Schwarzenberger, The Problem of an International Criminal Law, 3 Curr Leg Probs (1950), 263, and Bernhard Graefrath, Leave to the Court What Belongs to the Court: The Libyan Case 4 EJIL (1993), 184. Schwarzenberger argued that international criminal law was a contradiction in terms, and the post-war military tribunals were merely "world politics in disguise". Graefrath argued that the imposition of sanctions against Libya for its failure to surrender two suspects in the 1988 Lockerbie bombing of Pan Am Flight 103, violated the treaties and rules of international law that ought to have governed the Security Council and International Court of Justice.

2 Al-Bashir is alleged to have helped design, co-ordinate and implement crimes including: the forcible transfer of hundreds of thousands of civilians; the rape of thousands of women; torture; mass killings; and genocide. See Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (4 March 2009) (First Bashir Warrant) and Second Decision on the Prosecutor's Application for a Warrant of Arrest (12 July 2010) (Second Bashir Warrant).

3 In its initial decision, the Pre-Trial Chamber (PTC) emphasized that the Chapter VII authority of the Security Council was its basis for jurisdiction. See First Bashir Warrant, above n.2, paras.40–45. Two years later, a differently constituted PTC (two of the three judges had not participated in the first decision) made only a single, one-line mention of the Security Council, but spent 22 paragraphs arguing that it had jurisdiction over al-Bashir through an entirely separate rule of customary international law. See Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Pre-Trial Chamber I, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (12 December 2011) (Malawi Decision), paras.22–43 (Security Council reference para.36).

4 Two articles published consecutively in one issue of a law journal highlighted the uncertainty by presenting two competing arguments—both of which the PTC adopted (see above n.3). Paola Gaeta argued that the ICC only had jurisdiction because, as a rule of customary international law, head of State immunity did not protect perpetrators of international crimes before international courts. See Paola Gaeta, Does President Al Bashir Enjoy Immunity From Arrest?, 7 J. Int'l Criminal Justice (2009), 315. In the companion piece, Dapo Akande stated that only the Security Council's exercise of Chapter VII powers could defeat al-Bashir's immunity. See Dapo Akande, The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities, 7 J. Int'l Criminal Justice (2009), 333. A third argument is that the ICC is a competent court under the Genocide Convention. See Göran Sluiter, Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case, 8 J. Int'l Criminal Justice (2010), 365. The PTC has not adopted this

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undertakes a detailed and comprehensive analysis of the jurisdictional issues in the case. Contrary to most commentaries,[5] it concludes that al-Bashir remains protected by his immunity as the head of a State that is not a party to the Rome Statute.[6] At the risk of introducing even more controversy to the debate, this article argues that the ICC's jurisdictional claims over al-Bashir are tenuous at best; that the Court's position can only be sustained by relying on controversial and peripheral restatements of public international law; and that the manner of the pursuit of al-Bashir will undermine the goals and effectiveness of the ICC.

2. Although the charges against al-Bashir were first confirmed by the Pre-Trial Chamber (PTC) of the ICC in 2009, the issue remains relevant for two reasons. Firstly, the confusion surrounding the scope of head of State immunity continues. The indictment of al-Bashir has not lain dormant since the issuance of warrants for his arrest; the PTC recently invited the United States to arrest al-Bashir when the possibility of his visiting the UN General Assembly in New York was raised.[7] Head of State immunity surfaces in other cases as well. Before his death, Muammar Gaddafi of Libya was in the same unclear position as al-Bashir,[8] and the election of indictee Uhuru Kenyatta as Kenyan President means that the issue has arisen again.[9] Properly delineating

position, presumably because it would not account for all the crimes alleged against al-Bashir.

5 See, e.g., the respective articles of Paola Gaeta and Dapo Akande, above n.4. See also Manisuli Ssenyonjo, The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan, 59 ICLQ (2010), 205, and Sophie Papillon, Has the United Nations Security Council Implicitly Removed Al Bashir's Immunity? 10 Int'l Criminal LR (2010), 275.

6 Rome Statute of the International Criminal Court (Rome Statute), 2187 UNTS 90.

7 Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Pre-Trial Chamber I, Decision Regarding Omar Al-Bashir's Potential Travel to the United States of America (18 September 2013). At least one commentator—who otherwise believes that al-Bashir lacks immunity because of the Security Council referral of the Darfur case—argues that al-Bashir retains immunity when representing Sudan at UN meetings because of the operation of the Convention on the Privileges and Immunities of the United Nations and art. 105 of the UN Charter. See the Convention on the Privileges and Immunities of the United Nations, 90 UNTS 327, art. IV; and the analysis in Dapo Akande, above n.4, 351–352.

8 Libya, like Sudan, is not a State Party to the ICC and had not consented to its jurisdiction when Gaddafi was indicted by the Court in June 2011. See Situation in the Libyan Arab Jamahiriya, ICC-01/11, Pre-Trial Chamber I, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah al-Senussi" (27 June 2011) (Gaddafi Decision).

9 Kenyatta was indicted by the ICC for crimes committed in previous elections. See Prosecutor v. Francis Kirimi Muthuara, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01-09-02/11, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January

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the relationship between the immunity and the ICC therefore remains an important and unfinished task.[10] Secondly, there has been little analysis of how the ICC arguments on the immunity fit within the traditional constraints of public international law,[11] or how they may affect the future work of the Court. The risks of adopting the ICC position include States withdrawing from or no longer co-operating under the terms of the Rome Statute;[12] a disincentive for non-party States to join the ICC in the future; and the weakening of the rule of law in the international system. Of course, these outcomes do not explain why the ICC's stance is wrong, but they do demonstrate the need for a more careful analysis of the legal issues given the stakes. The importance of this article therefore lies in its resolution of the convoluted question of head of State immunity generally, and its explanation of how the ICC's flawed reasoning about this narrow legal issue substantially revises fundamental aspects of public international law.

3. Two clarifications must be offered as to the scope of this article. Firstly, no position is taken on whether the arrest or trial of al-Bashir itself will affect the prospects for peace in Sudan. The "peace versus justice" debate is a separate question. The argument here is not that holding al-Bashir accountable will undermine the peace process, but that the particular methods and reasoning relied upon by the Court are both legally dubious and will also have important negative repercussions *for the ICC*. Secondly, this article does not argue that al-Bashir is innocent or ought to be left free from judicial process. The desire to hold him accountable is correct, especially given the cogent evidence of

2012). The current Chief Prosecutor has declared her commitment to prosecuting Kenyatta despite his victory. See ICC prosecutors drop case against Kenyan politician Francis Muthaura, The Guardian (11 March 2013) (www.guardian.co.uk).

10 While the Special Rapporteur of the ILC has stated that the scope of immunity before international criminal courts has been "sufficiently delimited and clarified", she has also noted "the differing interpretations that may arise in practice when applying these international legal norms". International Law Commission, Second Report on the immunity of State officials from foreign criminal jurisdiction, Special Rapporteur Concepción Escobar Hernández, UNGAOR, 65th Sess, UN Doc A/CN.4/661 (4 April 2013), para.27.

11 For example, it has been said that because the Security Council referred the Darfur situation, it therefore has the legal authority to refer cases involving non-States Parties. See Sarah Williams and Lena Sharif, The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court, 14 J Conflict & Security L (2009), 71, 79.

12 The AU declared that it would continue not to co-operate in arresting Bashir despite the ICC referring Chad and Malawi to the ICC Assembly of State Parties for not arresting Bashir when he travelled to those States. See AU, Assembly of the African Union, 18th Sess, Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC), Doc Assembly/AU/Dec.397 (29–30 January 2012) (AU Dec. 397) (www.au.int/en/decisions/assembly).

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government involvement in crimes in Darfur.[13] The misgivings expressed in this essay are not about the general ethical motivation behind prosecuting al-Bashir, but about the particular legal arguments utilized by the ICC and the consequences of adopting those positions. While arresting alleged war criminals such as al-Bashir is important, the Court is pursuing that goal in a manner that compromises its long-term goals. The deficiencies in the Court's reasoning will undermine the Court's ability to protect future victims of atrocity, either by alienating States Parties to the Rome Statute or giving non-States Parties an incentive to not ratify the treaty, reducing or eliminating the local co-operation that is necessary for the Court's success.

4. These conclusions are examined in more detail after a thorough analysis of the legal issues. Section II focuses on the principles of head of State immunity that lie at the core of the case. Sections III through V critically evaluate and respond to the substantive arguments relied upon by the PTC to justify indicting al-Bashir. Section III addresses the claim that the Security Council can directly or indirectly override al-Bashir's immunity; Section IV explains how rules of treaty law restrict the ICC in this case; and Section V demonstrates that both statutory and case-law precedent provide little support for the PTC position. Section VI turns to the political context of the dispute to explain how the anti-immunity arguments are not only legally suspect but counter-productive to the goals of the ICC. The short-term "success" of arresting al-Bashir threatens to be offset by future difficulties in securing co-operation from States Parties and persuading non-States Parties to ratify the Rome Statute. Some of those States would oppose the ICC regardless, but the decisions of the Court in the al-Bashir case will provide legal justifications for their intransigence, and induce doubt in other States about the methods and trustworthiness of the Court.

## II. The ordinary rules of head of State immunity

5. The central issue is al-Bashir's immunity as a head of State, which al-Bashir says protects him from ICC jurisdiction. The ICC's response is that there is a rule of customary international law that prevents the application of immunity, and additionally that the Security Council's Chapter VII actions have stripped al-Bashir of his immunity in this instance.[14] Revisiting the basic rules of head of State immunity provides the foundation for assessing these twin arguments by showing, firstly, that head of State immunity is a rule of customary international law and, secondly, by highlighting the significant differences between al-Bashir and previous trials: all the precedents concern *former* heads of State, or heads of State whose immunity was waived. The distinctions are meaningful because former heads of State have drastically different immunities than

13 Including deeply troubling allegations that the Sudanese government sought legal advice on how to calibrate criminal acts in order to fall just short of the *dolus specialis* of genocide. See Mark Osiel, Making Sense of Mass Atrocity (2009), 137 (referencing confidential interviews by the author at The Hague in 2008).

14 See First Bashir Warrant, above n.2, and Malawi Decision, above n.3.

incumbents such as al-Bashir, and Sudan's refusal to waive al-Bashir's immunity means that he remains in a unique position when compared to predecessors such as Slobodan Milošević and contemporaries such as Uhuru Kenyatta.[15] Relying on past cases as precedents is therefore unhelpful to the ICC position.

6. Sitting heads of State have traditionally had "personal" immunity, such that while in office, they are immune from all foreign criminal jurisdiction.[16] Whether or not this immunity is *jus cogens* is debatable, but it is certainly a rule of customary international law,[17] and the scope of immunities are determined almost exclusively by reference to customary international law.[18] This immunity applies whether the head of State is traveling or not, and whether he or she is abroad for government business or private purposes.[19] For this reason, head of State immunity is more comprehensive than

15 Unlike Bashir, Kenyatta does not have immunity from the ICC as he is the head of State of a country that has ratified the Rome Statute. Article 143(4) of the Constitution of Kenya (2010) specifies that the immunity of the President "shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is a party and which prohibits such immunity".

16 See Roseanne Van Alebeek, The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law (2008), 169, and Dapo Akande, International Law Immunities and the International Criminal Court, 98 AJIL (2004), 407, 410. There is no such absolute rule with respect to domestic prosecutions—these vary from jurisdiction to jurisdiction. In Sudan, Article 60 of the 2005 Interim Constitution provides that the President and First Vice-President of Sudan are immune from all legal proceedings (including domestic) unless three-fourths of the National Legislature votes to charge either or both of them before the Sudanese Constitutional Court. If convicted, they are deemed to have forfeited their office and right to be protected by immunity. Interim National Constitution, Republic of the Sudan, The National Assembly of Sudan (www.parliament.gov.sd/en/).

17 See Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, ICJ Reports 2002, 3, 21–22, para.53; Dapo Akande, above n.16, 409; and Hazel Fox, The Law of State Immunity (3rd edn., 2013), 539. The point has also been stated in national courts. See e.g. John R Crook, Contemporary practice of the United States relating to international law: State jurisdiction and immunities: US Brief suggests Pope's immunity as a head of state, 100 AJIL (2006), 219, 220 (quoting the US State Department: "The doctrine of head of state immunity is applied in the United States as a matter of customary international law"); and Gaddafi (Court of Cassation, France), 125 ILR (2001), 490, 509 ("In the absence of contrary international provisions binding on the parties concerned, international custom precludes the institution of proceedings against incumbent heads of State before the criminal jurisdictions of a foreign State").

18 See International Law Commission, Preliminary report on immunity of State officials from foreign criminal jurisdiction, Special Rapporteur Roman Anatolevich Kolodkin, UNGAOR, 60th Sess, UN Doc A/CN.4/601 (29 May 2008), paras.30–34.

19 The ICJ described the scope of the immunity as follows: "A Head of State enjoys in particular 'full immunity from criminal jurisdiction and inviolability' which protects him or her 'against any act of authority of another State which would hinder him or her

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diplomatic immunity or ordinary functional immunities. The expansive nature of the immunity recognizes the functions of heads of State, which include high-level diplomacy, negotiations, and the pacific settlement of disputes.[20] These are more extensive and all-encompassing functions than those held by ordinary diplomats, who often perform much narrower diplomatic tasks, let alone former heads of State who have no official role at all. This is not to say that there is *no* rationale for potentially abrogating the immunities of sitting heads of State, only that—as recognized by the Institut de droit international[21]—there are important countervailing reasons for both preserving them and distinguishing incumbents from former heads of State, even when the persons involved are accused of serious international crimes.

7. Of course, head of State immunity is not permanent. Once heads of State are no longer in office, they lose any special protection afforded to them through their personal immunity as heads of State, and are only protected by the same rules of functional immunity[22] as applicable to other former State

in the performance of his or her duties'." See Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France), Judgment, ICJ Reports 2008, 177, 236–237, para. 170 (quoting from Arrest Warrant, above n. 17).

20 Heads of State can have multiple constitutional and political functions beyond the symbolic embodiment of sovereignty. See Hazel Fox, above n. 17, 542 (noting that heads of State have "full powers" of the State, including "the capacity to represent and act for the State"). Heads of State have been described as having an "exceptional position" amongst those who may claim some sort of immunity. See Lassa Oppenheim and Herscht Lauterpacht (eds.), International Law: A Treatise (8th edn., 1955), 358. Under the terms of the Interim National Constitution, above n. 16, Bashir is both the head of State and the Government of Sudan, and has important constitutional and political roles to play (as does arguably his First Vice-President).

21 The Institut's 2009 resolution on immunity affirmed the protection of personal immunities in the face of alleged international crimes, even as it encouraged States to consider waiving those same protections. See Third Committee, Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, Institut de droit international, Napoli Session (2009) (www.idi-iil.org).

22 It is unclear whether this functional immunity protects former heads of State from liability before national courts for international crimes committed while in office. In deciding the third *Pinochet* case, some members of the UK House of Lords held that former heads of State are not protected by functional immunity for international crimes, since these crimes cannot be seen as the proper functions of a head of State. Others argued that Pinochet lacked immunity not because of the "proper functions" argument, but because of the operation of the Convention Against Torture as part of domestic UK law. See R v. Bow Street Magistrate (*ex parte* Pinochet) [1999] UKHL 17, [2000] 1 AC 147. The situation remains unsettled in international law. See Hazel Fox, above n. 17, 550–553. For the purposes of this article, it is assumed that functional immunities offer no protection to former State officials who are indicted by the ICC for serious international crimes.

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officials.[23] Furthermore, as a matter of law, immunities—including the "personal" immunities of the head of State—belong to the State and not the individual, and can therefore be waived at any time by the government.[24] These waivers can be done on an individual-by-individual basis, or can be on-going in nature. An example of the latter is Article 27(2) of the Rome Statute, which states that a person's official capacity or immunities do not prevent the ICC from obtaining jurisdiction over that individual.[25]

8. For our purposes, there are three key aspects to head of State immunity.[26] Firstly, it is a rule of customary international law. Secondly, there are important reasons to distinguish the immunities of sitting heads of State from other types of immunities, including any that may protect former heads of State. Finally, the immunity may be waived by the State that holds it even if the individual is currently holding the office of head of State. As shown below, each of these propositions undermines important elements of the ICC's claims of jurisdiction over al-Bashir.

## III. The Security Council referral

9. This section refutes the position that the Chapter VII authority of the Security Council renders al-Bashir's immunity inoperative for the purposes of the Rome Statute. Al-Bashir is being investigated in relation to crimes allegedly committed in Darfur, which were referred to the ICC by Resolution 1593[27] of the Security Council. The PTC did not specify exactly how Resolution 1593 might bind Sudan to the Rome Statute and remove al-Bashir's immunity, but there are three possibilities. One is through the delegation of the Security Council's Chapter VII powers to the ICC, which then exercises that authority to compel co-operation from Sudan. Another is by binding Sudan to the Rome Statute and Article 27(2) through a Chapter VII resolution of the Security Council. The third is deleting the immunity through direct action by the Council itself. The last two arguments both depend on Article 103 of the UN Charter, and so are considered together. The common problem with all three of these arguments is that neither Chapter VII nor Article 103 of the Charter allows the Security Council to extend the jurisdiction of the Court.[28] The ICC is not able to exercise any Chapter VII

23 Roseanne Van Alebeek, above n.16, 183.

24 The Vienna Convention on Diplomatic Relations, 500 UNTS 95, art. 32 provides for the right of a State to waive the immunities of its own official(s).

25 See also the Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, art. 4.

26 All of which were affirmed by the 2009 Resolution of the Institut de droit international, above n.21.

27 SC Res 1593 (31 March 2005).

28 Luigi Condorelli and Santiago Villalpando, Can the Security Council Extend the ICC's Jurisdiction?, in: Antonio Cassese et al (eds.), The Rome Statute of the International Criminal Court: A Commentary (2002), 572.

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powers because it is not part of the UN, and the Security Council itself does not have the authority to revise the rules of public international law in order to negate al-Bashir's immunity. Those rules—which include the UN Charter itself,[29] the customary law rules of immunities outlined above, and the law of treaties—severely restrict the Security Council's powers in this case.

### III.A. The inability to delegate Chapter VII powers to the ICC

10. The first position to be addressed is that of delegation. Even if it is assumed that the Security Council has the power to remove immunities,[30] this does not necessarily mean that power may be delegated to the ICC. Assigning a discretionary decision-making power to a tribunal requires that the tribunal is actually competent to receive the Chapter VII power in the first place.[31] According to the UN Charter, competent entities are: UN member States[32]; "regional arrangements" as contemplated by Article 51 of the Charter[33]; and organs of the UN itself. The ICC does not fall into any of these categories.

11. The ICC is obviously not a UN member State, nor is it a regional arrangement under Article 51 of the Charter. While there is no definition of "regional" in the Charter, the types of organizations considered to be regional agencies include the Organization of American States (OAS), the Arab League, and the African Union (AU).[34] To permit a decentralized agency such as the ICC status as a regional arrangement under

29 Charter of the United Nations, 26 June 1945, Can TS 1945 No 7.

30 Discussed further in Section III.B, below.

31 See Danesh Sarooshi, The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers (2000), 247 ("[T]he competence of the Council to delegate Chapter VII powers to an entity does not in itself mean that the entity has the institutional competence to be able to exercise those powers"), and 252–253 ("The delegation of Chapter VII powers to a regional arrangement gives the arrangement—and thus its organs—the right to exercize those powers but not in disregard of its constituent treaty").

32 An example of such a delegation occurred in Operation Artemis, the French-led Interim Multinational Emergency Force to assist troops in the UN Mission in the Democratic Republic of Congo (MONUC), authorized by SC Res 1484 (30 May 2003).

33 Such as NATO, whose operations in Kosovo were authorized by SC Res 1244 (10 June 1999).

34 Along with the AU, OAS, and Arab League, Conforti includes the Commonwealth of Independent States (CIS), the Organization for Security and Cooperation in Europe (OSCE), the Western European Union (WEU), the Arab League, the Economic Community of West African States (ECOWAS), and the Organization of Eastern Caribbean States (OECS). See Benedetto Conforti, The Law and Practice of the United Nations (3rd edn., 2005), 235–238. Only the AU, OAS and Arab League are unambiguously considered regional agencies. See Waldemar Hummer and Michael Schewitzer, Article 52 in: Bruno Simma (ed.), The Charter of the United Nations: A Commentary (2002), 807, 828. NATO may arguably be a Chapter VIII regional agency as well,

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Chapter VIII would undermine the role of the UN in securing international peace[35] by rendering meaningless the proximity requirements of the Article 51 restriction.[36] Yet even if the ICC were classified as a regional arrangement, the problem arises that the only Chapter VII powers that can be delegated to regional arrangements are military enforcement powers,[37] as per Article 53(1) of the Charter.[38] The intention of Article 53(1) is further evidenced by the UN Secretary-General's Agenda for Peace[39] plan, which sought to put regional organizations to use in the political and military tasks of preventive diplomacy and peacekeeping.[40] It does not contemplate judicial tasks.[41]

12. The only remaining way in which the ICC might receive Chapter VII powers is through recognition as part of the UN system. Yet there is no basis for the position that the ICC is either a principal or subsidiary organ of the UN. The Rome Statute is a treaty that was negotiated outside the auspices of the UN, and Articles 1 and 4(1) of that treaty state that the Court is permanent (i.e. it does not exist at the pleasure of the UN) and that it has "international legal personality". The Preamble and Article 2 of the UN-ICC Agreement similarly recognize the independence of the Court from the UN system.[42] Unlike the International Criminal Tribunal for the Former Yugoslavia (ICTY),

notwithstanding its establishment as a collective security group. See Danesh Sarooshi, above n.31, 251.

35 Waldemar Hummer and Michael Schweitzer, above n.34, 822 ("Short of requiring 'regions' in the geographic sense, the requirement of some degree of spatial proximity among members of 'regional arrangements' cannot be dropped, since this would cause the decentralized system of the UN for securing the peace, which is embodied in these regional arrangements, largely to lose its effectiveness").

36 Parties to the Rome Statute are as diverse and geographically scattered as the UN membership. At the time of writing, 121 States Parties had ratified the ICC Statute. There were 33 States Parties from Africa, 25 from Western Europe (including Canada, New Zealand and Australia), 18 from the Asia-Pacific Region, and 27 from the Caribbean/Latin America. A complete and current list of States Parties is online (www.icc-cpi.int).

37 Danesh Sarooshi, above n.31, 248–251.

38 See generally, Jurgen Bröhmer and Georg Ress, Article 53, in: Bruno Simma (ed.), above n.34, 854, 859–866, esp. 860 ("[T]he majority of the member States assumed that the non-military sanctions were not enforcement actions which, from a systematic perspective (relation between Art. 53 and Art. 2(4)), is a conclusive interpretation"); Benedetto Conforti, above n.34, 231–238; and Danesh Sarooshi, above n.31, 247–253.

39 Report of the Secretary-General, An Agenda For Peace: Preventive Diplomacy, Peacemaking and Peace-keeping, UN Doc A/47/277—S/24111 (17 June 1992).

40 Christine Gray, International Law and the Use of Force (2004), 282–294. See also Danesh Sarooshi, above n.31, 4.

41 The only judicial role mentioned is that for the ICJ, a UN organ. Agenda for Peace, above n.39, paras.38–39.

42 Negotiated Relationship Between the International Criminal Court and the United Nations, ICC—UN, ICC-ASP/3/Res.1 (4 October 2004).

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International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), the ICC is governed entirely by its Assembly of States Parties. While judicially independent, the ICTY and ICTR are able to exercise Chapter VII authority because they are organs of the UN that have been established by the Security Council and delegated such authority.[43] The authority of the ICC, on the other hand, is based on the consent of States to the Rome Statute[44] and is wholly independent of the organizational structure of the UN. Aside from the ability to refer matters to the Court, the only substantive role that exists for the UN is in relation to Article 16 suspensions of the ICC's jurisdiction over a particular situation by the Security Council. Neither of these roles are mentioned or elaborated upon in the UN–ICC agreement, and neither the Rome Statute nor its drafting history make any clear provision for accepting or exercising Chapter VII powers.[45] Similarly, the Security Council cannot supervise any other aspect of the Court's work, including the appointment of its personnel. Contrast this with the SCSL, where the Secretary-General is responsible, either solely or jointly with other members of the SCSL, for the appointment of judges, prosecutors and the registrar of the court.[46] The far-reaching independence of the ICC suggests that there is no basis on which to suggest the ICC can receive Chapter VII powers, including the power to bind non-parties to the Rome Statute.

43 Danesh Sarooshi, above n.31, 107. The scope of this Chapter VII authority is limited in two ways. Firstly, by the restrictions on subject-matter, personal, temporal and territorial jurisdiction contained within the ICTY and ICTR statutes. Secondly, by the purpose of Chapter VII delegation, as established by the tribunal statutes and the Security Council resolutions establishing the tribunals. See SC Res 827 (25 May 1993), para.4 and the ICTY Statute, art. 29; and of SC Res 955 (8 November 1994), para.2 and the ICTR Statute, art. 28.

44 Either through ratification or *ad hoc* acceptance of ICC jurisdiction under art. 12(3) of the Rome Statute.

45 There are only two references to Chapter VII in the Rome Statute, in arts. 13 and 16. Security Council resolutions taken pursuant to either provision must be Chapter VII resolutions. The Chapter VII requirement certainly places procedural obligations on the Security Council (in terms of voting requirements per art. 27 of the UN Charter), as well as some sorts of obligations upon the Court (to either initiate or suspend certain types of proceedings). However, there is no indication in arts. 13 and 16 of the Rome Statute—or any other documents—that in passing Chapter VII resolutions the Security Council also transfers additional powers to the Court in order to enable it to meet those obligations. This would seem unnecessary in the context of art. 16, as no additional powers would be required for the ICC to stop doing what it is doing. As for referrals under art. 13, the language of the provision is permissive (i.e. the Prosecutor decides whether to proceed), and contains no further reference to the modification of existing ICC powers or procedures.

46 See the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court For Sierra Leone (16 January 2002), arts. 2–4, 6, 7 and 10.

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## III.B. Article 103 and the supremacy of the Security Council

13. The second set of arguments states that Sudan must comply with the Security Council referral because of Sudan's membership in the UN, its concomitant consent to the priority of the UN via Article 103[47] of the Charter,[48] and the mandatory nature of Chapter VII resolutions. Instead of Chapter VII powers flowing through the ICC, the obligation to arrest al-Bashir is directly imposed upon Sudan and other UN Member States by the Security Council itself. The basic flaw with this argument is that the UN Charter only takes precedence over other international treaties,[49] not customary international law rules such as head of State immunity or the laws governing treaties. In this case, those customary rules defeat the argument that the UN referral can negate al-Bashir's immunity.

14. The drafting history of Article 103 shows that, after considerable debate about whether the Charter should be supreme over all international law, the drafters made a deliberate choice to specify "international agreements" instead of "all international obligations", elevating the Charter only above treaties and other international agreements.[50] This was affirmed by the General Assembly in the Declaration on Friendly Relations,[51] which distinguished between "obligations under the generally recognized principles and rules of international law" and "obligations under international agreements valid under the generally recognized principles and rules of international law", and clearly stated only the latter were superseded by the Charter.[52]

47 "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." UN Charter, above n.29, art. 103.

48 Ibid.

49 This primacy does not necessarily result in the voiding of those treaties, only the suspension of those provisions in so far as they conflict with obligations arising under the Charter. Any treaties that violate *jus cogens* norms would only be void under the Charter if one or more parties were also UN Member States. At the same time, such treaties would be void on the separate basis that they violate a non-derogable norm of customary international law.

50 See Report of the Rapporteur of Committee IV/2, as approved by the Committee, "Privileges and Immunities" in: Documents of the United Nations Conference on International Organization (1945) Vol. XIII, 707. See also Rob McLaughlin, The Legal Regime Applicable to Use of Lethal Force When Operating under a United Nations Security Council Chapter VII Mandate Authorising "All Necessary Means", 12 J Conflict & Security L (2008), 389, 400–401; and Rain Liivoja, The Scope of the Supremacy Clause of the United Nations Charter, 57 ICLQ (2008), 583, 602–605.

51 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV), UN Doc. A/RES/25/2625, 121, 124 (24 October 1970).

52 Ibid.

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This understanding has appeared in numerous declarations by the General Assembly[53] without contradiction, and has also been confirmed by the International Court of Justice (ICJ),[54] and numerous scholars writing about the UN[55] and the ICJ's *Lockerbie* decisions.[56]

53 See the Declaration on the Strengthening of International Security, GA Res 2734 (XXV), UN Doc A/RES/25/2734 (16 December 1970), para.3; the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, GA Res 42/22, UN Doc A/RES/42/22 (18 November 1987) para.4; and the Preamble of Respect for the Purposes and Principles Contained in the Charter of the United Nations to Achieve International Cooperation in Promoting and Encouraging Respect for Human Rights and for Fundamental Freedoms and in Solving International Problems of a Humanitarian Character, GA Res 55/101, UN Doc A/RES/55/101 (2 March 2001).

54 Interpretation of the Agreement of 25 March 1951 Between the World Health Organization and Egypt, Advisory Opinion, ICJ Reports 1980, 73, 89–90, para.37 (all international organizations are bound by the rules of general international law). See also Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK), Provisional Measures, [1992] ICJ Reports 1992, 3, 15, para.39 ("in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention").

55 Aleksander Orakhelashvili, The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions, 16 EJIL (2005), 59, 69 ("Article 103 makes the Charter prevail over international agreements ... but this is not the case for the general international law, of which *jus cogens* is a part. The clear text does not support the opposite view, and those who wish to see Article 103 as making the Charter prevail over general international law cannot rely on evidence, but only on wishful thinking"); Derek Bowett, The Impact of Security Council Decisions on Dispute Settlement Procedures, 5 EJIL (1994), 89, 92 ("It is true that this reasoning confined to the supremacy of a Council decision over inconsistent treaty rights or obligations, because Article 103 is concerned solely with compatibility between Charter obligations and obligations 'under any other international agreement'. Accordingly the reasoning would not apply where a member relied on its rights under general international law"); Geoffrey R Watson, Constitutionalism, Judicial Review, and the World Court, 34 Harvard ILJ (1993), 1, 25 ("Article 103, relied on so heavily by the majority, provides that Charter obligations prevail over 'other international agreements'; it does not provide that Charter obligations prevail over *jus cogens* and other forms of customary international law"); and Judith Gardam, Legal Restraints on Security Council Military Enforcement Action, 17 Michigan JIL (1996), 285, 304 ("[T]he presence of Article 103 in the Charter has no impact on the need for the Security Council to comply with general international law. ... It is not necessarily inconsistent for the Security Council to override other treaty obligations of States while remaining bound itself by customary rules. States have differing treaty obligations but customary obligations bind all States equally.").

56 See Rob McLaughlin, above n.50, 402 (the *Lockerbie* decisions "generally assert that the Article 103 trump is exercisable over treaty law"); Christian Tomuschat, The

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15. If the Charter only has primacy over international *agreements* and not customary international law, then Member States are not obliged to comply with all directions that emanate from the UN. Any Security Council directive to violate a principle of customary international law is *ultra vires*, because any obligation to comply "is conditional upon the Council's compliance with the Charter principles: Article 103 cannot make a resolution which is unlawful under the Charter prevail over other legal norms".[57] This point, first made by Hans Kelsen in 1950,[58] was repeated by the ICJ in the *Lockerbie* case[59] and reinforced by other commentators.[60] In other words, UN Member States are bound to comply with Security Council resolutions under Chapter VII, but only when those decisions themselves do not breach the boundaries of UN competence—such as norms of customary international law. As argued in the following sections, this amounts to a crucial restriction on the scope of obligations that can be imposed by the Security Council in al-Bashir's case.

## IV. The customary law of treaties

16. Resolution 1593 can be seen as violating customary international law, and therefore *ultra vires*, either through its effects on the customary international law of immunities (discussed in Section V), or through its effects on treaty law. As a treaty-based organization, the UN is bound by the law of treaties: it is restricted by the terms of the UN Charter, as well as the codified and customary international law rules of treaties. Those basic rules prevent the Security Council, the ICC and any other international organization or group of States, from extending the jurisdiction of the Court or binding a non-State Party to any treaty without that State's consent. Depending on one's reading of the Rome Statute, these rules either completely preclude Security Council referrals of any non-State Party, or limit the ICC's powers in such cases.

*Lockerbie* Case Before the International Court of Justice, 48 Rev Int'l Comm Jurists (1992), 38, 43–44; and Bernhard Graefrath, above n.1, 198–199 (criticizing the Court's initial Lockerbie decisions for their inadequate analysis of art. 103 as it relates to non-treaty matters).

57 Aleksander Orakhelashvili, above n.55, 69.

58 Hans Kelsen, The Law of the United Nations: A Critical Analysis of Its Fundamental Problems (1950), 95 ("The meaning of Article of 25 is that the Members are obliged to carry out these decisions which the Security Council has taken in accordance with the Charter.").

59 Cited with approval in Lockerbie (Libya v UK), Provisional Measures, ICJ Reports 1992, 3, 101–102 (diss. op. El-Kosheri, para.23) (not dissenting on this point).

60 See e.g. Derek Bowett, above n.55, 92–93.

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## IV.A. Treaty law and the treatment of non-parties

17. The foundational principle at issue is that of *pacta tertiis nec nocent nec prosunt*—treaties neither create obligations upon nor grant rights to third parties.[61] This customary international law rule is codified in Article 34 of the Vienna Convention of the Law of Treaties.[62] Article 35 of that convention adds that obligations only arise for third party States if those States expressly accept the obligation.[63] Articles 39 and 40 specify that only parties to a treaty may amend it, and only after consultation with other parties. The Security Council is not a party to the Rome Statute, nor has it consulted with the Assembly of State Parties on this issue.[64] Nor do the provisions of the Rome Statute even permit the alteration of its terms by the Security Council, let alone in a way that would somehow make Article 27(2) applicable to non-States Parties.[65] Sudan would therefore seem to have no obligations—to arrest al-Bashir or do anything else—under the Rome Statute.

## IV.B. Reconciling Security Council referrals with the customary laws of treaties

18. Some may disagree with the characterization of the Darfur referral as *ultra vires*. Michael Wood argues that the referral has not bound Sudan to the Rome Statute, but only imposed the provisions of that treaty, and therefore is not *ultra vires*.[66] Of course, as he acknowledges, the referral imposed on Sudan "obligations to cooperate that were at least as comprehensive as those it would have been if it had been a party".[67] Since this imposition of obligations is unaccompanied by the benefits that accrue through ordinary ratification of the Rome Statute, such as voting rights in the Assembly of States Parties, the distinction Wood draws is more semantic than

61 See Certain German Interests in Polish Upper Silesia, Merits, (1926), PCIJ (Ser A) No 7, 29 ("A treaty only creates law as between the States which are parties to it").

62 Vienna Convention on the Law of Treaties (VCLT), 1155 UNTS 331, 8 ILM 679.

63 While insisting that Sudan should co-operate with the ICC, the Security Council referral notes "that States not party to the Rome Statute have no obligation under the Statute". See SC Res 1593 (31 March 2005).

64 To the extent it might be argued that it fits with the principles and purposes of the UN to bind Sudan to the terms of the Rome Statute in violation of customary and treaty law, it should be noted that the drafters of the VCLT agreed that "the present Convention will promote the purposes of the United Nations set forth in the Charter". See the VCLT, above n.62, Preamble, recitals 6 and 7.

65 See Héctor Olásolo, The Triggering Procedure of the International Criminal Court (2005), 97 ("[N]o de jure power to alter the jurisdictional scheme of the [Rome Statute] has been granted to the Security Council by the [Rome Statute] or [UN Charter]").

66 Michael Wood, The Law of Treaties and the UN Security Council: Some Reflections, in: Enzo Cannizzaro (ed.), The Law of Treaties Beyond the Vienna Convention (2011), 251.

67 Ibid.

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substantive. Problematic assertions such as these fail to fully address the *pacta tertiis* principle and the customary nature of immunities, and demand further analysis of the Security Council referral power, how such resolutions are to be interpreted and their permissible effects in relation to Sudan and al-Bashir.

*IV.B.i. Disallowing referrals*

19. The simplest (and perhaps most controversial) interpretation of Resolution 1593 and its effects is to not recognize the validity of the referral at all, because the law of treaties prevents binding non-States Parties to treaties. It is important to note that this interpretation does not make redundant Article 13(b), the Rome Statute provision that permits Security Council referrals in the first place. The Security Council's referral power can still be meaningful even though it cannot extend the Court's jurisdiction.[68] This is particularly true in conflict situations that involve ICC members but are not currently being investigated by the ICC Office of the Prosecutor. For example, there may be States Parties to the Rome Statute who, for reasons of domestic politics such as demonstrating to the citizenry that the government maintains sovereignty or control of a country or region (or, alternatively, who seek the continuation of atrocities by the government), will not self-refer to the ICC under Article 13(a). At the same time, the Office of the Prosecutor itself—burdened perhaps by the volume and difficulty of its existing work, or concerned with other crimes that appear more serious—may be unable to devote the resources to engage in a *proprio motu* investigation under Article 13(c). If these uninvestigated situations were deemed a threat to international peace and security, the Security Council could refer the matter to the Office of the Prosecutor and therefore make it a priority for the Court. While the Court and Prosecutor would still have discretion over whether and how the case was pursued, this limited referral power could advance the anti-impunity and justice-seeking goals of both the ICC and the UN without stretching basic principles of international law to the extreme.

*IV.B.ii. Reading down the Rome Statute*

20. Another way of interpreting the referral is to say that it has a limited effect because the Rome Statute must be "read down" when applied to non-States Parties. To the extent the referral does place obligations on Sudan, it can be said to have limited effect by precluding the application of certain provisions of the statute, including Article 27(2). As a result, Sudan would still have no obligation to co-operate with the ICC, but ICC members would be required to co-operate only so long as they did not violate rules of customary international law, including those concerning head of State immunity.

21. The idea of "reading down" is not a novel concept; it is found in both domestic legal systems and international law. When statutory powers appear to conflict with other powerful legal norms, those powers are regularly interpreted in a non-conflicting

68 See Luigi Condorelli and Santiago Villalpando, above n.28.

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manner, i.e. "read down" when appropriate. This saves the trouble of redrafting the statute so that it is no longer in conflict by providing a common-law rule of limited application with the same effect.[69] In international law, "reading down" statutes gives effect to another common rule of the law of treaties—that treaties not conflict with customary international law. Aust notes that it is "legitimate to assume parties did not intend a treaty to be incompatible with customary international law".[70] In accordance with the *lex generalis*, "a treaty is to be interpreted in a way consistent with general principles and rules of international law",[71] and "[w]here a treaty rule is ambiguous and *could* be construed to require 'violation' of a customary norm, it seems appropriate to apply a principle that the treaty should be interpreted in so far as possible to be consistent with the customary norm."[72] Weinberger argues for a modification of the rule in *Charming Betsy*[73] with the following result: "A treaty ought never to be construed to violate customary international law, if any other possible construction remains, and can never be construed to violate rights under customary law."[74] Indeed, the ICJ has already gone down this path, stating that even where a treaty might otherwise appear to grant jurisdiction over a foreign official, "such extensions of jurisdiction in no way affects immunities under customary international law."[75] For non-State Party referrals,

69 In Canada, where the practice of reading down is often used with respect to conflicts with constitutional norms and in non-constitutional questions of interpretation, Sullivan notes that reading down may be necessary to combat unintended over-inclusiveness: "[I]t is impossible for drafters to spell out every qualification or limitation that might appropriately apply in a given set of circumstances." Reading down is further justified by the "strong and virtually impossible to rebut" presumption of coherence between conflicting laws. Ruth Sullivan, Sullivan on the Construction of Statutes (2008) at 166–7 and 225. Peter Hogg describes the benefit of reading down as conciliatory: "[Reading down] achieves its remedial purpose without declaring the provision invalid. It allows the bulk of the legislative policy to be accomplished, while trimming off those applications that are constitutionally bad." Peter Hogg, Constitutional Law of Canada (1998), s. 15.7.

70 Anthony Aust, Modern Treaty Law and Practice, (2007), 248.

71 Ibid., 250.

72 Brian D. Lepard, Customary International Law: A New Theory with Practical Applications (2010), 272 (emphasis in original).

73 The rule being that national statutes must be interpreted so as not to conflict with international law. Murray v. The Charming Betsy, 6 US (2 Cranch) (1804), 64, 118.

74 Sheila Weinberger, The Wimbledon Paradox and the World Court: Confronting Inevitable Conflicts between Conventional and Customary International Law, 10 Emory ILR (1996), 397, 438.

75 "[T]he rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while the absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition,

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the Rome Statute's treaty-based override of head of State immunity would conflict with the customary law rule that continues to apply to non-States Parties. In such a situation, Article 27(2) should be interpreted as simply not applying.[76]

22. Others have argued that reading down the Rome Statute violates principles of the law of treaties because it makes Article 27(2) redundant or inutile.[77] This interpretation is flawed in three respects. Firstly, as mentioned earlier, this interpretation violates a separate principle of law of treaties, which is that treaties cannot bind third parties.[78] The second problem is that reading down Article 27(2) in the case of al-Bashir does not make it redundant. Rather, it recognizes the exceptional nature of the clause. Recall that Article 27(2) is an example of an on-going waiver from the ordinary customary law rules of immunities; without it, even States Parties to the Rome Statute could claim the protection afforded by personal immunities. In almost every case before the ICC, Article 27(2) does exactly what it is meant to do: override the immunities of individuals in those States that have consented to ICC jurisdiction. Indeed, the vitality of Article 27(2) is being demonstrated by the current proceedings against Kenyan President Uhuru Kenyatta. Precluding the application of Article 27(2) to al-Bashir has no impact on its utility against Kenyatta and others; Article 27(2) is only inoperative in that specific and narrow class of cases where two criteria are met: a non-State party has not voluntarily accepted the jurisdiction of the Court and persons clothed with personal immunity are indicted. As it stands, Darfur is the only current situation that meets these criteria, and only al-Bashir is in the class of persons that could be exempted from its application.[79] The fact that Article 27(2) has not been relied upon in the other cases does not mean that it is redundant, but that the Prosecutor has chosen not to utilize it by not pursuing anyone else protected by personal immunities. This exercise of prosecutorial discretion does not render a provision inutile, let alone justify the expansive interpretation of that clause.

thereby requiring them to extend their criminal jurisdiction, such extensions of jurisdiction in no way affects immunities under customary international law. ... These remain opposable before the courts of a foreign State, even where those courts exercise jurisdiction under those conventions." Arrest Warrant, above n.17, para.59.

76 This argument can be extended. One possibility is that all provisions of the Statute that create an obligation on the non-consenting State are of no effect, and States Parties are only bound by those obligations that do not violate customary law. For example, Sudan would have no art. 86 obligation to co-operate with the Court, while a State Party to the Rome Statute would have the obligation to co-operate with the ICC but not to arrest al-Bashir.

77 See Dapo Akande, above n.4, 338.

78 See art. 35 of the VCLT, above n.62, and accompanying text.

79 Of the seven other active ICC investigations, the only other situation that met these criteria was in Libya. The death of former Libyan leader Muammar Gaddafi means there is no longer any claim of head of State immunity in that case.

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23. The third flaw flows from this problem. Objecting to the "reading down" of the Rome Statute because it supposedly nullifies some provisions of the treaty is both incorrect and contradictory. Whereas negating the application of Article 27(2) in the al-Bashir case would not render it null for the vast majority of cases, applying it here would render Article 98(1) entirely ineffective and inutile. Article 98(1) precludes the Court from requesting States to arrest persons if that request would violate other international obligations owed by those States, such as obligations to respect immunities.[80] Even when "read down", Article 27(2) can apply to individuals other than al-Bashir,[81] but if Article 98(1) cannot apply to individuals such as al-Bashir—a national of a non-state party who would otherwise seem to be protected by customary law immunities—then what effectiveness can it claim?

24. Indeed, the only way to achieve a harmonious reading of Articles 27(2) and 98(1) that is both internally coherent as well as consistent with external rules of international law is either to disregard the referral entirely or to read down Article 27(2). The conflict between Article 27(2) and the rules of the law of treaties is otherwise unresolvable. The tension between them may be understood as a conflict between a *product* of the treaty system and the norms that are *fundamental to the existence of that system*, one that must be adverted to regardless of the object and purpose of the treaty in question.[82] If applied in the present case, this rule would not permit the arrest of al-Bashir so long as he remained President of Sudan, but would have other positive benefits. It would reinforce existing customary international law on both immunities and treaty interpretation, while still giving some effect to the important anti-impunity goals of the ICC by allowing the pursuit of those Sudanese suspects who are not covered by personal immunities.[83]

80 Article 27(2): "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." Article 98(1): "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity." Rome Statute, above n.6.

81 Such as Uhuru Kenyatta, see above n.15.

82 Note as well that the inclusion of arts 98(1) and 98(2) (precluding ICC jurisdiction on the basis of either international law immunities or bilateral agreements not to surrender certain nationals of States) make clear that the object and purpose of the treaty cannot be solely to end impunity or extend humanitarian protection.

83 Another way in which "reading down" supports anti-impunity efforts is by preserving the Charter's priority over so-called art. 98(2) agreements. Article 98(2) of the Rome Statute is similar to art. 98(1) in that it restricts the Court's ability to pursue suspects, but differs in that it refers to international agreements instead of customary law obligations on immunity. These art. 98(2) agreements have the same effect as customary immunities, but are not elevated to the same status under international law, and are therefore subordinate to the Charter and Security Council referrals.

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## V. A customary international law exception for immunities?

25. In Section II, it was shown that the immunity of a head of State is part of customary international law. Any Security Council action that directly or indirectly removes this immunity is therefore *ultra vires* and not binding upon Member States.[84] The only alternative is to argue that another rule of customary law has created an exception to head of State immunity.[85] This alleged exception states that immunities do not protect individuals charged with international crimes by international criminal tribunals.[86] This eliminates the need to rely on the authority of the Security Council, and perhaps explains why—after ignoring this argument in its confirmation of al-Bashir's indictment—the PTC relied almost exclusively on this alleged exception two years later.[87]

26. This customary law argument follows several lines: that the 1919 *Report of the Commission on the Responsibility of the Authors of the War*[88] and the statutes of previous international criminal tribunals show historical belief in the exception; that the rationale for personal immunities does not hold up *vis-à-vis* international courts because they are free from the bias of domestic courts; relatedly, that these statutes and the *Arrest Warrant*[89] decision of the ICJ demonstrate that the ICC, as an international court, automatically has jurisdiction over al-Bashir; and that there is a growing practice of international criminal tribunals removing the immunities of sitting heads of State.

27. Yet the evidence the PTC relies upon often demonstrates something quite different from what is claimed. The supposed precedents lack the historical pedigree or legal significance attributed to them for a variety of reasons. Statutes and prior cases that supposedly demonstrate the exception do not in fact deviate from the basic rules of head of State immunity outlined in Section II. Previous examples of heads of State being prosecuted either concern former heads of State or incumbents whose immunity was waived, and the statutes of previous tribunals actually provide evidence of a separate rule that affects substantive defenses, not personal immunities. Finally, the argument that international courts are impartial *because* they are international depends

84 The necessary implication of this position is that the purported competence of the ad hoc tribunals to strip immunities was therefore also ultra vires.

85 To be clear, the ICC has not adopted the position that it is creating a new exception and therefore changing customary international law. Rather, the PTC has been unambiguous about its belief that customary international law has already changed and that the necessary precedents already exist. To adapt Wolfke's phrasing, the PTC is trying to "justify [its] conduct as allegedly permissible exceptions of a valid general customary rule." See Karol Wolfke, Custom in Present International Law (1993), 65–66.

86 See Paola Gaeta, above n.4.

87 See above n.3.

88 Commission on the Responsibility of the Authors of the War and On Enforcement of Penalties—Report Presented to the Preliminary Peace Conference, reprinted in: 14 AJIL (1920), 95, 116–117 [1919 Commission Report].

89 See above n.17.

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upon an unsustainable interpretation of unclear statements made by the ICJ and an unduly optimistic reading of both international relations and the past and present state of international criminal courts. For these reasons, it cannot be said there is a customary law exception to head of State immunity.

### V.A. A lack of supporting case law

28. A rule of customary international law can only be said to exist when there is evidence of State practice following the rule, and belief in the legal validity of that rule. There is little evidence of State practice or *opinio juris* that sitting heads of State can be arrested and tried for international crimes. The cases that purportedly establish this rule usually suffer from one or both of the following flaws: the individuals concerned were no longer sitting heads of State at the relevant time, and therefore lacked the personal immunity that al-Bashir currently has; or, they had been transferred, with the consent or co-operation of the State, to the court in question, which amounts to a waiver of the immunity by the State concerned. These reasons fit perfectly with ordinary understandings of head of State immunity, and show no evidence of an exception to those rules.[90]

29. The PTC relies upon what it claims are four examples of sitting heads of States who have lost their personal immunities before international criminal courts and tribunals: Laurent Gbagbo, Muammar Gaddafi, Charles Taylor and Slobodan Milošević. The first two cases are dubious precedents for indicting al-Bashir. The arrest and transfer of Laurent Gbagbo, the former president of the Ivory Coast, cannot be claimed as precedent given that he was a former head of State at the time of his arrest and transfer to the ICC,[91] and his immunities had been waived *by Gbagbo's own government.*[92] Gbagbo was President from 2000 until a disputed election in 2010. In April 2003, his government declared its *ad hoc* acceptance of ICC

90 As described in Section II, above.

91 Gbagbo surrendered his claim to winning the 2010 Ivory Coast presidential election on 11 April 2011. The ICC was not authorised to open its investigation into post-election violence until 3 October 2011. Situation in the Cote d'Ivoire, ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire (3 October 2011). A warrant for Gbagbo's arrest was issued on 23 November 2011, nearly 7 months after he had lost any claim to immunity: Prosecutor v. Laurent Koudou Gbagbo, ICC-02/11, Pre-Trial Chamber III, Warrant of Arrest for Laurent Koudou Gbagbo (23 November 2011); and Public redacted version of Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo (30 November 2011).

92 That self-referral was for any crimes that had been committed during an armed rebellion against Gbagbo's rule that started on 19 September 2002. See Déclaration de reconnaissance de la Compétence de la Cour Pénale Internationale, Letter from Bamba Mamadou, Minister of State (CIV) to ICC (18 April 2003) (www.icc-cpi.int).

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jurisdiction "*sans retard et sans exception*",[93] thereby accepting the statutory waiver of immunity under Article 27(2). Nearly a year before Gbagbo's eventual arrest in 2011, his successor confirmed the continuing unconditional acceptance of ICC jurisdiction.[94] Arresting individuals whose immunity has been waived and who are former heads of State is perfectly in accordance with the ordinary customary rules of immunities; they neither present nor provide support for any exception.

30. As for the deceased Muammar Gaddafi, his case[95] cannot count in any meaningful sense. Including Gaddafi as a "precedent" seems an inaccurate embellishment given that he was indicted *after* al-Bashir, and placed in precisely the same unsettled legal position. Even had Gaddafi lived, there is little doubt that the new Libyan government either would have waived his immunity and surrendered him to the Court, or initiated domestic proceedings against him.[96] Again, this is in line with the present law on immunities.

31. Charles Taylor, the former warlord leader of Liberia, was a sitting head of State at the time of his indictment,[97] but had been out of office for nearly three years at the time of his arrest and transfer to the SCSL. Again, the transfer of a former head of State is in line with ordinary rules of personal immunities.[98] The trial of Slobodan Milošević, who was indicted while still serving as President of the Federal Republic of Yugoslavia (FRY),[99] is a more complex case, but still not nearly as straightforward as suggested by the Court. By

93 Ibid.

94 On 14 December 2010, Alassane Ouattara—Gbagbo's opponent in the 2010 election who was declared victorious by the Independent Election Commission and internationally recognized as President—issued a confirmation of the State's continuing acceptance of ICC jurisdiction under art. 12(3) of the Rome Statute. See: Confirmation de la Déclaration de Reconnaissance, Letter from Alassane Ouattara, President (CIV) to ICC (14 December 2010) (www.icc-cpi.int).

95 A warrant for his arrest was issued in June 2011, but proceedings were terminated in November 2011 after his death. Gaddafi Decision, above n.8.

96 The National Transitional Council of Libya stated Muammar Gaddafi's son, Saif al-Islam Gaddafi, would have a domestic trial instead of being sent to the ICC. See Libya Rules out ICC Trial for Saif Al-Islam, Al Jazeera English (9 April 2012) (www.aljazeera.com).

97 A sealed indictment was issued in March 2003. Prosecutor v. Charles Ghankay Taylor, SCSL-2003-01-I, Indictment (7 March 2003) (on file with author). Taylor resigned as President of Liberia on 11 August 2003, and was not arrested until 29 March 2006.

98 As noted by the court. See Prosecutor v. Charles Ghankay Taylor, SCSL-2003-01-I, Appeals Chamber, Decision on Immunity from Jurisdiction (31 May 2004), para.59 (Taylor Immunity Decision).

99 One of his contemporaries, Milan Milutinović, was also indicted while serving as President of Serbia. However, Milutinović surrendered himself to the ICTY after this term ended in 2002, and did not raise immunity as an issue during his trial. See Prosecutor v. Šainović et al, IT-05-87, Trial Chamber, Decision on Milutinović Motion for Provisional Release—Public (22 May 2007), para.10.

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the time Milošević was produced before the ICTY in 2001, he had lost his bid for re-election, resigned as President of the Federal Republic of Yugoslavia (FRY), and been arrested on domestic corruption and abuse of power charges.[100] He was therefore a former head of State, at which time the ICTY reissued a warrant for his arrest.[101] As with Gbagbo, Gaddafi and Taylor, who were also former heads of State, Milošević lacked any personal immunities at the time of his arrest and trial.[102] Again, this creates no exception to the traditional customary law of head of State immunity.[103]

### V.B. Article 27(2) has no statutory predecessor

32. In addition to these very recent international cases, the PTC also relies on historical statutory precedents. Yet there are equally compelling alternate explanations of this evidence that the PTC does not engage with. An example is the 1919 Commission Report presented at the Preliminary Peace Conference after the First World War, which implied that immunities should not apply for international crimes.[104] While the Commission may itself have envisaged a change in the nature of immunities, States failed to implement the Commission's proposals.[105] The Commission Report led to Article 227 of the Treaty of Versailles, in which "[t]he 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."[106] The obvious problem is that this again deals

100 Milošević lost to Vojislav Koštunica. While his term was not set to end until June 2001, he resigned on 7 October 2000 after public protests at alleged manipulation of electoral results by his allies.

101 The warrants were re-issued on 22 January 2001. See ICTY, News Release, SJP/P.I.S./557-e, Milosevic and others case: warrants re-issued to the Federal Republic of Yugoslavia, (23 January 2001) (www.icty.org/sid/8029).

102 See Prosecutor v. Slobodan Milošević, IT-02-54, Trial Chamber, Decisions on Preliminary Motions (8 November 2001). Both the Hague District Court and, on appeal, the European Court of Human Rights, held that they lacked jurisdiction to hear the matter. See Slobodan Milošević v. The State of the Netherlands, reprinted in: 41 ILM (2002), 86; and Milošević v. the Netherlands, App. No. 77631/01, ECtHR (19 March 2002).

103 While Serbia transferred Milošević to the ICTY in violation of a domestic court order (see Konstantinos D. Magliveras, The Interplay Between the Transfer of Slobodan Milošević to the ICTY and Yugoslav International Law, 13 EJIL (2002), 661, 663–668), this should not be interpreted as a waiver of immunity. For one, Milošević had no immunity to waive at the time, since he had ceased to be President of Serbia in 1997, and President of the FRY in 2000. Second, Serbia, as a provincial entity within the federal State of Yugoslavia, was not competent to waive any immunity Milošević might have had as President of the FRY.

104 1919 Commission Report, above n.88, 116–117.

105 Robert Cryer, Prosecuting International Crimes: Selectivity and the International Criminal Law Regime (2005), 33.

106 Treaty of Versailles, 225 CTS 188.

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with the immunity of a *former* head of State. Additionally, Article 227 recognized that any jurisdiction the Allies enjoyed over the former Kaiser was not absolute. Instead of obliging the Netherlands to transfer the former Emperor, the Allies could only "request" his transfer,[107] an entreaty that was promptly rejected. None of this creates an exception to the standard understanding of personal immunities,[108] and the failure to realize Article 227 has been labelled "the least satisfactory aspect" of the Treaty of Versailles.[109]

33. The PTC also claims the statutes of previous international criminal tribunals provide further evidence of an established customary law exception. However, this position overlooks the important distinction in criminal law between substantive defenses and procedural constraints such as immunities.[110] Article 27(1)[111] of the Rome Statute contains a nearly identical statement to declarations contained in the Nuremberg[112] and Tokyo Charters,[113] as well as the ICTR and ICTY Statutes.[114] These provisions all remove the substantive defense of official capacity—the defense that an individual cannot be held responsible for acts of the State. Yet what makes the Rome Statute unique is Article 27(2), which removes personal immunities—the procedural barriers that prevent a court from exercising its authority over particular individuals. Article 27 (2) has no statutory predecessor; none of the other statutes even mentions

107 Contrast this "request" with the mandatory language of arts 228 and 230, ibid., requiring Germany to hand over all accused persons and all documentation necessary to the determination of responsibility.

108 Note as well that this supposed rule was agreed upon only by the victorious Allied powers, which would also have judged the defeated former Emperor, undermining the idea that this rule had widespread international acceptance.

109 Robert Cryer, above n.105.

110 See Roseanne Van Alebeek, above n.16, 265–266; Hazel Fox, above n.17, 555–556; and Dapo Akande, above n.16, 414–415, 419–420 (although Akande argues that part of art. 27(1) of the Rome Statute also affects procedural immunities). See also Taylor Immunity Decision, above n.98, para.32.

111 "[O]fficial capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute." Rome Statute, above n.6, art. 27(1).

112 Charter of the International Military Tribunal (Nuremberg Charter), art. 7 reprinted in: Michael R. Marrus, The Nuremberg War Crimes Trial, 1945–46: A Documentary History (1997).

113 Charter of the International Military Tribunal for the Far East, art. 6 reprinted in: Robert Cryer and Neil Boster, Documents on the Tokyo International Military Tribunal (2008).

114 See Statute for the International Criminal Tribunal for the Former Yugoslavia, 32 ILM 1159, art. 7(2) and Statute for the International Criminal Tribunal for Rwanda, 33 ILM 1602, art. 6(2). The Special Court for Sierra Leone has a similar provision in its statute. See Statute of the Special Court for Sierra Leone, 2178 UNTS 138, 145, art. 6(2).

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immunities.[115] In addition, the ICJ has twice stated that immunity from jurisdiction is not the same as absence of responsibility,[116] and this point is so commonly repeated that it is a "cliché"[117]; to conflate the two is to mis-state basic principles of criminal law. Our earlier introduction of immunity and waivers further illustrates the important difference between substantive defenses and procedural bars: if the two were identical in meaning, then head of State immunity could *never* be waived by a State against the wishes of the accused.[118] This directly contradicts the nature of immunities, and strongly undermines the PTC's argument that statutory precedent is on its side.

### V.C. Bias and neutrality in international courts

34. In the absence of supporting case-law and statutory precedent, the final position the PTC relies upon is the theoretical argument that the rationale for immunities is inapplicable to the ICC because it is an international and not a domestic court. This adopts Cassese's argument that (a) the reason why personal immunities may be raised before national courts is that State A might otherwise use prosecutions to unduly impede or limit the ability of State B to engage in international action, and (b) this rationale does not apply to international courts because they are "totally independent of states and subject to strict rules of impartiality".[119]

35. This understanding is questionable in at least three ways. The first reply is that it is irrelevant to the determination of customary international law whether a practice is supported by a good rationale. What matters is that the practice exists and exhibits a belief in the rule, not its rationality. As shown above, State practice has consistently supported the traditional interpretations of head of State immunity, not the exception argued for by the PTC.

36. Cassese's argument suffers even if this positivist approach is abandoned and one takes it on its substantive terms. One immediate response is that, surely, the cleavage

115 Hazel Fox, above n.17, 555 ("In fact, only the ICC expressly provides that immunity may be set aside").

116 See Arrest Warrant, above n.17, 25–26, para.60 ("Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility"). See also Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports 1999, 62, 88–89, para.66. While that case concerned the immunity of a UN official and not a head of State, the ICJ noted that the immunity of that official did not negate UN responsibility for damages caused by the actions of that official.

117 Robert Cryer, Prosecuting International Crimes, above n.105, 292.

118 Ibid.

119 Malawi Decision, above n.3, para.34.

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between the national and international is not as clean as imagined here. As far as the ICC is concerned, enforcement action originates at the State level, making the actions of national legal and police systems integral to the Court's work, and opening the door to at least some degree of bias. For example, domestic authorities might be inclined to only arrest anti-government suspects, or—when dealing with persons clothed in immunity—only pursue the leaders of unfriendly States. Secondly, there is a great deal of disagreement about the impartiality and neutrality of international judicial institutions. The Tokyo and Nuremberg military tribunals have been poorly reviewed on neutrality grounds,[120] as—to a lesser degree—have the ICJ[121] and ICTY.[122] As for the ICC, many States have asserted claims of bias with respect to the pursuit of al-Bashir.

37. The idea that international courts are somehow uniquely impartial is based in part on overly ambitious interpretations of the *Arrest Warrant* decision. In that case, the ICJ considered whether Belgium's indictment of Abdoulaye Yerodia for crimes against international law violated his immunities as the serving Minister of Foreign Affairs for the Democratic Republic of Congo (DRC). After making its dispositive finding in Yerodia's favour, the ICJ added that "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts where they have jurisdiction", including the ICTY, ICTR and ICC.[123] There is limited precedential value to this statement for a number of reasons. The case was about diplomatic immunity, not head of State immunity, and the statement itself did not even distinguish between incumbent and former immunity holders. Nor did the Court discuss immunities in the context of non-parties to the ICC Statute, immunities before international courts in general or the ability of the Security Council to effect treaty-based overrides of customary immunities. The comment was made in *obiter*, and not based on a specific analysis of facts relating to the ICTR, ICTY or ICC. In fact, none of the pleadings even raised this argument. This perhaps explains why the ICJ did not fully distinguish the *ad hoc* tribunals from the ICC, or specify what is common about them so as to justify the abrogation of immunities before all of them.

38. The argument that the *Arrest Warrant* case conclusively determines the question of head of State immunity is only sustainable if one accepts the grand but demonstrably untrue assertion that all international criminal tribunals are identical in creation, regulation and jurisdiction, and that this commonality results exclusively from their supranational status. The more reasonable interpretation of the court's brief comments is

120 The best example being Justice Pal's scathing dissent in the Tokyo Trials. See Radhabinod Pal, Dissentient Judgment of Justice Pal (Kokusho-Kankokai, 1999).

121 See Bernhard Graefrath, above n.1.

122 See Dan Saxon, Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia, 4 Journal of Human Rights (2005), 559 (stating that all victim communities, but especially Serbs, view the ICTY as a politically-biased instrument).

123 Arrest Warrant, above n.17, para.61.

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that it simply restates that nationals of ICC States Parties are not able to claim protection through personal immunities. At best, the ICJ can be criticized for its brevity in not distinguishing tribunals constituted under the Chapter VII powers of the Security Council from treaty-based courts such as the ICC.[124] Any determination that the ICJ purported to provide a complete analysis that covered extraordinary cases such as al-Bashir's, or do more than list *some* of the courts before which immunities *may* not apply, is an unjustified extrapolation.

39. Ultimately, the fact that a court or institution is international says little about its perceived or actual impartiality. The ICC and Security Council, the key international institutions involved in the al-Bashir case, have long been seen with suspicion, particularly by less powerful States. In addition, at least some of the precedents relied upon by the PTC can be questioned for failing to meet Cassese's own criteria. All of this suggests that the rationale for immunities continues to be relevant even for international courts.

*V.C.i. Political bias in international courts*

40. Concerns about the neutrality and impartiality of the ICC pre-date[125] and exist independently of the Darfur situation.[126] At the same time, many States suspicious of the

124 Another important flaw with the ICJ's reasoning is replicated in the Malawi Decision, above n.3, para.27. The ICJ misstated the law when it found that Yerodia's diplomatic immunity was co-extensive with that of head of State immunity. As noted in Section I, the immunity of heads of State extends further than diplomatic immunity, so that the immunity persists even when the head of State is abroad on private visits. See Sir Arthur Watts, The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers, 247 Recueil des Cours 9 (1994-III). As Judge van den Wyngaert stated in dissent, heads of State and foreign ministers may have comparable functions, but that does not mean they have comparable immunities. Arrest Warrant, above n.17, 146–147, paras.14–17 (diss. op. van den Wyngaert). Any argument that purports to abrogate head of State immunity on a purely functional basis is deficient because it collapses the distinction between a head of State's personal immunity and a government official's functional immunity. See Arrest Warrant, above n.17, 150, para.22 (diss. op. van den Wyngaert), and Dapo Akande, above n.16, 411–412.

125 Political concerns largely animate the United States' objections to the ICC, including: the Court's claimed jurisdiction over nationals of non-States Parties; the potential for politicized prosecutions; an unaccountable prosecutor; and the threat of usurping the Security Council's role in international relations. See Jennifer K Elsea, US Policy Regarding the International Criminal Court, CRS Report RL31495 (29 August 2006). Similar concerns explain Chinese opposition to the ICC. See Lu Jianping and Wang Zhixiang, China's Attitude Towards the ICC, 3 J of Int'l Crim Justice (2005), 608. Concern about the politicization and lack of accountability of the Office of the Prosecutor has led to calls for self-imposed prosecutorial guidelines. See Allison Marsten Danner, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, 97 AJIL (2003) 510, 525.

126 That the Court can be a site for political contests is clear from reactions to the Court's (in)action with respect to the Israel-Palestine situation. Canada has threatened the

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supposed neutrality and legitimacy of the ICC and the Security Council argue that the al-Bashir case provides particularly strong evidence of bias and impropriety. The willingness of the ICC and Security Council to stretch basic concepts of public international law in order to indict yet another African, has led Sudan, the AU and other States to contest the actions of both of these organizations from the outset. When the Security Council voted to refer the situation in Darfur to the ICC, Sudan's Ambassador to the United Nations protested that the referral was reminiscent of colonial practices, and of dubious legality. It was "fraught with a series of procedural impediments and legitimate reservations", rested on the belief "that the scales of justice and law are based on exceptions", and demonstrated that the ICC was "a tool for the exercise of the culture of superiority and to impose cultural superiority".[127]

41. The AU has repeatedly objected to al-Bashir's indictment and stated that its members would not co-operate with the ICC to arrest him[128] because the indictment

Palestinian Authority for attempting to refer alleged Israeli crimes to the ICC. Mike Blanchfield, You'll Face "Consequences" from Canada if You Take Israel to International Criminal Court: Baird to Palestinians, National Post (6 March 2013) (news.nationalpost.com). Amnesty International said the decision not to investigate alleged Israeli war crimes "opened the court to accusations of political bias". See Amnesty International, Press Release, ICC Prosecutor statement: Fears over justice for Gaza victims, PRE01/176/2012, (3 April 2012) (www.amnesty.org). A pro-Israeli intervener said the same decision proved that the ICC had not been "hijacked for political purposes". See Lawfare Defeat for NGOs at ICC, NGO Monitor (3 April 2012) (www.ngo-monitor.org).

127 Comments of Mr. Elfatih Erwa, Sudanese Ambassador to the UN, made to the Security Council immediately after the passage of Resolution 1593, referring Darfur to the ICC. UN Doc S/PV.5158 (31 May 2005), 12–13.

128 Every AU General Assembly since al-Bashir's indictment has included one or more statements on (a) the doctrine of universal jurisdiction and the immunities of foreign officials; (b) Security Council deferrals under Article 16 for Sudan, Libya or Kenya; and (c) co-operation with the arrest warrants for al-Bashir and Muammar Gaddafi of Libya. See Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/Dec.243 (XIII) (3 July 2009) (AU Dec. 243) and Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC), Doc. Assembly/AU/Dec.245 (XIII) (3 July 2009) (AU Dec. 245); Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC), Doc. Assembly/AU/Dec. 270 (XIV) (2 February 2010) (AU Dec. 270); Decision on the Progress Report of the Commission on the Implementation of Decision On the Second Ministerial Meeting on the Rome Statute of The International Criminal Court (ICC), Doc. Assembly/AU/Dec. 296 (XV) (27 July 2010) (AU Dec. 296); Decision on the Implementation of the Decisions on the International Criminal Court, Doc. Assembly/AU/Dec. 334 (XVI) (31 January 2011) (AU Dec. 334); Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Doc. Assembly/AU/Dec.366 (XVII) (1 July 2011) (AU Dec. 366); and Decision on the Progress Report of the Commission on the Implementation of the

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exists in the context of a "double standard" applied to "poor countries"[129] and reflects the abuse of universal jurisdiction to target African leaders.[130] Some AU Member States "unreservedly attributed the indictment of the Sudanese president to a glaring practice of selective justice."[131] The AU has remained consistent in its objection to the role of the Security Council in the referral of Sudan, the non-deferral of the situation under Article 16, and the effect of the Security Council's involvement on the interpretation of the Rome Statute and the development of public international law.[132] It has also argued that Article 98(1) of the Statute[133] justifies non-co-operation with respect to al-Bashir.[134] The Arab League has rejected the validity of the indictment as well,[135] and even China—a Permanent Member of the Security Council—has openly flouted the referral by welcoming al-Bashir with a full State reception.[136]

42. As a result, the AU and some member States have engaged in symbolic non-co-operation. At one point, there was discussion of a mass withdrawal from the ICC by AU members, but this was rejected in favour of pressuring the Security Council instead.[137] Other examples of non-co-operation include refusing the ICC permission to open a liaison office in Ethiopia,[138] and stating that AU members which welcomed al-Bashir after his indictment "were discharging their obligations under Article 23 of the Constitutive Act of the African Union and Article 98 of the Rome Statute as well

Assembly Decisions on the International Criminal Court (ICC), Doc. Assembly/AU/Dec. 397 (XVIII) (30 January 2012) (AU Dec. 397). (All documents at www.au.int/en/decisions/assembly).

129 AU criticizes ICC ruling on Bashir genocide charges, Sudan Tribune (5 February 2010) (www.sudantribune.com/spip.php?article34022).

130 See Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec.199 (XI) (June 30–July 1, 2008) (www.au.int/en/decisions/assembly).

131 Ramtane Lamama, quoted in African ICC Members Mull Withdrawal Over Bashir Indictment, Voice of America (8 June 2009) (www1.voanews.com/english/news/a-13-2009-06-08-voa30-68788472.html).

132 See AU Dec. 199, AU Dec. 245, AU Dec. 270, AU Dec. 296, AU Dec. 334, AU Dec. 366, and AU Dec. 297, above n.128.

133 Above n.80.

134 See AU Dec. 245, AU Dec. 270, AU Dec. 366 and AU Dec. 397, above n.128.

135 Arab leaders back "wanted" Bashir (30 March 2009) BBC News, (news.bbc.co.uk/2/hi/7971624.stm).

136 Malcolm Moore, Sudan's al-Bashir Given Red Carpet Treatment by China, The Telegraph (29 June 2011) (www.telegraph.co.uk).

137 African Countries Back Away from ICC Withdrawal Demand, Sudan Tribune (10 June 2009) (www.sudantribune.com/spip.php?article31443). The AU subsequently complained about the Security Council's failure to act on its requests for a deferral of the investigation into Darfur. See AU Dec. 296, above n.128, para.4.

138 Ibid., para.8.

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as acting in pursuit of peace and stability in their respective regions".[139] Even after the ICC referred non-co-operating States to the Assembly of State Parties and Security Council,[140] and the PTC found that Malawi had acted contrary to the Rome Statute by failing to arrest al-Bashir in 2011,[141] the AU repeated its support for those States, and further asked that African States work to "ensure that African proposals and concerns are properly considered by the UN Security Council and the Assembly of States Parties to the Rome Statute".[142] While AU members are not unanimous in their support of al-Bashir,[143] there remains concern about the legality of the pursuit of al-Bashir, and suspicion of the ICC's relationship to Africa.[144] This suspicion is manifested in growing support for local, non-ICC court processes in Libya and Kenya,[145] a renewal of calls for a mass withdrawal from the ICC,[146] and repeated criticisms of the Security Council's refusal to engage with the AU to resolve the impasse.[147] The

139 AU Dec. 366, above n.128, para.5.

140 Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, and Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya (27 August 2010) (International Criminal Court, Pre-Trial Chamber I).

141 See Malawi Decision, above n.3.

142 AU Dec. 397, above n.128, paras.3–7.

143 Botswana, for one, has regularly stated its belief that it is obligated to arrest al-Bashir should he arrive in the country. However, Botswana apologized to Kenya after its foreign minister initially stated that Kenyatta would be banned from Botswana "if he refuses to co-operate with the ICC". See Botswana Apologises to Kenya over Kenyatta ICC warning, BBC (14 March 2013) (www.bbc.co.uk). After being threatened with cuts to foreign aid, the new President of Malawi stated that it would be obligated to arrest al-Bashir were he to arrive in the country; in response, an AU meeting scheduled to take place in Malawi in 2012 was moved to Ethiopia. Aaron Maasho, AU moves summit to Ethiopia after Malawi snubs Bashir, Reuters (12 June 2012) (www.reuters.com).

144 In January 2013, the AU recommended seeking an advisory opinion on the immunity of non-States Parties' heads of State. It also asked States to balance their obligations to the AU against their obligations to the ICC, and to unite behind particular judicial candidates in order to promote African representation on the ICC bench. Decision on the Implementation of the Decisions on the International Criminal Court (ICC), Assembly/AU/Dec.419(XIX) (AU Dec. 419).

145 See, e.g., Decision on International Jurisdiction, Justice and the International Criminal Court (ICC), Assembly/AU/Dec. 482(XXI) (AU Dec. 482) (on Kenya) (iccnow.org); and AU Dec. 419, above n.144 (on Libya).

146 Sudan says AU to agree on mass withdrawal from ICC, Sudan Tribune (24 May 2013) (www.sudantribune.com).

147 See e.g. AU Dec. 482, above n.145.

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al-Bashir indictment is no longer an isolated case; it is the first and most notorious flashpoint of general dissatisfaction with the ICC and its "race hunting" of African States.[148]

*V.C.ii The role of the Security Council in international courts*

43. As implied by the AU's steady complaints, these arguments reflect long-standing concerns about the procedures and neutrality of international institutions, including the Security Council. A key deficiency with the PTC commingling its jurisdictional claims with the Security Council referral is that this fails to confront the central issues of legitimacy and legality that arise when the Council enters into "legally grey areas"[149] such as the Sudan referral. This is not a new problem. The SCSL, for example, acknowledged that not every international court is automatically competent to delete immunities, and that one group of States cannot join together to abrogate the immunities of another State simply by saying their court is international.[150] As groups of States can easily have shared, politicized interests, including the punishment of a common enemy, there must be some additional element beyond "internationality" for international courts to justify the deletion of immunities.[151] For the SCSL, the extra justifying condition was the Chapter VII resolution[152] of the Security Council that initiated the treaty process establishing the court.[153] The problem with this reasoning is the same as in the al-Bashir case: it fails to acknowledge the contested nature of the Security Council's powers, how that affects the legitimacy of international courts, or the dubious legality of the Security Council's judicial and quasi-judicial acts.[154]

148 According to AU Chairman (and President of Ethiopia) Hailemariam Desalegn, "The intention was to avoid any kind of impunity ... but now the process has degenerated to some kind of race hunting." See African Leaders Accuse ICC of "Race Hunt", Al-Jazeera (28 May 2013) (www.aljazeera.net).

149 See Tetsuo Sato, The legitimacy of Security Council activities under Chapter VII of the United Nations Charter since the end of the Cold War, in: The Legitimacy of International Organizations, Jean-Marc Coicaud and Veijo Heiskanen (eds.), (2001), 309. Sato analyses the legitimacy of Security Council activities and highlights the need for greater legitimation in the 'legally grey areas' of quasi-judicial and quasi-legislative activities, including more functional separation of powers and more active judicial review.

150 This position was based on submissions from the amici in the case. See Prosecutor v. Charles Ghankay Taylor, SCSL-2003-01-I, Submissions of the *Amicus Curiae* on Head of State Immunity, Trial Chamber II (23 October 2003) para.78 (Taylor Amicus Brief).

151 Ibid. Whether a court has jurisdiction depends on "the nature of the tribunal: how it was established and whether the State of the official sought to be tried is bound by the instrument establishing the tribunal." See Dapo Akande, above n.16, 417.

152 SC Res 1315 (14 August 2000).

153 See Taylor Immunity Decision, above n.98, paras.34-42.

154 Frederic L. Kirgis, Jr., The Security Council's First Fifty Years, 89 AJIL (1995), 506, 531 ("The most serious legal or quasi-legal issues surrounding the post-Cold War

44. Any justification of ICC action that rests on Security Council authorization must at least acknowledge the important on-going debate about the legitimacy of many of the Security Council's actions.[155] The suggestion that States have consented to *any* exercise of Security Council power by virtue of Articles 24(1), 25 and 103 of the UN Charter overlooks not only the reality of political resistance to Council resolutions at the State level (such as the refusal of Sudan to co-operate), but legal resistance that confronts Council action.[156] The Council's limited and undemocratic membership is insufficient to demonstrate neutrality or provide the referral with the legitimacy necessary to assert jurisdiction over al-Bashir.[157] Nor is it enough to say that since both the Security Council and the Court ostensibly seek to end impunity that their respective powers may be combined to that end, or that the powers of one may be interpreted expansively so as to aid the aims of the other: "This 'Security Council as legal demiurge

> Security Council have ... had much more to do with the possible abuse of power than with abdication of it. ... It has empowered the [war crimes] tribunals and the [compensation] commission to apply norms that do not necessarily reflect pre-existing international law. Council has made quasi-judicial determinations that go well beyond those inherent in its express authority to determine threats to the peace, breaches of the peace and acts of aggression. It has also gone beyond its readily implied authority to interpret and apply relevant Charter provisions or to interpret its own resolutions. It has done so despite its own non-judicial character, and without procedural safeguards").

155 On the democratic and deliberative deficits of Security Council action, see Ian Johnstone, Legislation and Adjudication: Bringing Down the Deliberative Deficit, 102 AJIL (2008), 275. On the hegemonic nature of some Security Council action, see Detlev F. Vagts, Hegemonic International Law, 95 AJIL (2001), 843, and José E. Alvarez, Hegemonic International Law Revisited, 97 AJIL (2003), 873.

156 As in Kadi, where the claimant's assets were frozen by virtue of a Security Council action that designated him a terrorist supporter without giving him the option to refute the accusations. The European Court of Justice stated that UN Member States have a "free choice" as to how to implement Council resolutions within their domestic legal order, such that judicial review of the "internal lawfulness" of the implementation of those resolutions is perfectly compatible with the existing "international legal order". The Court then set aside an European Council regulation implementing a Security Council resolution on the basis that sufficient procedural guarantees were not provided for at the Security Council level: Joined Case C-402 and 415/05P, Kadi and Al Barakaat Int'l Found. v. Council and Comm'n [2008] E.C.R. I-6351, para.298–299, 327–328 and 350–353.

157 On the general debate about Security Council legitimacy, see Ian Hurd, Legitimacy, Power, and the Symbolic Life of the United Nations Security Council, 8 Global Governance (2002), 35, and Tetsuo Sato, above n.149. On forms of legal deliberation and their effect on Security Council legitimacy, see Ian Johnstone, Legal Deliberation and Argumentation in International Decision Making, in: Hilary Charlesworth and Jean-Marc Coicaud (eds.), Fault Lines of International Legitimacy (2010), 175. On the history and use of legitimacy at the Security Council, see Ian Hurd, After Anarchy: Legitimacy and Power in the United Nations Security Council (2007).

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view', which is controversial on its own grounds, is obviously difficult to transpose to the situation of the ICC where, in the relations of the Court with non-state parties, it would amount to no less than a sort of cosmopolitan hold-up."[158] To the extent that the ICC both accepts Security Council referrals and relies upon them to make highly controversial arguments about jurisdiction, it is undermining the claims of neutrality that are central to any court's legitimacy.

45. All these issues demonstrate that many States do not trust international institutions in the way Cassese suggests they do. Importantly, their reasons for distrust are meaningful even if they are simultaneously politically self-interested. The publicly stated reasons for opposing the ICC centre on many of the same issues discussed in this article: the unprecedented nature of the indictment; the democratic deficit of the Security Council; the contravention of basic principles of the law of treaties; and the apparent impropriety demonstrated by the Office of the Prosecutor. All of these factors undermine the ICC's claim to neutrality, and therefore the argument that the rationale for immunities is inapplicable to international tribunals.

46. Focusing on the legitimacy of tribunals in this way has three results: it clarifies that mere international status is insufficient to permit deletions of immunity; it calls into question the argument that there is consistent State practice abrogating immunities; and it further contradicts Cassese's argument. Cassese may be right that immunities should not apply before neutral courts, but it is an oversimplification to equate "international" with "neutral". By extension, in so far as the PTC adopts Cassese's position,[159] it cannot then rely on either the 1919 Commission or the military tribunals as evidence of a customary exception. The selectivity[160] and politicization problems

158 Frédéric Mégret, In Search of the "Vertical": An Exploration of What Makes International Criminal Tribunals Different (and Why), in: Carsten Stahn and Larissa van den Herik (eds.), Future Perspectives on International Criminal Justice (2010), 178, 220.

159 Malawi Decision, above n.3, para.34.

160 To the extent that art. 7 of the Nuremberg Charter is claimed as a precedent for the removal of immunities, it is perhaps worth noting that this clause was itself limited by art. 6, which means that the only immunities removed were those of the "major war criminals of the European Axis countries". See Charter of the International Military Tribunal (Nuremberg Charter), art. 6 reprinted in: Michael R. Marrus, above n.112. One wonders if the Allies would have favoured the language of art. 7 in the absence of the protection afforded by art. 6. Similar complaints about the broader selectivity problems at Nuremberg were made contemporaneously with the trials. See Herbert Wechsler, The Issues of the Nuremberg Trial, 62 Political Science Q (1947), 11, 26 ("My concern is with the point of equality itself, so important an element of justice—equality in the sense that the sanctions do not apply either to our allies or to ourselves"); and Bernard Meltzer, A Note on Some Aspects of the Nuremberg Debate, 14 U Chicago LR (1947), 455, 469 ("It is, in my judgment, the central difficulty of Nuremberg: The governing law has not been equally applied. The standards of guilt have been applied only to the enemy. They have not been applied to

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of those bodies[161] are examples of the false multi-lateralism that undermines their claim to neutrality.[162]

47. This section leads to two important conclusions. Firstly, there is a dearth of customary international law precedent to support the PTC. The alleged State practice from the First and Second World Wars can be explained as deficient on three grounds: no individual ever lost his or her personal immunities, including the former German emperor; the Tokyo and Nuremberg Charters only removed the substantive defense of official responsibility, not the procedural bar of personal immunity; and the lack of multi-lateralism behind those tribunals. When combined with the absence of precedent in ICC, ICTY and ICTR jurisprudence, it is difficult to recognize a customary law rule that immunities are inapplicable before international criminal tribunals.

48. The second point is that denying the customary international law argument would not alter the past practice of international criminal law in any meaningful

our Allies or to ourselves. The Russians are not forced to defend their operations in Finland or Poland. We are not required to justify Hiroshima."). But see Francis Biddle, In Brief Authority (1962), 450–56, Robert Cryer, above n.105, 200–201 and Sienho Yee, The *Tu Quoque* Argument as a Defence to International Crimes, Prosecution or Punishment, 3 Chinese JIL (2004), 87, 103–109.

161 See Georg Schwarzenberger, above n.1. Robert Cryer notes that the 1919 Commission was composed solely of representatives of the Allied Powers and that, "[u]nsurprisingly, given its composition, the Commission found that the outbreak of war was entirely the fault of the Central Powers, despite the fact that they also accepted that the question was complex and 'might be more fitly investigated by historians and statesmen than by a tribunal'." Robert Cryer, above n.105, 32. Similarly, the judges and prosecutors at Nuremberg were exclusively from the four major Allied Powers: Russia, France, the United Kingdom, and United States. The problems with the Nuremberg trials were succinctly stated by Norman Birkett, the British alternate judge at the tribunal, who stated in respect of the Nuremberg Charter that, "[i]f it continues to apply only to the enemy, then I think the verdict of history may be against Nuremberg." Norman Birkett, International Legal Theories Evolved at Nuremberg, in: Guénaël Mettraux (ed.), Perspectives on the Nuremberg Trial, (2008), 307.

162 Selectivity concerns also animated the ICJ in the Arrest Warrant case, where five members of the Court all expressed varying degrees of scepticism about the potential abuse of universal jurisdiction through selective prosecutions. See Arrest Warrant case, above n.17, Separate Opinion of President Guillame, para.15 ("It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as an agent for an ill-defined 'international community'"; Separate Opinion of Judge *ad hoc* Bula-Bula, para.14 (after noting the history of Belgian colonialism in Congo, the judge asked, "Why does the respondent State not exercise its territorial jurisdiction by prosecuting Belgian companies established on its territory suspected of illegal activities in areas of foreign occupation within the Congo?"; and Joint Separate Opinion of Judges Higgins, Koojimans and Buergenthal, para.59 (a State wishing to exercise universal jurisdiction to bring criminal charges must "prevent abuse", in part through the use of "a prosecutor or *juge d'instruction* who acts in full independence, without links to or control by the government of that State").

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way. It was perfectly acceptable to arrest and prosecute Charles Taylor, Laurent Gbagbo and Slobodan Milošević not because there was some customary law exception to the ordinary rules of head of State immunity, but because those ordinary rules already allowed for their prosecutions: all three were former heads of State and, in the case of Gbabgo, had seen the immunity waived by the State holding it. An exception cannot be drawn from cases that comply with the regular rule.

## VI. Practical implications of the ICC position

49. The analysis to this point has focused on the strictly legal arguments raised in support of the PTC position. It has argued that the Security Council cannot empower the ICC to bind Sudan to the Rome Statute, or obligate other States to violate al-Bashir's immunity. A review of past cases and tribunals demonstrates that the cases relied upon by the ICC as proof of an exception to customary international law are in fact perfectly aligned with the ordinary rules of head of State immunity, and that the statutes of previous tribunals do not support the exception either. This section supplements this technocratic legal argument by examining the political and legal consequences of the PTC's arguments. Arresting al-Bashir threatens the future of work of the ICC, and to radically reshape public international law without either consulting those most affected by the change or fully addressing the consequences of doing so.

### VI.A. Undermining the Court and future prosecutions

50. The first and most compelling response to the suggestion that it is worth sacrificing certain principles of public international law in order to put al-Bashir on trial is that doing so actually decreases the likelihood that such prosecutions will occur in the future. As stated above, the Sudanese response to Resolution 1593 was not only legally targeted, but crafted in language that created special resonance with histories of colonialism, exceptionalism and exploitation. That powerful mix of law and politics has been supplemented by the AU response that adopts that language but also articulates several legal points that need to be addressed by the Court.[163] The AU has paired its legal analysis with specific demands to its member States to not co-operate in arresting al-Bashir, including—at one time—the possibility of a regionally organized withdrawal from the Rome Statute.[164] While that stance has been deferred,[165] the potential for non-co-operation and withdrawal remains; the Kenyan parliament recently voted for the second time to withdraw from the Rome Statute.[166]

163 With the caveat that some of these legal points have been articulated with more clarity and specificity than others. Article 16 has been considered in some detail by the AU, but art. 98 has not.

164 See African ICC Members Mull Withdrawal, above n.131.

165 See African Countries Back Away, above n.137.

166 Associated Press, Kenya votes to leave ICC days before deputy president's Hague trial, The Guardian (5 September 2013) (www.guardian.co.uk). The vote remains symbolic

51. The loss of States Parties, either through withdrawal or non-co-operation, would be devastating to the ICC. For one, the symbolic statement would be a tremendous blow to the symbolism and credibility of the Court. What would it say about the legitimacy of an international organization that cannot count among its supporters a regional bloc of States from the only continent where it has initiated trials? Why would less powerful States who are not yet parties want to ratify the Rome Statute, when so many others do not trust the Court either to act in an unbiased manner or to acknowledge their concerns about ICC rules and procedures? The Arab League's members, for example, would surely feel reassured about their non-participation in the Court.

52. Withdrawal and other forms of non-co-operation would also have a deleterious effect on the Court's docket. Article 127 of the Rome Statute requires a one-year notice of withdrawal from the Statute, and states that withdrawal does not affect a State's obligations to the Court, including co-operation with existing cases and investigations, as well as future cases arising out of the same situation.[167] While this is strong, unambiguous language, it is equally clear that it is subordinate to the practical realities of enforcement. The success of the Court is predicated upon co-operation at the national level, and it has no way to compel such assistance. The Court has no enforcement branch, and relies on the flow of information and witnesses from domestic authorities, which are easily obstructed.[168] Some cases might be able to continue without State co-operation, but the majority would be unable to proceed.[169] While many accused persons

until and unless a legislative bill giving it effect is introduced and ratified by the government. Ugandan officials have also expressed their support for the Kenyan vote. Uganda backs Kenya vote to quit ICC, New Vision (8 September 2013) (www.newvision.co.ug).

167 Rome Statute, above n.6.

168 In Kenya, for example, the ICC has been confronted with an "unprecedented level of witness interference" in its Kenyan cases. See Bernard Momyani and Simon Jennings, Kenya Witnesses Face Harassment Institute for War and Peace Reporting, ACR Issue 350 (5 June 2013) (iwpr.net). The Office of the Prosecutor was forced to drop charges against one Kenyan accused after a key witness confessed to accepting a bribe and recanted essential evidence, and the Government of Kenya failed to provide the Court with access to vital evidence or witnesses. See Statement by ICC Prosecutor on the Notice to withdraw charges against Mr. Muthaura, (11 March 2013) (www.icc-cpi.int).

169 As are the cases against government officials from Sudan, including al-Bashir. The government of Sudan has undertaken simple but extraordinary measures in order to frustrate the ICC. The Office of the Prosecutor alleged that the Sudanese Embassy in the Hague simply physically barred the ICC from delivering documents to it after the ICC indicted two other government officials, Ahmed Harun and Ali Kushayb. See First Bashir Warrant, above n.2 at paras. 228–229.

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would find themselves in situations where they could not travel outside their home countries,[170] that would hardly equate to bringing them to justice, let alone provide the other salutary effects of trials.[171] The Court would project weakness and ineffectiveness, a danger that arises even without the exceptional step of a mass withdrawal. An expansion of the AU non-co-operation stance so that it includes all ICC situations in Africa would have largely the same result. States might still be in violation of their obligations under the Rome Statute, but would be able to present a more principled explanation for their position, along the lines of a general strike rather than general repudiation. This would give those governments with buyer's remorse—notably Uganda and Kenya—a sham principle with which to justify their current obstruction of the Court's processes.[172] It should also be noted that obstruction and non-co-operation can happen in less blunt and more legalistic ways. By way of example, the AU has become so frustrated with the ICC position on al-Bashir and immunities that it has advised member States to rely on Article 98(2) of the Rome Statute and draw up bilateral agreements confirming "the immunities of their Senior State officials".[173] That decision has the potential to increase the number of defendants claiming immunity from the Court; this would both hinder co-operation between the ICC and States and undermine the protective mission of the ICC.

53. The second structural result is the creation of a clear hierarchy of States and their unequal exposure to the jurisdiction of the ICC. At the bottom of this hierarchy, open to prosecution but with little ability to influence its exercise, will be States such as Sudan, who lack a permanent seat on the Security Council and have no real capacity to influence the governance of the Court. States that have ratified the Rome Statute will be in the middle—they will have greater exposure to jurisdiction, but will retain

170 Al-Bashir has visited a number of States since his indictment, including Chad, Malawi, Ethiopia, Djibouti, Uganda, China and Nigeria. However, the threat of arrest has loomed over some of his recent trips, including to Nigeria, where he was forced to cut his visit short after a human rights lawyers filed suit demanding his arrest. Bashir leaves Nigeria amid calls for arrest, Al-Jazeera (16 July 2013) (www.aljazeera.net).

171 Including fact-finding about atrocities and the incapacitation of perpetrators.

172 Despite self-referring the Lord's Resistance Army to the ICC, Uganda has turned against the Court, insisting that any trials take place through national courts in Uganda. At the swearing-in ceremonies for newly elected Kenyan President Uhuru Kenyatta, Ugandan President Yoweri Museveni congratulated the Kenyan people for choosing Kenyatta, who has resisted the ICC, and explained his change of opinion of the ICC: "I was one of those that supported the ICC because I abhor impunity. However, the usually opinionated and arrogant actors using their careless analysis have distorted the purpose of that institution. They are now using it to install leaders of their choice in Africa and eliminate the ones they do not like." See Museveni attacks ICC at Uhuru's swearing-in, Daily Monitor (10 April 2013) (www.monitor.co.ug).

173 AU Dec. 419, above n.144.

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some ability to affect the policies and principles by which that jurisdiction is exercised. At the top will be the United States, Russia and China, the three permanent members of the Security Council who have not ratified the Rome Statute. Under the "Chapter VII Resolution as binding" model, those three States will occupy a hugely privileged position. They will retain the ability to not only push for the referral of situations concerning other non-State Parties, but do so while shielding themselves (and their non-State Party allies) through their veto power. If the referral of a situation by the Security Council and Article 103 of the UN Charter combine to defeat the customary international law protections of Article 98(1), they must also defeat agreements signed under Article 98(2). As a result, little incentive will exist for three of the world's largest military powers to ratify the Rome Statute when they are able to insulate themselves from its reaches through their vetoes, while at the same time defeating the treaty and customary-law protections applying to other States.

54. Ratification of the Rome Statute is therefore the only way for these three States to seriously risk being brought under ICC jurisdiction.[174] They are thus essentially exempt from liability yet retain the ability to override the protections that ostensibly apply to any other non-party State. It would be unthinkable for such power brokers and adherents to *realpolitik* to trade such relative power for the uncertainty and vagaries of the inherent jurisdiction of the Court. While the Court would theoretically have universal reach, the practical upper limit of its jurisdiction would be those permanent members of the Security Council who have not ratified the Rome Statute. This limits the ability of the ICC to protect a number of potential victims, and—perhaps more crucially—calls into question the legitimacy of an institution that not only is incapable of exercising jurisdiction over such major military powers, but actually reasoned itself into that situation. At that point, it matters little whether the ICC would ever have actually dared to indict Russian, Chinese or American officials for international crimes; what is of consequence is that it would be virtually impossible to do so because the Court gave its blessing to a regime where less exacting standards are applied to the most powerful States.

### VI.B. Revision of basic principles of public international law

55. The PTC position also contests at least two basic principles of public international law. Accepting that the Chapter VII Security Council referral binds the government of Sudan to the terms of the Rome Statute alters basic rules about whether and by whom third parties can be bound to treaties against their will. While some international agreements already have unavoidable effects upon third parties, and thereby direct their actions in a certain way, those obligations are usually ones of recognition—of boundaries or governments, for example—and are qualitatively different from the one at issue

174 This invulnerability is not absolute. A secondary risk of liability arises through the Rome Statute, above n.6, art. 12(2)(a). That provision grants the ICC territorial jurisdiction over situations self-referred by States or investigated *proprio motu* by the Office of the Prosecutor.

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here. They are not obligations requiring the third party State to surrender its leader to a treaty-based court with which it has no relationship. In so far as these sorts of obligations are ones that *ought* to be imposed, they require careful calibration through global negotiations or, at the very least, through judicially evaluated restraints developed by truly multi-lateral institutions such as the UN. It might be the case that the Security Council is the only body that should have the power to impose these sorts of third-party obligations, but why and with what restrictions? What does the attribution of this power say about the definition of "international peace and security", or—crucially for legitimacy purposes—the relationship between the ICC and the Security Council? None of these issues have been addressed by the Security Council or the ICC, and neither of those bodies seems competent to determine all or some of these issues. And yet the reasoning employed by the ICC legitimates the unfiltered expansion of Security Council powers, even though at least one of the likely consequences of doing so is counter-productive to the ICC's larger mission.

56. The second principle affected by the ICC's decision is the relationship between non-treaty law and Article 103 of the Charter. Accepting the Security Council referral despite its effects upon treaty law implies acceptance of a changing relationship between the UN and general international law, re-shaping our understanding of the supremacy clause of the Charter in a way that contradicts past statements of the ICJ and the General Assembly. It is not clear from the al-Bashir case how this internal tension is to be resolved and whether customary international law acts as a restraint on UN or Security Council action. Nor is it clear under what circumstances customary international law does *not* constrain one or both of these bodies. Should all deviations from customary international law need approval from the General Assembly, or is a Chapter VII resolution sufficient? This leads to a further interrogation—if the organization for collective security is not bound by these principles, is any individual State? Again, these are questions that are best left not to the ICC or the Security Council, but to a more broadly representative body with the expertise and competence to answer them. This might be the ICJ or the General Assembly, but it surely cannot be the remit of an international criminal tribunal with narrow jurisdictional scope over a limited class of individuals to determine, adjust or pronounce upon the appropriate relationship between another international organization and customary international law.

### VI.C. Constructing the ICC as an institution of global governance

57. A similar point can be made about the ICC and its relationship to the AU. The PTC claims that the AU cannot use Article 98(1) to justify its non-co-operation resolutions, and therefore cannot compel individual member States not to co-operate with the Court, because the ICC has determined that customary international law is in its favour.[175] The problems with this determination are manifold. Malawi's

175 See Malawi Decision, above n.3 at paras.15 and 37.

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memberships in the ICC Assembly of States Parties and AU are legally and conceptually distinct, and so while the ICC can contest the AU interpretation of customary international law, the Court comes perilously close to being judge in its own cause when it purports to resolve that question in its favour. Moreover, the ICC cannot legally exercise any jurisdiction over another international organization such as the AU or interpret the terms of the AU Constitutive Act, and any attempt to restrict the powers of the AU to issue binding obligations to AU members is *ultra vires*. Finally, the Court elides the distinction between States and States Parties to the Rome Statute when it claims for itself the *ius puniendi* for the international community.[176] The ICC may have some rights to punish with respect to States that have accepted the Court's jurisdiction, but it is overstating the case by implying the existence of a residual global right to punish. There are numerous qualifiers to this right within the Rome Statute itself, some of which are clearer[177] than others.[178]

58. These errors seem to stem from the Court's flawed conception of itself as occupying a privileged place in the hierarchy of global governance, albeit in the absence of anything resembling a supremacy clause such as Article 103 of the UN Charter. The effect of such pronouncements may be minimal in the short term, but a longer view of international relations suggests this will be interpreted as an arrogation of power that is controversial because it is of dubious legal pedigree, and made even less palatable by the fact of its exercise against African States both as individual entities and part of a collective. This alienation will likely increase if the ICC takes this position to heart and relies upon it in future cases.

## VII. Conclusion

59. This article has argued that in attempting to justify the indictment of Omar al-Bashir, the ICC has risked its legitimacy as an institution of international justice. It has done so by relying on controversial legal propositions, all of which can be rebutted by countervailing arguments outlined above. The manner in which the PTC has pursued al-Bashir, and the disputed legal arguments which it has relied upon, threaten to undermine the future work of the Court by giving some States a disincentive to ratify the Rome Statute, and others good reason to withdraw or at least not co-operate with the Court. In addition, the Court's reasoning seems to require a reshaping of some fundamental tenets of public international law.

60. There is no denying that, at its core, the desire to try those responsible for horrific crimes is understandable, and this moral position is not easily addressed by the counter-arguments raised above. At the same time, the haste with which this humanitarian

176 Ibid., para.46.

177 See arts. 98(1) and (2), and the admissibility restrictions in art. 17 of the Rome Statute, above n.6.

178 Such as the effects of Security Council referrals.

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impulse is pursued should give pause to its supporters. In the drive to hold al-Bashir accountable, vital questions of international criminal law and public international law have been ignored or overlooked, individual States and regional organizations have become resistant and obstructionist, and even members of the Security Council have contradicted the edicts of the Court and Council. The goal may be laudable, but it must be asked whether the methods employed to achieve it are the appropriate ones, and whether the long-term consequences are worth the short-term gains.

61. Assuming that the PTC is correct to call for al-Bashir's accountability but incorrect in its reasoning, how then is he to be brought to justice? The alternatives, unfortunately, are not encouraging. As a sitting head of State, al-Bashir is immune from all foreign processes, and the current Constitution of Sudan protects him from domestic proceedings. It may be that the tide of public opinion turns against him, as it did against Slobodan Milošević, leading to his removal from power and the deletion of his immunities. Or it could be that the government of Sudan sacrifices al-Bashir in the same way that Hosni Mubarak was offered up in Egypt.[179] There also remains the possibility that some bold country, one with a differing view of either the legal analysis in the case or the political costs, simply decides to arrest al-Bashir on one of his many sojourns outside Sudan,[180] providing the necessary rupture of legal precedent that accompanies all revisions of customary international law.[181] More likely, however, is that the ICC will have to play the waiting game to be able to secure jurisdiction over al-Bashir, as was acknowledged by the then-ICC Prosecutor.[182]

62. Even if al-Bashir is ultimately put on trial, that will be of little comfort, given the length of time it will have taken to do so, and the crimes that continue in the interim. If anything, this imbroglio has made it clear that the time is ripe for the international

179 Of course, even domestic revolution does not guarantee accountability or even societal change. Mubarak's trials are on-going, and he has yet to be convicted of any crime, while his former associates from the Egyptian armed forces are now running the country.

180 International criminal tribunals have been reluctant to relinquish jurisdiction over accused persons even when the legality of their transfer is questionable. See e.g. Prosecutor v. Dragan Nikolić, IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, Appeals Chamber (5 June 2003).

181 Depending, amongst other factors, on what Lepard describes as the "overall factual context", including reaction of other States to such a violation. However, not every change in customary international law requires such a violation; a shift in *opinio juris* may precede any novel practice. See Brian D Lepard, Customary International Law: A New Theory with Practical Applications (2010), 277–278.

182 Luis Moreno-Ocampo said it could take up to twenty years to arrest suspects such as al-Bashir. See Interview of Luis Moreno-Ocampo by David Frost (20 June 2008) on Frost Over the World, Al-Jazeera English (www.youtube.com/user/AlJazeeraEnglish); and Interview of Luis Moreno-Ocampo (19 March 2009) on Riz Khan, Al-Jazeera English, (www.youtube.com/user/AlJazeeraEnglish).

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community to reconsider the double-edged sword of immunities. Though international law and the rules of international diplomacy presently provide no exception for personal immunities, this should not be a barrier to a future exception, perhaps one that removes immunities in cases of large-scale human rights violations.[183] It may even be that the arrest and prosecution of al-Bashir is in fact the first step in creating the customary law exception that does not yet exist. The key point is that any such shift must be clearly articulated as such, not created out of a haze of optimistic reconstructions of customary international law and unpredictable extensions of the powers of international organizations. Whatever the precise contours of a new norm, the central issues will be that of its adjudication and application. The body that decides on such issues will have to be clearly impartial, persuasive in its reasoning, and universally recognized as legitimate to take on such cases. The ultimate risk of the current practice is that, after the decades it took to finally establish a permanent international criminal court, that institution is already losing the confidence of some States who believe the Court is assuming, instead of demonstrating, that it possesses those characteristics.

183 Rosanne van Alebeek outlines some possibilities in this regard. See Roseanne Van Alebeek, above n.16, 301–414.

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# AFFAIRE RELATIVE AU MANDAT D'ARRÊT DU 11 AVRIL 2000

(RÉPUBLIQUE DÉMOCRATIQUE DU CONGO c. BELGIQUE)

**ARRÊT DU 14 FÉVRIER 2002**

# 2002

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

(DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM)

**JUDGMENT OF 14 FEBRUARY 2002**

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ARRÊT

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# ARREST WARRANT OF 11 APRIL 2000
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JUDGMENT

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No. 121

**14 February 2002**

# CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

## (DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM)

*Facts of the case — Issue by a Belgian investigating magistrate of "an international arrest warrant* in absentia *" against the incumbent Minister for Foreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity — International circulation of arrest warrant through Interpol — Person concerned subsequently ceasing to hold office as Minister for Foreign Affairs.*

* *

*First objection of Belgium — Jurisdiction of the Court — Statute of the Court, Article 36, paragraph 2 — Existence of a "legal dispute" between the Parties at the time of filing of the Application instituting proceedings — Events subsequent to the filing of the Application do not deprive the Court of jurisdiction.*

*Second objection of Belgium — Mootness — Fact that the person concerned had ceased to hold office as Minister for Foreign Affairs does not put an end to the dispute between the Parties and does not deprive the Application of its object.*

*Third objection of Belgium — Admissibility — Facts underlying the Application instituting proceedings not changed in a way that transformed the dispute originally brought before the Court into another which is different in character.*

*Fourth objection of Belgium — Admissibility — Congo not acting in the context of protection of one of its nationals — Inapplicability of rules relating to exhaustion of local remedies.*

*Subsidiary argument of Belgium —* Non ultra petita *rule — Claim in Application instituting proceedings that Belgium's claim to exercise a universal jurisdiction in issuing the arrest warrant is contrary to international law — Claim not made in final submissions of the Congo — Court unable to rule on that ques-*

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*tion in the operative part of its Judgment but not prevented from dealing with certain aspects of the question in the reasoning of its Judgment.*

* *

*Immunity from criminal jurisdiction in other States and also inviolability of an incumbent Minister for Foreign Affairs — Vienna Convention on Diplomatic Relations of 18 April 1961, preamble, Article 32 — Vienna Convention on Consular Relations of 24 April 1963 — New York Convention on Special Missions of 8 December 1969, Article 21, paragraph 2 — Customary international law rules — Nature of the functions exercised by a Minister for Foreign Affairs — Functions such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability — No distinction in this context between acts performed in an "official" capacity and those claimed to have been performed in a "private capacity".*

*No exception to immunity from criminal jurisdiction and inviolability where an incumbent Minister for Foreign Affairs suspected of having committed war crimes or crimes against humanity — Distinction between jurisdiction of national courts and jurisdictional immunities — Distinction between immunity from jurisdiction and impunity.*

*Issuing of arrest warrant intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs — Mere issuing of warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs — Purpose of the international circulation of the arrest warrant to establish a legal basis for the arrest of Minister for Foreign Affairs abroad and his subsequent extradition to Belgium — International circulation of the warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs.*

* *

*Remedies sought by the Congo — Finding by the Court of international responsibility of Belgium making good the moral injury complained of by the Congo — Belgium required by means of its own choosing to cancel the warrant in question and so inform the authorities to whom it was circulated.*

## JUDGMENT

*Present:* *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL; *Judges* ad hoc BULA-BULA, VAN DEN WYNGAERT; *Registrar* COUVREUR.

In the case concerning the arrest warrant of 11 April 2000,

*between*

the Democratic Republic of the Congo,

represented by

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Ngele Masudi, Minister of Justice and Keeper of the Seals,
Maître Kosisaka Kombe, Legal Adviser to the Presidency of the Republic,
Mr. François Rigaux, Professor Emeritus at the Catholic University of Louvain,
Ms Monique Chemillier-Gendreau, Professor at the University of Paris VII (Denis Diderot),
Mr. Pierre d'Argent, Chargé de cours, Catholic University of Louvain,
Mr. Moka N'Golo, Bâtonnier,
Mr. Djeina Wembou, Professor at the University of Abidjan,

as Counsel and Advocates;

Mr. Mazyambo Makengo, Legal Adviser to the Ministry of Justice,

as Counsellor,

*and*

the Kingdom of Belgium,

represented by

Mr. Jan Devadder, Director-General, Legal Matters, Ministry of Foreign Affairs,

as Agent;

Mr. Eric David, Professor of Public International Law, Université libre de Bruxelles,
Mr. Daniel Bethlehem, Barrister, Bar of England and Wales, Fellow of Clare Hall and Deputy Director of the Lauterpacht Research Centre for International Law, University of Cambridge,

as Counsel and Advocates;

H.E. Baron Olivier Gilles de Pélichy, Permanent Representative of the Kingdom of Belgium to the Organization for the Prohibition of Chemical Weapons, responsible for relations with the International Court of Justice,
Mr. Claude Debrulle, Director-General, Criminal Legislation and Human Rights, Ministry of Justice,
Mr. Pierre Morlet, Advocate-General, Brussels Cour d'Appel,
Mr. Wouter Detavernier, Deputy Counsellor, Directorate-General Legal Matters, Ministry of Foreign Affairs,
Mr. Rodney Neufeld, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge,
Mr. Tom Vanderhaeghe, Assistant at the Université libre de Bruxelles,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

1. On 17 October 2000 the Democratic Republic of the Congo (hereinafter referred to as "the Congo") filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter referred to as "Belgium") in respect of a dispute concerning an "international arrest warrant issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi".

In that Application the Congo contended that Belgium had violated the "principle that a State may not exercise its authority on the territory of another State", the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations", as well as "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

In order to found the Court's jurisdiction the Congo invoked in the aforementioned Application the fact that "Belgium ha[d] accepted the jurisdiction of the Court and, in so far as may be required, the [aforementioned] Application signifie[d] acceptance of that jurisdiction by the Democratic Republic of the Congo".

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of Belgium by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case; the Congo chose Mr. Sayeman Bula-Bula, and Belgium Ms Christine Van den Wyngaert.

4. On 17 October 2000, the day on which the Application was filed, the Government of the Congo also filed in the Registry of the Court a request for the indication of a provisional measure based on Article 41 of the Statute of the Court. At the hearings on that request, Belgium, for its part, asked that the case be removed from the List.

By Order of 8 December 2000 the Court, on the one hand, rejected Belgium's request that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. In the same Order, the Court also held that "it [was] desirable that the issues before the Court should be determined as soon as possible" and that "it [was] therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition"

5. By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. By Orders of 14 March 2001 and 12 April 2001, these time-limits, taking account of the reasons given by the Congo and the agreement of the Parties, were successively extended. The Memorial of the Congo was filed on 16 May 2001 within the time-limit thus finally prescribed.

6. By Order of 27 June 2001, the Court, on the one hand, rejected a request

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by Belgium for authorization, in derogation from the previous Orders of the President of the Court, to submit preliminary objections involving suspension of the proceedings on the merits and, on the other, extended the time-limit prescribed in the Order of 12 April 2001 for the filing by Belgium of a Counter-Memorial addressing both questions of jurisdiction and admissibility and the merits. The Counter-Memorial of Belgium was filed on 28 September 2001 within the time-limit thus extended.

7. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

8. Public hearings were held from 15 to 19 October 2001, at which the Court heard the oral arguments and replies of:

*For the Congo:* H.E. Mr. Jacques Masangu-a-Mwanza,
H.E. Mr. Ngele Masudi,
Maître Kosisaka Kombe,
Mr. François Rigaux,
Ms Monique Chemillier-Gendreau,
Mr. Pierre d'Argent.

*For Belgium:* Mr. Jan Devadder,
Mr. Daniel Bethlehem,
Mr. Eric David.

9. At the hearings, Members of the Court put questions to Belgium, to which replies were given orally or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. The Congo provided its written comments on the reply that was given in writing to one of these questions, pursuant to Article 72 of the Rules of Court.

*

10. In its Application, the Congo formulated the decision requested in the following terms:

> "The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels Tribunal de première instance against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law', that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000."

11. In the course of the written proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of the Congo,*

in the Memorial:

> "In light of the facts and arguments set out above, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

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1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC;
3. the violation of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 precludes any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that, following the Court's Judgment, Belgium renounces its request for their co-operation in executing the unlawful warrant."

*On behalf of the Government of Belgium,*

in the Counter-Memorial:

"For the reasons stated in Part II of this Counter-Memorial, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the preceding submission, the Court concludes that it does have jurisdiction in this case and that the application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the application."

12. At the oral proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of the Congo,*

"In light of the facts and arguments set out during the written and oral proceedings, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the war-

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rant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

*On behalf of the Government of Belgium,*

"For the reasons stated in the Counter-Memorial of Belgium and in its oral submissions, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the Application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the submissions of Belgium with regard to the Court's jurisdiction and the admissibility of the Application, the Court concludes that it does have jurisdiction in this case and that the Application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the Application."

* * *

13. On 11 April 2000 an investigating judge of the Brussels Tribunal de première instance issued "an international arrest warrant *in absentia*" against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.

At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo.

14. The arrest warrant was transmitted to the Congo on 7 June 2000, being received by the Congolese authorities on 12 July 2000. According to Belgium, the warrant was at the same time transmitted to the International Criminal Police Organization (Interpol), an organization whose function is to enhance and facilitate cross-border criminal police co-operation worldwide; through the latter, it was circulated internationally.

15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", as amended by the Law of 10 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law" (hereinafter referred to as the "Belgian Law").

Article 7 of the Belgian Law provides that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed". In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which

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the arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia's alleged offences was also uncontested.

Article 5, paragraph 3, of the Belgian Law further provides that "[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law".

16. At the hearings, Belgium further claimed that it offered "to entrust the case to the competent authorities [of the Congo] for enquiry and possible prosecution", and referred to a certain number of steps which it claimed to have taken in this regard from September 2000, that is, before the filing of the Application instituting proceedings. The Congo for its part stated the following: "We have scant information concerning the form [of these Belgian proposals]." It added that "these proposals . . . appear to have been made very belatedly, namely *after* an arrest warrant against Mr. Yerodia had been issued".

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings (see paragraph 1 above), in which the Court was requested "to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000". The Congo relied in its Application on two separate legal grounds. First, it claimed that "[t]he *universal jurisdiction* that the Belgian State attributes to itself under Article 7 of the Law in question" constituted a

> "[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations".

Secondly, it claimed that "[t]he non-recognition, on the basis of Article 5 . . . of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office" constituted a "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

18. On the same day that it filed its Application instituting proceedings, the Congo submitted a request to the Court for the indication of a provisional measure under Article 41 of the Statute of the Court. During the hearings devoted to consideration of that request, the Court was informed that in November 2000 a ministerial reshuffle had taken place in the Congo, following which Mr. Yerodia had ceased to hold office as Minister for Foreign Affairs and had been entrusted with the portfolio of Minister of Education. Belgium accordingly claimed that the Congo's Application had become moot and asked the Court, as has already been

recalled, to remove the case from the List. By Order of 8 December 2000, the Court rejected both Belgium's submissions to that effect and also the Congo's request for the indication of provisional measures (see paragraph 4 above).

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today.

20. On 12 September 2001, the Belgian National Central Bureau of Interpol requested the Interpol General Secretariat to issue a Red Notice in respect of Mr. Yerodia. Such notices concern individuals whose arrest is requested with a view to extradition. On 19 October 2001, at the public sittings held to hear the oral arguments of the Parties in the case, Belgium informed the Court that Interpol had responded on 27 September 2001 with a request for additional information, and that no Red Notice had yet been circulated.

21. Although the Application of the Congo originally advanced two separate legal grounds (see paragraph 17 above), the submissions of the Congo in its Memorial and the final submissions which it presented at the end of the oral proceedings refer only to a violation "in regard to the . . . Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers" (see paragraphs 11 and 12 above).

* * *

22. In their written pleadings, and in oral argument, the Parties addressed issues of jurisdiction and admissibility as well as the merits (see paragraphs 5 and 6 above). In this connection, Belgium raised certain objections which the Court will begin by addressing.

* *

23. The first objection presented by Belgium reads as follows:

> "That, in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], there is no longer a 'legal dispute' between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case."

24. Belgium does not deny that such a legal dispute existed between the Parties at the time when the Congo filed its Application instituting proceedings, and that the Court was properly seised by that Application. However, it contends that the question is not whether a legal dispute

existed at that time, but whether a legal dispute exists at the present time. Belgium refers in this respect *inter alia* to the *Northern Cameroons* case, in which the Court found that it "may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties" (*I.C.J. Reports 1963*, pp. 33-34), as well as to the *Nuclear Tests* cases (*Australia* v. *France*) (*New Zealand* v. *France*), in which the Court stated the following: "The Court, as a court of law, is called upon to resolve existing disputes between States . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision" (*I.C.J. Reports 1974*, pp. 270-271, para. 55; p. 476, para. 58). Belgium argues that the position of Mr. Yerodia as Minister for Foreign Affairs was central to the Congo's Application instituting proceedings, and emphasizes that there has now been a change of circumstances at the very heart of the case, in view of the fact that Mr. Yerodia was relieved of his position as Minister for Foreign Affairs in November 2000 and that, since 15 April 2001, he has occupied no position in the Government of the Congo (see paragraphs 18 and 19 above). According to Belgium, while there may still be a difference of opinion between the Parties on the scope and content of international law governing the immunities of a Minister for Foreign Affairs, that difference of opinion has now become a matter of abstract, rather than of practical, concern. The result, in Belgium's view, is that the case has become an attempt by the Congo to "[seek] an advisory opinion from the Court", and no longer a "concrete case" involving an "actual controversy" between the Parties, and that the Court accordingly lacks jurisdiction in the case.

25. The Congo rejects this objection of Belgium. It contends that there is indeed a legal dispute between the Parties, in that the Congo claims that the arrest warrant was issued in violation of the immunity of its Minister for Foreign Affairs, that that warrant was unlawful *ab initio*, and that this legal defect persists despite the subsequent changes in the position occupied by the individual concerned, while Belgium maintains that the issue and circulation of the arrest warrant were not contrary to international law. The Congo adds that the termination of Mr. Yerodia's official duties in no way operated to efface the wrongful act and the injury that flowed from it, for which the Congo continues to seek redress.

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26. The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently

become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction (see *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122; *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 23-24, para. 38; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 129, para. 37).

27. Article 36, paragraph 2, of the Statute of the Court provides:

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> *(a)* the interpretation of a treaty;
> *(b)* any question of international law;
> *(c)* the existence of any fact which, if established, would constitute a breach of an international obligation;
> *(d)* the nature or extent of the reparation to be made for the breach of an international obligation."

On 17 October 2000, the date that the Congo's Application instituting these proceedings was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with the above provision: Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case.

Moreover, it is not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. Such a dispute was clearly a legal dispute within the meaning of the Court's jurisprudence, namely "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" in which "the claim of one party is positively opposed by the other" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 22; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Juagment, I.C.J. Reports 1998*, pp. 122-123, para. 21).

28. The Court accordingly concludes that at the time that it was seised

of the case it had jurisdiction to deal with it, and that it still has such jurisdiction. Belgium's first objection must therefore be rejected.

* *

29. The second objection presented by Belgium is the following:

> "That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . Government [of the Congo], the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case."

30. Belgium also relies in support of this objection on the *Northern Cameroons* case, in which the Court considered that it would not be a proper discharge of its duties to proceed further in a case in which any judgment that the Court might pronounce would be "without object" (*I.C.J. Reports 1963*, p. 38), and on the *Nuclear Tests* cases, in which the Court saw "no reason to allow the continuance of proceedings which it knows are bound to be fruitless" (*I.C.J. Reports 1974*, p. 271, para. 58; p. 477, para. 61). Belgium maintains that the declarations requested by the Congo in its first and second submissions would clearly fall within the principles enunciated by the Court in those cases, since a judgment of the Court on the merits in this case could only be directed towards the clarification of the law in this area for the future, or be designed to reinforce the position of one or other Party. It relies in support of this argument on the fact that the Congo does not allege any material injury and is not seeking compensatory damages. It adds that the issue and transmission of the arrest warrant were not predicated on the ministerial status of the person concerned, that he is no longer a minister, and that the case is accordingly now devoid of object.

31. The Congo contests this argument of Belgium, and emphasizes that the aim of the Congo — to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered — remains unachieved at the point in time when the Court is called upon to decide the dispute. According to the Congo, in order for the case to have become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have to have been obtained.

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32. The Court has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon (see *Questions of Interpretation and Application of the 1971 Mont-*

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*real Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 46; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 131, para. 45).

However, it considers that this is not such a case. The change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo's submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium's second objection must accordingly be rejected.

* *

33. The third Belgian objection is put as follows:

> "That the case as it now stands is materially different to that set out in the [Congo]'s Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

34. According to Belgium, it would be contrary to legal security and the sound administration of justice for an applicant State to continue proceedings in circumstances in which the factual dimension on which the Application was based has changed fundamentally, since the respondent State would in those circumstances be uncertain, until the very last moment, of the substance of the claims against it. Belgium argues that the prejudice suffered by the respondent State in this situation is analogous to the situation in which an applicant State formulates new claims during the course of the proceedings. It refers to the jurisprudence of the Court holding inadmissible new claims formulated during the course of the proceedings which, had they been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (see *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 447-448, para. 29). In the circumstances, Belgium contends that, if the Congo wishes to maintain its claims, it should be required to initiate proceedings afresh or, at the very least, apply to the Court for permission to amend its initial Application.

35. In response, the Congo denies that there has been a substantial amendment of the terms of its Application, and insists that it has presented no new claim, whether of substance or of form, that would have transformed the subject-matter of the dispute. The Congo maintains that it has done nothing through the various stages in the proceedings but "condense and refine" its claims, as do most States that appear before the Court, and that it is simply making use of the right of parties to amend their submissions until the end of the oral proceedings.

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36. The Court notes that, in accordance with settled jurisprudence, it "cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character" (*Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173; cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80; see also *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 264-267, in particular paras. 69 and 70). However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international law. The Congo's final submissions arise "directly out of the question which is the subject-matter of that Application" (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72; see also *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 36).

In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence, or that the requirements of the sound administration of justice were infringed. Belgium's third objection must accordingly be rejected.

* *

37. The fourth Belgian objection reads as follows:

> "That, in the light of the new circumstances concerning Mr. Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being pro-

tected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

38. In this respect, Belgium accepts that, when the case was first instituted, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name in respect of the alleged violation by Belgium of the immunity of the Congo's Foreign Minister. However, according to Belgium, the case was radically transformed after the Application was filed, namely on 15 April 2001, when Mr. Yerodia ceased to be a member of the Congolese Government. Belgium maintains that two of the requests made of the Court in the Congo's final submissions in practice now concern the legal effect of an arrest warrant issued against a private citizen of the Congo, and that these issues fall within the realm of an action of diplomatic protection. It adds that the individual concerned has not exhausted all available remedies under Belgian law a necessary condition before the Congo can espouse the cause of one of its nationals in international proceedings.

39. The Congo, on the other hand, denies that this is an action for diplomatic protection. It maintains that it is bringing these proceedings in the name of the Congolese State, on account of the violation of the immunity of its Minister for Foreign Affairs. The Congo further denies the availability of remedies under Belgian law. It points out in this regard that it is only when the Crown Prosecutor has become seised of the case file and makes submissions to the Chambre du conseil that the accused can defend himself before the Chambre and seek to have the charge dismissed.

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40. The Court notes that the Congo has never sought to invoke before it Mr. Yerodia's personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies.

In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application (see *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 26; *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 42, para. 49). Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed

(see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 43-44; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-43). Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium's fourth objection must accordingly be rejected.

* *

41. As a subsidiary argument, Belgium further contends that "[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, . . . the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo]'s final submissions". Belgium points out that, while the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge's lack of jurisdiction, and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs, the Congo no longer claims in its final submissions that Belgium wrongly conferred upon itself universal jurisdiction *in absentia*. According to Belgium, the Congo now confines itself to arguing that the arrest warrant of 11 April 2000 was unlawful because it violated the immunity from jurisdiction of its Minister for Foreign Affairs, and that the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

42. The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the "exercise of an excessive universal jurisdiction" being in this connection only a secondary consideration. The Congo asserts that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at the request of the Congo but, rather, by virtue of the defence strategy adopted by Belgium, which appears to maintain that the exercise of such jurisdiction can "represent a valid counterweight to the observance of immunities".

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43. The Court would recall the well-established principle that "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (*Asylum, Judgment, I.C.J. Reports 1950*,

p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

* *

44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo's Application, that the Application is not without object and that accordingly the case is not moot and that the Application is admissible. Thus, the Court now turns to the merits of the case.

* * *

45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo's submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

* *

47. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability

and to immunity from criminal process being "absolute or complete", that is to say, they are subject to no exception. Accordingly, the Congo contends that no criminal prosecution may be brought against a Minister for Foreign Affairs in a foreign court as long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under customary international law simply in order to enable the foreign State representative enjoying such immunity to perform his or her functions freely and without let or hindrance. The Congo adds that the immunity thus accorded to Ministers for Foreign Affairs when in office covers *all* their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterized or not as "official acts".

48. The Congo states further that it does not deny the existence of a principle of international criminal law, deriving from the decisions of the Nuremberg and Tokyo international military tribunals, that the accused's official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a "ground of exemption from his criminal responsibility or a ground for mitigation of sentence". The Congo then stresses that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. It concludes that immunity does not mean impunity.

49. Belgium maintains for its part that, while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.

50. Belgium further states that, in the circumstances of the present case, Mr. Yerodia enjoyed no immunity at the time when he is alleged to have committed the acts of which he is accused, and that there is no evidence that he was then acting in any official capacity. It observes that the arrest warrant was issued against Mr. Yerodia personally.

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51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain

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holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

52. A certain number of treaty instruments were cited by the Parties in this regard. These included, first, the Vienna Convention on Diplomatic Relations of 18 April 1961, which states in its preamble that the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing States". It provides in Article 32 that only the sending State may waive such immunity. On these points, the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations of 24 April 1963, to which the Congo and Belgium are also parties.

The Congo and Belgium further cite the New York Convention on Special Missions of 8 December 1969, to which they are not, however, parties. They recall that under Article 21, paragraph 2, of that Convention:

> "The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law."

These conventions provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, for

example, Article 7, paragraph 2 *(a)*, of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that chargés d'affaires are accredited.

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

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56. The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the *Pinochet* and *Qaddafi* cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the *Pinochet* decision recognizes an exception to the immunity rule when Lord Millett stated that "[i]nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose", or when Lord Phillips of Worth Matravers said that "no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime". As to the French Court of Cassation, Belgium contends that, in holding that, "under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State", the Court explicitly recognized the existence of such exceptions.

57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the *Pinochet* and *Qaddafi* cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the *Pinochet* case, the Congo cites Lord Browne-Wilkinson's statement that "[t]his immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . .". According to the Congo, the

French Court of Cassation adopted the same position in its *Qaddafi* judgment, in affirming that "international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State".

As regards the instruments creating international criminal tribunals and the latter's jurisprudence, these, in the Congo's view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

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58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus,

although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the

official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

* * *

62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and declare that:

> "[B]y issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States."

63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a "coercive legal act" which violates the Congo's immunity and sovereign rights, inasmuch as it seeks to "subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach" and is fully enforceable without special formality in Belgium.

The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.

64. As regards the international circulation of the said arrest warrant, this, in the Congo's view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium "thus cast upon one of the most prominent members of its Government". The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo's former President. In the Congo's view, Belgium "[thus] manifests an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition". The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly

"no further consideration need be given to the specific responsibility which a State executing it might incur, or to the way in which that responsibility should be related" to that of the Belgian State. The Congo observes that, in such circumstances, "there [would be] a direct causal relationship between the arrest warrant issued in Belgium and any act of enforcement carried out elsewhere".

65. Belgium rejects the Congo's argument on the ground that "the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the [Congo]".

With regard to the legal effects under Belgian law of the arrest warrant of 11 April 2000, Belgium contends that the clear purpose of the warrant was to procure that, if found in Belgium, Mr. Yerodia would be detained by the relevant Belgian authorities with a view to his prosecution for war crimes and crimes against humanity. According to Belgium, the Belgian investigating judge did, however, draw an explicit distinction in the warrant between, on the one hand, immunity from jurisdiction and, on the other hand, immunity from enforcement as regards representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium. Belgium further contends that, in its effect, the disputed arrest warrant is national in character, since it requires the arrest of Mr. Yerodia if he is found in Belgium but it does not have this effect outside Belgium.

66. In respect of the legal effects of the arrest warrant outside Belgium, Belgium maintains that the warrant does not create any obligation for the authorities of any other State to arrest Mr. Yerodia in the absence of some further step by Belgium completing or validating the arrest warrant (such as a request for the provisional detention of Mr. Yerodia), or the issuing of an arrest warrant by the appropriate authorities in the State concerned following a request to do so, or the issuing of an Interpol Red Notice. Accordingly, outside Belgium, while the purpose of the warrant was admittedly "to establish a legal basis for the arrest of Mr. Yerodia . . . and his subsequent extradition to Belgium", the warrant had no legal effect unless it was validated or completed by some prior act "requiring the arrest of Mr. Yerodia by the relevant authorities in a third State". Belgium further argues that "[i]f a State had executed the arrest warrant, it might infringe Mr. [Yerodia's] criminal immunity", but that "the Party directly responsible for that infringement would have been that State and not Belgium".

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67. The Court will first recall that the "international arrest warrant *in absentia*", issued on 11 April 2000 by an investigating judge of the Brussels Tribunal de première instance, is directed against Mr. Yerodia,

stating that he is "currently Minister for Foreign Affairs of the Democratic Republic of the Congo, having his business address at the Ministry of Foreign Affairs in Kinshasa". The warrant states that Mr. Yerodia is charged with being "the perpetrator or co-perpetrator" of:

> "— Crimes under international law constituting grave breaches causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)
> — Crimes against humanity (Article 1, paragraph 2, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)."

The warrant refers to "various speeches inciting racial hatred" and to "particularly virulent remarks" allegedly made by Mr. Yerodia during "public addresses reported by the media" on 4 August and 27 August 1998. It adds:

> "These speeches allegedly had the effect of inciting the population to attack Tutsi residents of Kinshasa: there were dragnet searches, manhunts (the Tutsi enemy) and lynchings.
>
> The speeches inciting racial hatred thus are said to have resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials."

68. The warrant further states that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The investigating judge does, however, observe in the warrant that "the rule concerning the absence of immunity under humanitarian law would appear . . . to require some qualification in respect of immunity from enforcement" and explains as follows:

> "Pursuant to the general principle of fairness in judicial proceedings, immunity from enforcement must, in our view, be accorded to all State representatives welcomed as such onto the territory of Belgium (on 'official visits'). Welcoming such foreign dignitaries as official representatives of sovereign States involves not only relations between individuals but also relations between States. This implies that such welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against its guest and the invitation cannot become a pretext for ensnaring the individual concerned in what would then have to be labelled a trap. In the contrary case, failure to respect this

undertaking could give rise to the host State's international responsibility."

69. The arrest warrant concludes with the following order:

"We instruct and order all bailiffs and agents of public authority who may be so required to execute this arrest warrant and to conduct the accused to the detention centre in Forest;

We order the warden of the prison to receive the accused and to keep him (her) in custody in the detention centre pursuant to this arrest warrant;

We require all those exercising public authority to whom this warrant shall be shown to lend all assistance in executing it."

70. The Court notes that the *issuance*, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The fact that the warrant is enforceable is clearly apparent from the order given to "all bailiffs and agents of public authority . . . to execute this arrest warrant" (see paragraph 69 above) and from the assertion in the warrant that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The Court is bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

71. The Court also notes that Belgium admits that the purpose of the international *circulation* of the disputed arrest warrant was "to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium". The Respondent maintains, however, that the enforcement of the warrant in third States was "dependent on some further preliminary steps having been taken" and that, given the "inchoate" quality of the warrant as regards third States, there was no "infringe[ment of] the sovereignty of the [Congo]". It further points out that no Interpol Red Notice was requested until 12 September 2001, when Mr. Yerodia no longer held ministerial office.

The Court cannot subscribe to this view. As in the case of the warrant's issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed Mr. Yero-

dia's immunity as the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo's conduct of its international relations. Since Mr. Yerodia was called upon in that capacity to undertake travel in the performance of his duties, the mere international circulation of the warrant, even in the absence of "further steps" by Belgium, could have resulted, in particular, in his arrest while abroad. The Court observes in this respect that Belgium itself cites information to the effect that Mr. Yerodia, "on applying for a visa to go to two countries, [apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium", adding that "[t]his, moreover, is what the [Congo] . . . hints when it writes that the arrest warrant 'sometimes forced Minister Yerodia to travel by roundabout routes'". Accordingly, the Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

* * *

72. The Court will now address the issue of the remedies sought by the Congo on account of Belgium's violation of the above-mentioned rules of international law. In its second, third and fourth submissions, the Congo requests the Court to adjudge and declare that:

> "A formal finding by the Court of the unlawfulness of [the issue and international circulation of the arrest warrant] constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
>
> The violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
>
> Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

73. In support of those submissions, the Congo asserts that the termination of the official duties of Mr. Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continue to exist. It argues that the warrant is unlawful *ab initio*, that "[i]t is fundamentally flawed" and that it cannot therefore have any legal effect today. It points

out that the purpose of its request is reparation for the injury caused, requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It states that, inasmuch as the wrongful act consisted in an internal legal instrument, only the "withdrawal" and "cancellation" of the latter can provide appropriate reparation.

The Congo further emphasizes that in no way is it asking the Court itself to withdraw or cancel the warrant, nor to determine the means whereby Belgium is to comply with its decision. It explains that the withdrawal and cancellation of the warrant, by the means that Belgium deems most suitable, "are not means of enforcement of the judgment of the Court but the requested measure of legal reparation/restitution itself". The Congo maintains that the Court is consequently only being requested to declare that Belgium, by way of reparation for the injury to the rights of the Congo, be required to withdraw and cancel this warrant by the means of its choice.

74. Belgium for its part maintains that a finding by the Court that the immunity enjoyed by Mr. Yerodia as Minister for Foreign Affairs had been violated would in no way entail an obligation to cancel the arrest warrant. It points out that the arrest warrant is still operative and that "there is no suggestion that it presently infringes the immunity of the Congo's Minister for Foreign Affairs". Belgium considers that what the Congo is in reality asking of the Court in its third and fourth final submissions is that the Court should direct Belgium as to the method by which it should give effect to a judgment of the Court finding that the warrant had infringed the immunity of the Congo's Minister for Foreign Affairs.

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75. The Court has already concluded (see paragraphs 70 and 71) that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

> "[t]he essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the conse-

quences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47).

In the present case, "the situation which would, in all probability, have existed if [the illegal act] had not been committed" cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy: in particular, the Court cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment's implications might be for third States, and the Court cannot therefore accept the Congo's submissions on this point.

* * *

78. For these reasons,

THE COURT,

(1) (A) By fifteen votes to one,

*Rejects* the objections of the Kingdom of Belgium relating to jurisdiction, mootness and admissibility;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(B) By fifteen votes to one,

*Finds* that it has jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 17 October 2000;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(C) By fifteen votes to one,

*Finds* that the Application of the Democratic Republic of the Congo is not without object and that accordingly the case is not moot;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren,

Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(D) By fifteen votes to one,

*Finds* that the Application of the Democratic Republic of the Congo is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(2) By thirteen votes to three,

*Finds* that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Al-Khasawneh; *Judge* ad hoc Van den Wyngaert;

(3) By ten votes to six,

*Finds* that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated.

IN FAVOUR: *President* Guillaume; *Vice-President* Shi *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; *Judge* ad hoc Van den Wyngaert.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourteenth day of February, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Demo-

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cratic Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

*(Signed)* Gilbert GUILLAUME,
President.

*(Signed)* Philippe COUVREUR,
Registrar.

President GUILLAUME appends a separate opinion to the Judgment of the Court; Judge ODA appends a dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a declaration to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judges HIGGINS, KOOIJMANS and BUERGENTHAL append a joint separate opinion to the Judgment of the Court; Judge REZEK appends a separate opinion to the Judgment of the Court; Judge AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* BULA-BULA appends a separate opinion to the Judgment of the Court; Judge *ad hoc* VAN DEN WYNGAERT appends a dissenting opinion to the Judgment of the Court.

*(Initialled)* G.G.

*(Initialled)* Ph.C.

# Chapter VI
# Subsequent agreements and subsequent practice in relation to the interpretation of treaties

## A. Introduction

64. The Commission, at its sixtieth session (2008), decided to include the topic "Treaties over time" in its programme of work and to establish a Study Group on the topic at its sixty-first session.[376] At its sixty-first session (2009), the Commission established the Study Group on treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic.[377]

65. From the sixty-second to the sixty-fourth session (2010-2012), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte. The Study Group examined three reports presented informally by the Chairperson, which addressed, respectively, the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction;[378] the jurisprudence under special regimes relating to subsequent agreements and subsequent practice;[379] and the subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings.[380]

66. At the sixty-fourth session (2012), the Commission, on the basis of a recommendation of the Study Group,[381] decided: (a) to change, with effect from its sixty-fifth session (2013), the format of the work on this topic as suggested by the Study Group; and (b) to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".[382]

67. At the sixty-fifth session (2013), the Commission considered the first report of the Special Rapporteur (A/CN.4/660) and provisionally adopted five draft conclusions and the commentaries thereto.[383]

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[376] At its 2997th meeting, on 8 August 2008. See *Yearbook ... 2008*, vol. II (Part Two), para. 353; and for the syllabus of the topic, *ibid*., annex I. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

[377] *Yearbook ... 2009*, vol. II (Part Two), paras. 220-226.

[378] *Official Records of the General Assembly*, *Sixty-fifth Session*, *Supplement No. 10* (A/65/10), paras. 344-354; and *ibid*., *Sixty-sixth Session*, *Supplement No. 10* (A/66/10), para. 337.

[379] *Ibid*., *Sixty-sixth Session*, *Supplement No. 10* (A/66/10), paras. 338-341; and *ibid*., *Sixty-seventh Session*, *Supplement No. 10* (A/67/10), paras. 230-231.

[380] *Ibid*., *Sixty-seventh Session*, *Supplement No. 10* (A/67/10), paras. 232-234. At the sixty-third session (2011), the Chairperson of the Study Group presented nine preliminary conclusions, reformulated in the light of the discussions in the Study Group (*ibid*., *Sixty-sixth Session*, *Supplement No. 10* (A/66/10), para. 344). At the sixty-fourth session (2012), the Chairperson presented the text of six additional preliminary conclusions, also reformulated in the light of the discussions in the Study Group (*ibid*., *Sixty-seventh Session*, *Supplement No. 10* (A/67/10), para. 240). The Study Group also discussed the format in which the further work on the topic should proceed and the possible outcome of the work. A number of suggestions were formulated by the Chairperson and agreed upon by the Study Group (*ibid*., paras. 235-239).

[381] *Ibid*., *Sixty-seventh Session*, *Supplement No. 10* (A/67/10), paras. 226 and 239.

[382] *Ibid*., para. 227.

[383] *Ibid*., *Sixty-eighth Session*, *Supplement No. 10* (A/68/10), paras. 33-39. The Commission provisionally adopted draft conclusion 1 (General rule and means of treaty interpretation); draft

68. At the sixty-sixth session (2014), the Commission considered the second report of the Special Rapporteur (A/CN.4/671) and provisionally adopted five draft conclusions and the commentaries thereto.[384]

69. At the sixty-seventh session (2015), the Commission considered the third report of the Special Rapporteur (A/CN.4/683) and provisionally adopted one draft conclusion and the commentary thereto.[385]

## B. Consideration of the topic at the present session

70. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/694), which addressed the legal significance, for the purpose of interpretation and as forms of practice under a treaty, of pronouncements of expert treaty bodies (chap. II) and of decisions of domestic courts (chap. III) and which proposed, respectively, draft conclusions 12 and 13 on those issues. It also discussed the structure and scope of the draft conclusions (chap. IV), proposed the inclusion of a new draft conclusion 1a, and suggested a revision to draft conclusion 4, paragraph 3 (chap. V).

71. The Commission considered the report at its 3303rd to 3307th meetings, from 24 to 31 May 2016. At its 3307th meeting on 31 May 2016, the Commission decided to refer draft conclusions 1a and 12, as presented by the Special Rapporteur, to the Drafting Committee.

72. At its 3313th meeting, on 10 June 2016, the Commission considered the report of the Drafting Committee and adopted a set of 13 draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties on first reading (see section C.1 below). At its 3335th to 3337th, 3340th and 3341st meetings, on 4, 5, 8 and 9 August 2016, the Commission adopted the commentaries to the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (see section C.2 below).

73. At its 3341st meeting, on 9 August 2016, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions (sect. C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018.

74. At its 3341st meeting, on 9 August 2016, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Georg Nolte, which enabled the Commission to bring to a successful conclusion its first reading of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

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conclusion 2 (Subsequent agreements and subsequent practice as authentic means of interpretation); draft conclusion 3 (Interpretation of treaty terms as capable of evolving over time); draft conclusion 4 (Definition of subsequent agreement and subsequent practice); and draft conclusion 5 (Attribution of subsequent practice).

[384] *Ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 70-76. The Commission provisionally adopted draft conclusion 6 (Identification of subsequent agreements and subsequent practice); draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation); draft conclusion 8 (Weight of subsequent agreements and subsequent practice as a means of interpretation); draft conclusion 9 (Agreement of the parties regarding the interpretation of a treaty); and draft conclusion 10 (Decisions adopted within the framework of a Conference of States Parties).

[385] *Ibid., Seventieth Session, Supplement No. 10* (A/70/10), paras. 123-129. The Commission provisionally adopted draft conclusion 11 (Constituent instruments of international organizations).

## C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission

### 1. Text of the draft conclusions

75. The text of the draft conclusions adopted by the Commission on first reading is reproduced below.

**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**

**Part One**
**Introduction**

**Conclusion 1 [1a][386]**
**Introduction**

The present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.

**Part Two**
**Basic rules and definitions**

**Conclusion 2 [1]**
**General rule and means of treaty interpretation**

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law.

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

3. Article 31, paragraph 3, provides, *inter alia*, that 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; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.

5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

**Conclusion 3 [2]**
**Subsequent agreements and subsequent practice as authentic means of interpretation**

Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

[386] The numbers of the draft conclusions, as previously adopted by the Commission, are indicated in square brackets.

**Conclusion 4**
**Definition of subsequent agreement and subsequent practice**

1. A "subsequent agreement" as an authentic means of interpretation under article 31, paragraph 3 (a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A "subsequent practice" as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. Other "subsequent practice" as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

**Conclusion 5**
**Attribution of subsequent practice**

1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

**Part Three**
**General aspects**

**Conclusion 6**
**Identification of subsequent agreements and subsequent practice**

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not normally the case if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

**Conclusion 7**
**Possible effects of subsequent agreements and subsequent practice in interpretation**

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

**Conclusion 8 [3]**
**Interpretation of treaty terms as capable of evolving over time**

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

**Conclusion 9 [8]**
**Weight of subsequent agreements and subsequent practice as a means of interpretation**

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.

2. The weight of subsequent practice under article 31, paragraph 3 (b), depends, in addition, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

**Conclusion 10 [9]**
**Agreement of the parties regarding the interpretation of a treaty**

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

**Part Four**
**Specific aspects**

**Conclusion 11 [10]**
**Decisions adopted within the framework of a Conference of States Parties**

1. A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States

Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

**Conclusion 12 [11]**
**Constituent instruments of international organizations**

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

**Conclusion 13 [12]**
**Pronouncements of expert treaty bodies**

1. For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.

2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.

3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or other subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.

4. This draft conclusion is without prejudice to the contribution that a pronouncement of an expert treaty body may otherwise make to the interpretation of a treaty.

### 2. Text of the draft conclusions and commentaries thereto

76. The text of the draft conclusions and commentaries thereto adopted by the Commission on first reading is reproduced below. This text comprises a consolidated version of the commentaries adopted so far by the Commission, including modifications and additions made to commentaries previously adopted and commentaries adopted at the sixty-eighth session of the Commission.

**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**

**Part One**
**Introduction**

**Conclusion 1 [1a]**
**Introduction**

The present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.

**Commentary**

(1) The present draft conclusions aim at explaining the role that subsequent agreements and subsequent practice play in the interpretation of treaties. They are based on the Vienna Convention on the Law of Treaties of 1969 (hereinafter "1969 Vienna Convention").[387] The draft conclusions situate subsequent agreements and subsequent practice within the framework of the rules of the Vienna Convention on interpretation by identifying and elucidating relevant authorities and examples, and by addressing certain questions that may arise when applying those rules.[388]

(2) The draft conclusions do not address all conceivable circumstances in which subsequent agreements and subsequent practice may play a role in the interpretation of treaties. For example, one aspect not dealt with specifically is the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations or between international organizations.[389] The draft conclusions also do not address the interpretation of rules adopted by an international organization, the identification of customary international law or general principles of law. This is without prejudice to the other means of interpretation under article 31, including paragraph 3 (c) according to which the interpretation of a treaty shall take into account any relevant rules of international law applicable in the relations between the parties.

(3) The draft conclusions aim to facilitate the work of those who are called on to interpret treaties. Apart from international courts and tribunals, they offer guidance for States, including their courts, and international organizations, as well as for non-State actors and all those called upon to interpret treaties.

**Part Two**
**Basic rules and definitions**

**Conclusion 2 [1]**
**General rule and means of treaty interpretation**

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law.

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[387] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[388] As is always the case with the Commission's output, the draft conclusions are to be read together with the commentaries.

[389] See Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations ("1986 Vienna Convention") (Vienna, 21 March 1986, not yet in force) (A/CONF.129/15); this does not exclude that some materials relating to such treaties, but which are also of general relevance are used in the commentaries.

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

3. Article 31, paragraph 3, provides, *inter alia*, that 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; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.

5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

**Commentary**

(1) Draft conclusion 2 [1] situates subsequent agreements and subsequent practice as a means of treaty interpretation within the framework of the rules on the interpretation of treaties set forth in articles 31 and 32 of the 1969 Vienna Convention. The title "General rule and means of treaty interpretation" signals two points. First, article 31, as a whole, is the "general rule" of treaty interpretation.[390] Second, articles 31 and 32 together list a number of "means of interpretation", which shall (article 31) or may (article 32) be taken into account in the interpretation of treaties.[391]

*Paragraph 1, first sentence — relationship between articles 31 and 32*

(2) Paragraph 1 of draft conclusion 2 [1] emphasizes the interrelationship between articles 31 and 32, as well as the fact that these provisions, together, reflect customary international law. The reference to both articles 31 and 32 clarifies from the start the general context in which subsequent agreements and subsequent practice are addressed in the draft conclusions.

(3) Whereas article 31 sets forth the general rule and article 32 deals with supplementary means of interpretation, both rules[392] must be read together as they constitute an integrated framework for the interpretation of treaties. Article 32 includes a threshold between the primary means of interpretation according to article 31,[393] all of which are to be taken into account in the process of interpretation, and "supplementary means of interpretation" to which recourse may be had in order to confirm the meaning

390 Title of article 31 of the 1969 Vienna Convention.

391 See the first report on subsequent agreements and subsequent practice in relation to treaty interpretation (A/CN.4/660), para. 8; M.E. Villiger, "The 1969 Vienna Convention on the law of treaties: 40 years after", *Recueil des cours de l'Académie de droit international de La Haye 2009* (hereinafter "*Recueil des cours …*"), vol. 344, p. 9-133, at pp. 118-119 and 126-128.

392 On the meaning of the term "rules" in this context: see *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 217-220 (Commentary, introduction); R.K. Gardiner, *Treaty Interpretation,* 2nd edition (Oxford, Oxford University Press, 2015), pp. 36-38.

393 *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 223, commentary to draft article 28, para. (19); Waldock, third report on the law of treaties, *Yearbook … 1964*, vol. II, document A/CN.4/167 and Add.1-3, pp. 58-59, para. 21; M.K. Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", *Recueil des cours … 1976-III*, vol. 151, pp. 1-114, at p. 78; I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester, Manchester University Press, 1984), pp. 141-142; Villiger, "The 1969 Vienna Convention …" (see footnote 391 above), pp. 127-128.

resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning of the treaty or its terms ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.

*Paragraph 1, second sentence — the Vienna Convention rules on interpretation and customary international law*

(4) The second sentence of paragraph 1 of draft conclusion 2 [1] confirms that the rules enshrined in articles 31 and 32 reflect customary international law.[394] International courts and tribunals have acknowledged the customary character of these rules. This is true, in particular, for the International Court of Justice,[395] the International Tribunal for the Law of the Sea (ITLOS),[396] inter-State arbitrations,[397] the Appellate Body of the World Trade Organization (WTO),[398] the European Court of Human Rights,[399] the Inter-American Court

[394] Y. le Bouthillier, "Commentary on article 32 of the Vienna Convention", in *The Vienna Conventions on the Law of Treaties: A Commentary*, O. Corten and P. Klein, eds. (Oxford, Oxford University Press, 2011), pp. 841-865, at pp. 843-846, paras. 4-8; P. Daillier, M. Forteau and A. Pellet, *Droit international public* (Nguyen Quoc Din), 8th edition (Paris, L.G.D.J., 2009), at pp. 285-286; Gardiner, *Treaty Interpretation* (see footnote 392 above), at pp. 13-20; Villiger, "The 1969 Vienna Convention" (see footnote 391 above), pp. 132-133.

[395] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 46, para. 65 (1969 Vienna Convention, art. 31); *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 237, para. 47; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at pp. 109-110, para. 160; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 174, para. 94; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 12, at p. 48, para. 83; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), Judgment, I.C.J. Reports 2002*, p. 625, at p. 645, para. 37; *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466, at p. 501, para. 99 (1969 Vienna Convention, art. 31); *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1059, para. 18 (1969 Vienna Convention, art. 31); *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at pp. 21-22, para. 41 (1969 Vienna Convention, art. 31, and without expressly mentioning art. 32 of the 1969 Vienna Convention but referring to the supplementary means of interpretation).

[396] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the area*, case No. 17, Advisory Opinion, 1 February 2011, *ITLOS Reports … 2011*, p. 10, at para. 57.

[397] *Award in Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, decision of 24 May 2005, United Nations, *Reports of International Arbitral Awards (UNRIAA)*, vol. XXVII (sales No. E/F.06.V.8), pp. 35-125, at para. 45 (1969 Vienna Convention, arts. 31-32).

[398] Art. 3, para. 2, of the WTO understanding on rules and procedures governing the settlement of disputes provides that "… it serves to … to clarify the existing provisions of [the WTO-covered] agreements in accordance with customary rules of interpretation of public international law" (United Nations, *Treaties Series*, vol. 1869, No. 31874, p. 402), but does not specifically refer to arts. 31 and 32 of the 1969 Vienna Convention. However, the Appellate Body has consistently recognized that arts. 31 and 32 reflect rules of customary international law and has resorted to them by reference to art. 3.2 of the understanding on rules and procedures governing the settlement of disputes. See, for example, WTO Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline (US-Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, Section III, B (1969 Vienna Convention, art. 31, para 1); WTO Appellate Body Report, *Japan — Taxes on Alcoholic Beverages (Japan-Alcoholic Beverages II)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, Section D (1969 Vienna Convention, arts. 31-32). See also G. Nolte, "Jurisprudence under special regimes relating to subsequent agreements and subsequent practice:

of Human Rights,[400] the Court of Justice of the European Union,[401] and tribunals established by the International Centre for Settlement of Investment Disputes (ICSID)[402] under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[403] Hence, the rules contained in articles 31 and 32 apply as treaty law in relation to those States that are parties to the 1969 Vienna Convention and the treaties that fall within the scope of the Convention, and as customary international law between all States.

(5) The Commission also considered referring to article 33 of the 1969 Vienna Convention in draft conclusion 2 [1] and whether this provision also reflected customary international law. Article 33 may be relevant for draft conclusions on the topic of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". A "subsequent agreement" under article 31, paragraph 3 (a), for example, could be formulated in two or more languages, and there could be questions regarding the relationship of any subsequent agreement to different language versions of the treaty itself. The Commission nevertheless decided not to address such questions.

(6) The Commission, in particular, considered whether the rules set forth in article 33 reflected customary international law. Some members thought that all the rules in article 33 reflected customary international law, while others wanted to leave open the possibility that only some, but not all, rules set forth in this provision qualified as such. The jurisprudence of international courts and tribunals has not yet fully addressed the question. The International Court of Justice and the WTO Appellate Body have considered parts of article 33 to reflect rules of customary international law. In *LaGrand*, the International Court of Justice recognized that paragraph 4 of article 33 reflects customary international law.[404] It is less clear whether the Court in the *Kasikili/Sedudu Island* case considered that paragraph 3 of article 33 reflected a customary rule.[405] The WTO Appellate Body has held that the rules in paragraphs 3 and 4 reflect customary law.[406] The Arbitral Tribunal in the *Young Loan*

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second report for the ILC Study Group on treaties over time", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), pp. 210-240, at p. 215.

399 *Golder v. the United Kingdom*, no. 4451/70, 21 February 1975, Series A no. 18, para. 29; *Witold Litwa v. Poland*, no. 26629/95, 4 April 2000, ECHR 2000-III, para. 58 (1969 Vienna Convention, art. 31); *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR-2008, para. 65 (by implication, 1969 Vienna Convention, arts. 31-33).

400 *The effect of reservations on the entry into force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, 24 September 1982, Inter-Am. Ct. H.R. Series A No. 2, para. 19 (by implication, 1969 Vienna Convention, arts. 31-32); *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago (Merits, Reparations and Costs, Judgment)*, 21 June 2002, Inter-Am. Ct. H.R. Series C No. 94, para. 19 (1969 Vienna Convention, art. 31, para. 1).

401 *Brita GmbH v. Hauptzollamt Hamburg-Hafen*, judgment of 25 February 2010, Case C-386/08, *European Court Reports 2010 I-01289*, paras. 41-43 (1969 Vienna Convention, art. 31).

402 *National Grid plc v. Argentine Republic*, decision on jurisdiction (UNCITRAL), 20 June 2006, para. 51 (1969 Vienna Convention, arts. 31-32); *Canfor Corporation v. United States of America, and Tembec et al. v. United States of America, and Terminal Forest Products Ltd. v. United States of America*, Order of the Consolidation Tribunal, 7 September 2005, para. 59 (1969 Vienna Convention, arts. 31-32).

403 United Nations, *Treaty Series*, vol. 575, No. 8359, p. 159.

404 *LaGrand* (see footnote 395 above), p. 502, para. 101.

405 *Kasikili/Sedudu Island* (see footnote 395 above), p. 1062, para. 25; the Court may have applied this provision only because the parties had not disagreed about its application.

406 WTO Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (US — Softwood Lumber IV)*, WT/DS257/AB/R, adopted 17 February 2004, para. 59 (1969 Vienna Convention, art. 33, para. 3); WTO Appellate Body Report, *United States — Subsidies on Upland Cotton (US — Upland Cotton)*, WT/DS267/AB/R,

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*Arbitration* found that paragraph 1 "incorporated" a "principle".[407] ITLOS and the European Court of Human Rights have gone one step further and stated that article 33 as a whole reflects customary law.[408] Thus, there are significant indications in the case law that article 33, in its entirety, indeed reflects customary international law.

*Paragraph 2 — article 31, paragraph 1*

(7) Paragraph 2 of draft conclusion 2 [1] reproduces the text of article 31, paragraph 1, of the 1969 Vienna Convention given its importance for the topic. Article 31, paragraph 1, is the point of departure for any treaty interpretation according to the general rule contained in article 31 as a whole. This is intended to contribute to ensuring the balance in the process of interpretation between an assessment of the terms of the treaty in their context and in the light of its object and purpose, on the one hand, and the considerations regarding subsequent agreements and subsequent practice in the present draft conclusions. The reiteration of article 31, paragraph 1, as a separate paragraph is not, however, meant to suggest that this paragraph, and the means of interpretation mentioned therein, possess a primacy in substance within the context of article 31 itself. All means of interpretation in article 31 are part of a single integrated rule.[409]

*Paragraph 3 — article 31, paragraph 3*

(8) Paragraph 3 reproduces the language of article 31, paragraph 3 (a) and (b), of the Vienna Convention, in order to situate subsequent agreements and subsequent practice, as the main focus of the topic, within the general legal framework of the interpretation of treaties. Accordingly, the chapeau of article 31, paragraph 3, "[t]here shall be taken into account, together with the context", is maintained in order to emphasize that the assessment of the means of interpretation mentioned in paragraph 3 (a) and (b) of article 31 are an integral part of the general rule of interpretation set forth in article 31.[410]

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adopted 21 March 2005, para. 424, where the Appellate Body applied and expressly referred to art. 33, para. 3, of the 1969 Vienna Convention without suggesting its customary status; WTO Appellate Body Report, *Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R and Corr.1, adopted 23 October 2002, para. 271 (1969 Vienna Convention, art. 33 (4)).

[407] *The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, 16 May 1980, UNRIAA, vol. XIX (sales No. E/F.90.V.7), pp. 67-145, at p. 67, para. 17 or *International Law Reports*, vol. 59 (1980), p. 494, para. 17.

[408] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, case No. 17, Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*; *Golder v. the United Kingdom*, no. 4451/70, 21 February 1975, Series A no. 18, para. 29; *Witold Litwa v. Poland*, no. 26629/95, 4 April 2000, ECHR 2000-III, para. 59; *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR-2008, para. 65 (1969 Vienna Convention, arts. 31-33).

[409] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 219-220, para. (8). See, in detail, below para. (12) of the commentary to draft conclusion 2 [1], para. 5.

[410] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 220, para. (8); and G. Nolte, "Jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction relating to subsequent agreements and subsequent practice: introductory report for the ILC Study Group on treaties over time", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), p. 169, at p. 177.

*Paragraph 4 — other subsequent practice under article 32*

(9) Paragraph 4 clarifies that subsequent practice in the application of the treaty, which does not meet all criteria of article 31, paragraph 3 (b), nevertheless falls within the scope of article 32. Article 32 includes a non-exhaustive list of supplementary means of interpretation.[411] Paragraph 4 borrows the language "recourse may be had" from article 32 to maintain the distinction between the mandatory character of the taking into account of the means of interpretation, which are referred to in article 31, and the discretionary nature of the use of the supplementary means of interpretation under article 32.

(10) In particular, subsequent practice in the application of the treaty, which does not establish the agreement of all parties to the treaty, but only of one or more parties, may be used as a supplementary means of interpretation. This was stated by the Commission,[412] and has since been recognized by international courts and tribunals,[413] and in the literature[414] (see in more detail paragraphs (23) to (37) of the commentary to draft conclusion 4).

(11) The Commission did not, however, consider that subsequent practice, which is not "in the application of the treaty", should be dealt with, in the present draft conclusions, as a supplementary means of interpretation. Such practice may, however, under certain circumstances be a relevant supplementary means of interpretation as well.[415] But such practice is beyond what the Commission now addresses under the present topic, except insofar as it may contribute to "assessing" relevant subsequent practice in the application of a treaty (see draft conclusion 5 and accompanying commentary). Thus, paragraph 4 of draft conclusion 2 [1] requires that any subsequent practice be "in the application of the treaty", as does paragraph 3 of draft conclusion 4, which defines "other 'subsequent practice'".

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411 Yasseen, "L'interprétation des traités …" (see footnote 393 above), at p. 79.

412 *Yearbook … 1964*, vol. II, document A/5809, pp. 203-204, commentary to draft article 69, para. (13).

413 *Kasikili/Sedudu Island* (see footnote 395 above), p. 1096, paras. 79-80; *Loizidou v. Turkey* (preliminary objections), no. 15318/89, 23 March 1995, ECHR Series A no. 310, paras. 79-81; *Hilaire, Constantine and Benjamin et al.* (see footnote 400 above), para. 92; *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, provisional measures, order of 27 August 1999, *ITLOS Reports … 1999*, p. 280, at para. 50; WTO Appellate Body Report, *European Communities — Customs Classification of Certain Computer Equipment* (*EC — Computer Equipment)*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, adopted 22 June 1998, para. 90; see also WTO Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements (US — COOL)*, WT/DS384/AB/R and WT/DS386/AB/R, adopted 23 July 2012, para. 452.

414 Yasseen, "L'interprétation des traités …" (see footnote 393 above), at p. 52 ("… la Convention de Vienne ne retient pas comme élément de la règle générale d'interprétation la pratique ultérieure en général, mais une pratique ultérieure spécifique, à savoir *une pratique ultérieure non seulement concordante, mais également commune à toutes les parties. … Ce qui reste de la pratique ultérieure peut être un moyen complémentaire d'interprétation, selon l'article 32 de la Convention de Vienne*") (emphasis added); Sinclair, *The Vienna Convention …* (see footnote 393 above), at p. 138: "… paragraph 3 (b) of [a]rticle 31 of the Convention [covers] … only a specific form of subsequent practice — that is to say, *concordant subsequent practice common to all the parties. Subsequent practice which does not fall within this narrow definition may nonetheless constitute a supplementary means of interpretation with the meaning of [a]rticle 32 of the Convention*" (emphasis added); S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the law of treaties" in *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern, in honour of his 80th birthday*, G. Hafner and others, eds. (The Hague, Kluwer Law International, 1998), p. 721, at p. 726; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, Martinus Nijhoff, 2009), pp. 431-432.

415 L. Boisson de Chazournes, "Subsequent practice, practices, and 'family resemblance': towards embedding subsequent practice in its operative milieu", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), pp. 53-63, at pp. 59-62.

*Paragraph 5 — "a single combined operation"*

(12) The Commission considered it important to complete draft conclusion 2 [1] by emphasizing in paragraph 5[416] that, notwithstanding the structure of draft conclusion 2 [1], moving from the general to the more specific, the process of interpretation is a "single combined operation", which requires that "appropriate emphasis" be placed on various means of interpretation.[417] The expression "single combined operation" is drawn from the Commission's commentary to the 1966 draft articles on the law of treaties.[418] There the Commission also stated that it intended "to emphasize that the process of interpretation is a unity".[419]

(13) Paragraph 5 of draft conclusion 2 [1] also explains that appropriate emphasis must be placed, in the course of the process of interpretation as a "single combined operation", on the various means of interpretation, which are referred to in articles 31 and 32 of the 1969 Vienna Convention. The Commission did not, however, consider it necessary to include a reference, by way of example, to one or more specific means of interpretation in the text of paragraph 5 of draft conclusion 2 [1].[420] This avoids a possible misunderstanding that any one of the different means of interpretation has priority over others, regardless of the specific treaty provision or the case concerned.

(14) Paragraph 5 uses the term "means of interpretation". This term captures not only the "supplementary means of interpretation", which are referred to in article 32, but also the elements mentioned in article 31.[421] Whereas the Commission, in its commentary on the draft articles on the law of treaties, sometimes used the terms "means of interpretation" and "elements of interpretation" interchangeably, for the purpose of the present topic the Commission retained the term "means of interpretation" because it also describes their function in the process of interpretation as a tool or an instrument.[422] The term "means" does not set apart from each other the different elements, which are mentioned in articles 31 and 32. It rather indicates that these means each have a function in the process of interpretation, which is a "single", and at the same time a "combined", operation.[423] Just as courts typically begin their reasoning by looking at the terms of the treaty, and then continue, in an interactive process,[424] to analyse those terms in their context and in the light of the object and purpose of the treaty,[425] the precise relevance of different means of

[416] A/CN.4/660, para. 64; and Nolte, "Jurisprudence of the International Court of Justice …" (see footnote 410 above), at pp. 171 and 177.

[417] On the different function of subsequent agreements and subsequent practice in relation to other means of interpretation, see A/CN.4/660, paras. 42-57; and Nolte, "Jurisprudence of the International Court of Justice …" (see footnote 410 above), at p. 183.

[418] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 219-220, para. (8).

[419] *Ibid*.

[420] This had been proposed by the Special Rapporteur in his first report, see A/CN.4/660, para. 28: "Draft conclusion 1 (General rule and means of treaty interpretation) … The interpretation of a treaty in a specific case may result in a different emphasis on the various means of interpretation contained in articles 31 and 32 of the Vienna Convention, in particular on the text of the treaty or on its object and purpose, depending on the treaty or on the treaty provisions concerned." See also the analysis in the first report (*ibid*., paras. 8-27).

[421] See also above commentary to draft conclusion 2 [1], para. (1); and Villiger, "The 1969 Vienna Convention … "(see footnote 391 above), p. 129; Daillier, Forteau and Pellet, *Droit international public* (see footnote 394 above), at pp. 284-289.

[422] Provisional summary record of the 3172nd meeting, 31 May 2013 (A/CN.4/SR.3172), p. 4.

[423] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 219-220, para. (8).

[424] *Ibid*.

[425] *Ibid*., p. 219, para. (6). See also Yasseen, "L'interprétation des traités …" (footnote 393 above), at p. 58; Sinclair, *The Vienna Convention …* (footnote 393 above ), at p. 130; J. Klabbers, "Treaties, object

interpretation must first be identified in any case of treaty interpretation before they can be "thrown into the crucible"[426] in order to arrive at a proper interpretation, by giving them appropriate weight in relation to each other.

(15) The obligation to place "appropriate emphasis on the various means of interpretation" may, in the course of the interpretation of a treaty in specific cases, result in a different emphasis on the various means of interpretation depending on the treaty or on the treaty provisions concerned.[427] This is not to suggest that a court or any other interpreter is more or less free to choose how to use and apply the different means of interpretation. What guides the interpretation is the evaluation by the interpreter, which consists in identifying the relevance of different means of interpretation in a specific case and in determining their interaction with the other means of interpretation in this case by placing a proper emphasis on them in good faith, as required by the rule to be applied.[428] This evaluation should include, if possible and practicable, consideration of relevant prior assessments and decisions in the same and possibly also in other relevant areas.[429]

(16) The Commission debated whether it would be appropriate to refer, in draft conclusion 2 [1], to the "nature" of the treaty as a factor that would typically be relevant in determining whether more or less weight should be given to certain means of interpretation.[430] Some members considered that the subject matter of a treaty (for example, whether provisions concern purely economic matters or rather address the human rights of individuals; and whether the rules of a treaty are more technical or more value-oriented) as well as its basic structure and function (for example, whether provisions are more reciprocal in nature or intended more to protect a common good) may affect its interpretation. They indicated that the jurisprudence of different international courts and

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and purpose", *Max Planck Encyclopedia on Public International Law* (www.mpepil.com), para. 7; Villiger, *Commentary …* (see footnote 414 above), at p. 427, para. 11; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 1988*, p. 69, at p. 89, paras. 45-46; *Delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decision of 30 June 1977, UNRIAA, vol. XVIII (sales No. E/F.80.V.7), pp. 3-413, at pp. 32-35, para. 39.

426 *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 220.

427 Draft conclusion 1, para. 2, as proposed in document A/CN.4/660, at para. 28, and, generally, paras. 10-27.

428 Decisions of domestic courts have not been uniform as regards the relative weight that subsequent agreements and subsequent practice possess in the process of treaty interpretation, see United Kingdom of Great Britain and Northern Ireland, House of Lords: *R (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 18, paras. 47-48 (Lord Steyn); *Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, para. 31 (Lord Steyn). United States of America, Supreme Court: *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), pp. 183-185; *O'Connor v. United States*, 479 U.S. 27 (1986), pp. 31-32; *United States v. Stuart*, 489 U.S. 353 (1989), where a dissenting judge (Justice Scalia) criticized the majority of the Court for relying on "[t]he practice of the treaty signatories", which, according to him, need not be consulted, since when the "Treaty's language resolves the issue presented, there is no necessity of looking further", at p. 371. Switzerland: Federal Administrative Court, judgment of 21 January 2010, BVGE 2010/7, para 3.7.11; Federal Supreme Court, *A v. B*, appeal judgment of 8 April 2004, No. 4C.140/2003, BGE, vol. 130 III, p. 430, at p. 439.

429 The first report (A/CN.4/660) refers to the jurisprudence of different international courts and tribunals as examples of how the weight of a means in an interpretation exercise is to be determined in specific cases and demonstrates how given instances of subsequent practice and subsequent agreements contributed, or not, to the determination of the ordinary meaning of the terms in their context and in light of the object and purpose of the treaty.

430 Draft conclusion 1, para. 2, as proposed in the first report (A/CN.4/660), para. 28, and analysis at paras. 8-28.

tribunals suggested that this is the case.[431] It was also mentioned that the concept of the "nature" of a treaty is not alien to the 1969 Vienna Convention (see, for example, article 56, paragraph 1 (a))[432] and that the concept of the "nature" of the treaty and/or of treaty provisions had been included in other work of the Commission, in particular on the topic of the effects of armed conflicts on treaties.[433] Other members, however, considered that the draft conclusion should not refer to the "nature" of the treaty in order to preserve the unity of the interpretation process and to avoid any categorization of treaties. The point was also made that the notion of the "nature of the treaty" was unclear and that it would be difficult to distinguish it from the object and purpose of the treaty.[434] The Commission ultimately decided to leave the question open and to make no reference in draft conclusion 2 [1] to the nature of the treaty for the time being.

**Conclusion 3 [2]**
**Subsequent agreements and subsequent practice as authentic means of interpretation**

Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

**Commentary**

(1) By characterizing subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention as "authentic means of interpretation", the Commission indicates the reason why those means are significant for

[431] WTO Panels and the Appellate Body, for example, seem to emphasize more the terms of the respective WTO-covered agreement (for example, WTO Appellate Body, *Brazil — Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, adopted 4 August 2000, para. 45), whereas the European Court of Human Rights and the Inter-American Court of Human Rights highlight the character of the Convention as a human rights treaty (for example, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I, para. 111; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 October 1999, Inter-Am. Ct. H.R. Series A No. 16, para. 58); see also *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), pp. 281-282, and Nolte, "Jurisprudence under special regimes …" (see footnote 398 above), p. 210, at pp. 216, 244-246, 249-262 and 270-275.

[432] M. Forteau, "Les techniques interprétatives de la Cour internationale de Justice", *Revue générale de droit international public*, vol. 115 (2011), p. 399, at pp. 406-407 and 416; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, Separate Opinion of Judge Dillard, p. 150, at p. 154, at footnote 1.

[433] Articles on the effects of armed conflicts on treaties (art. 6 (a)), General Assembly resolution 66/99 of 9 December 2011, annex; see also the guide to practice on reservations to treaties, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1); guideline 4.2.5 refers to the nature of obligations of the treaty, rather than the nature of the treaty as such.

[434] According to the commentary to guideline 4.2.5 of the guide to practice on reservations to treaties, it is difficult to distinguish between the nature of treaty obligations and the object and purpose of the treaty (guide to practice on reservations to treaties, commentary to guideline 4.2.5, para. (3), in *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1)). On the other hand, art. 6 of the articles on the effects of armed conflicts on treaties suggests "a series of factors pertaining to the nature of the treaty, particularly its subject matter, its object and purpose, its content and the number of the parties to the treaty", *ibid.*, commentary to draft article 6, para. (3).

the interpretation of treaties.[435] The Commission thereby follows its 1966 commentary on the draft articles on the law of treaties, which described subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), as "authentic means of interpretation" and which underlined that:

> "The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty."[436]

(2) Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), are, however, not the only "authentic means of interpretation". As the Commission has explained:

> "… the Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, … making the ordinary meaning of the terms, the context of the treaty, its objects and purposes, and the general rules of international law, together with authentic interpretations by the parties, the primary criteria for interpreting a treaty".[437]

The term "authentic" thus refers to different forms of "objective evidence" or "proof" of conduct of the parties, which reflects the "common understanding of the parties" as to the meaning of the treaty.

(3) By describing subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), as "authentic" means of interpretation, the Commission recognizes that the common will of the parties, from which any treaty results, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty. The 1969 Vienna Convention thereby accords the parties to a treaty a role that may be uncommon for the interpretation of legal instruments in some domestic legal systems.

(4) The character of subsequent agreements and subsequent practice of the parties under article 31, paragraph 3 (a) and (b), as "authentic means of interpretation" does not, however, imply that these means necessarily possess a conclusive, or legally binding, effect. According to the chapeau of article 31, paragraph 3, subsequent agreements and subsequent practice shall, after all, only "be taken into account" in the interpretation of a treaty, which consists of a "single combined operation" with no hierarchy among the means of interpretation that are referred to in article 31.[438] For this reason, and contrary to the view

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[435] See R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th edition, vol. 1 (Harlow, Longman, 1992), p. 1268, para. 630; G. Fitzmaurice, "The law and procedure of the International Court of Justice 1951-4: treaty interpretation and certain other treaty points", *British Yearbook of International Law 1957*, vol. 33, pp. 203-293, at pp. 223-225; WTO Panel Report, *United States — Measures Affecting Trade in Large Civil Aircraft (second complaint) (US — Large Civil Aircraft (2nd Complaint))*, WT/DS353/R, adopted 23 March 2012, para. 7.953.

[436] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (15).

[437] *Yearbook … 1964*, vol. II, document A/5809, pp. 204-205, para. (15); see also *ibid*., pp. 203-204, para. 13: "Paragraph 3 specifies as *further* authentic elements of interpretation: (a) agreements between the parties regarding the interpretation of the treaty, and (b) any subsequent practice in the application of the treaty which clearly established the understanding of all the parties regarding its interpretation" (emphasis added); on the other hand, Waldock explained in his third report that "… *travaux préparatoires* are not, as such, an authentic means of interpretation". See *ibid*., document A/CN.4/167 and Add.1-3, pp. 58-59, para. (21).

[438] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 219-220, paras. (8) and (9).

of some commentators,[439] subsequent agreements and subsequent practice that establish the agreement of the parties regarding the interpretation of a treaty are not necessarily conclusive or legally binding.[440] Thus, when the Commission characterized a "subsequent agreement" as representing "an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation",[441] it did not go quite as far as saying that such an interpretation is necessarily conclusive in the sense that it overrides all other means of interpretation.

(5) This does not exclude that the parties to a treaty, if they wish, may reach a binding agreement regarding the interpretation of a treaty. The Special Rapporteur on the law of treaties, Sir Humphrey Waldock, stated in his third report that it may be difficult to distinguish subsequent practice of the parties under what became article 31, paragraph 3 (a) and (b) — which is only to be taken into account, among other means, in the process of interpretation — and a later agreement that the parties consider to be binding:

> "Subsequent practice when it is consistent and embraces all the parties would appear to be decisive of the meaning to be attached to the treaty, *at any rate* when it indicates that the parties consider the interpretation to be binding upon them. In these cases, subsequent practice as an element of treaty interpretation and as an element in the formation of a tacit agreement overlap and the meaning derived from the practice becomes an authentic interpretation established by agreement."[442] (emphasis added)

Whereas Waldock's original view that (simple) agreed subsequent practice "would appear to be decisive of the meaning" was ultimately not adopted in the 1969 Vienna Convention, subsequent agreements and subsequent practice establishing the agreement of the parties regarding the interpretation of a treaty must be conclusive regarding such interpretation when "the parties consider the interpretation to be binding upon them". It is, however, always possible that provisions of domestic law prohibit the Government of a State from

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[439] M.E. Villiger, "The rules on interpretation: misgivings, misunderstandings, miscarriage? The 'crucible' intended by the International Law Commission", in *The Law of Treaties beyond the Vienna Convention*, E. Cannizzaro, ed. (Oxford, Oxford University Press, 2011), pp. 105-122, at p. 111; Gardiner, *Treaty Interpretation* (see footnote 392 above), at p. 34; O. Dörr, "Article 31, general rule of interpretation", in *Vienna Convention on the Law of Treaties. A commentary*, O. Dörr and K. Schmalenbach, eds. (Berlin, Springer, 2012), pp. 521-570, at pp. 553-554, paras. 72-75; K. Skubiszewski, "Remarks on the interpretation of the United Nations Charter", in *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte — Festschrift für Hermann Mosler*, R. Bernhardt and others, eds. (Berlin, Springer, 1983), pp. 891-902, at p. 898.

[440] H. Fox, "Article 31 (3) (a) and (b) of the Vienna Convention and the *Kasikili Sedudu Island* Case", in *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on*, M. Fitzmaurice, O. Elias and P. Merkouris, eds. (Leiden, Martinus Nijhoff, 2010), pp. 59-74, at pp. 61-62; A. Chanaki, *L'adaptation des traités dans le temps* (Brussels, Bruylant, 2013), pp. 313-315; M. Benatar, "From probative value to authentic interpretation: the legal effects of interpretative declarations", *Revue belge de droit international*, vol. 44 (2011), pp. 170-195, at pp. 194-195; cautious: J.M. Sorel and B. Eveno, "1969 Vienna Convention, Article 31: General rule of interpretation", in Corten and Klein, *The Vienna Conventions …* (see footnote 394 above), pp. 804-837, at p. 825, paras. 42-43; see also G. Nolte, "Subsequent agreements and subsequent practice of States outside of judicial or quasi-judicial proceedings", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), pp. 307-385, at p. 375, para. 16.4.3.

[441] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (14).

[442] *Yearbook … 1964*, vol. II, document A/CN.4/167 and Add.1-3, p. 60, para. (25).

arriving at a binding agreement in such cases without satisfying certain — mostly procedural — requirements under its constitution.[443]

(6) The possibility of arriving at a binding subsequent interpretative agreement by the parties is particularly clear in cases in which the treaty itself so provides. Article 1131, paragraph 2, of the North American Free Trade Agreement (NAFTA), for example, provides that: "An interpretation by the [inter-governmental] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."[444] The existence of such a special procedure or an agreement regarding the authoritative interpretation of a treaty that the parties consider binding may or may not preclude additional recourse to subsequent agreements or subsequent practice under article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention.[445]

(7) The Commission has continued to use the term "authentic means of interpretation" in order to describe the not necessarily conclusive, but more or less authoritative, character of subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b). The Commission has not employed the terms "authentic interpretation" or "authoritative interpretation" in draft conclusion 3 [2] since these concepts are often understood to mean a necessarily conclusive, or binding, agreement between the parties regarding the interpretation of a treaty.[446]

(8) Domestic courts have sometimes explicitly recognized that subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), are "authentic" means of interpretation.[447] They have, however, not always been consistent regarding the legal consequences that this characterization entails. Whereas some courts have assumed that subsequent agreements and practice by the parties under the treaty may produce certain

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[443] See, for example, Germany, Federal Fiscal Court, BFHE, vol. 181, p. 158, at p. 161; and *ibid*., vol. 219, p. 518 *et seq*., at pp. 527-528.

[444] North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States (1992) (Washington, D.C., United States Government Printing Office, 1993).

[445] This question will be explored in more detail at a later stage of the work on the topic. See also: the Marrakesh Agreement establishing the World Trade Organization (1994), United Nations, *Treaty Series*, vol. 1867, No. 31874, p. 3, art. IX, para. 2; WTO Appellate Body Report, *European Communities — Custom Classification of Frozen Boneless Chicken Cuts (EC — Chicken Cuts)*, WT/DS269/AB/R and Corr.1, WT/DS286/AB/R and Corr.1, adopted 27 September 2005, para. 273; WTO Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU by Ecuador (EC — Bananas III)*, Second Recourse to Article 21.5, WT/DS27/AB/RW2/ECU and Corr.1, adopted 11 December 2008, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, paras. 383 and 390.

[446] See, for example, *Methanex Corporation v. United States of America*, UNCITRAL Arbitration under NAFTA Chapter Eleven, Final Award on Jurisdiction and Merits, 3 August 2005, Part II, chap. H, para. 23 (with reference to Jennings and Watts, see footnote 435 above), p. 1268, para. 630); Gardiner, *Treaty Interpretation* (see footnote 392 above), at p. 34; U. Linderfalk, *On the Interpretation of Treaties* (Dordrecht, Springer, 2007), p. 153; Skubiszewski, "Remarks on the interpretation of the United Nations Charter" (see footnote 439 above), at p. 898; G. Haraszti, *Some Fundamental Problems of the Law of Treaties* (Budapest, Akadémiai Kiadó, 1973), p. 43; see also Nolte, "Jurisprudence under special regimes … (see footnote 398 above), p. 210, at p. 240, para. 4.5.

[447] Switzerland Federal Supreme Court: *A v. B*, appeal judgment of 8 April 2004, No. 4C.140/2003, BGE, vol. 130 III, p. 430, at p. 439 (where the Court speaks of the parties as being "masters of the treaty" ("Herren der Verträge"); judgment of 12 September 2012, No. 2C_743/2011, BGE, vol. 138 II, p. 524, at pp. 527-528. Germany, Federal Constitutional Court, BVerfGE, vol. 90, p. 286, at p. 362. See also India, Supreme Court, *Godhra Electricity Co. Ltd. and Another v. The State of Gujarat and Another* [1975] AIR 32. Available from http://indiankanoon.org/doc/737188 (accessed 8 June 2016).

binding effects,[448] others have rightly emphasized that article 31, paragraph 3, only requires that subsequent agreements and subsequent practice "be taken into account".[449]

(9) The term "authentic means of interpretation" encompasses a factual and a legal element. The factual element is indicated by the expression "objective evidence", whereas the legal element is contained in the concept of "understanding of the parties". Accordingly, the Commission characterized a "subsequent agreement" as representing "an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation",[450] and subsequently stated that subsequent practice "similarly … constitutes objective evidence of the understanding of the parties as to the meaning of the treaty".[451] Given the character of treaties as embodiments of the common will of their parties, "objective evidence" of the "understanding of the parties" possesses considerable authority as a means of interpretation.[452]

(10) The distinction between any "subsequent agreement" (article 31, paragraph 3 (a)) and "subsequent practice … which establishes the agreement of the parties" (article 31, paragraph 3 (b)) does not denote a difference concerning their authentic character.[453] The Commission rather considers that a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" *ipso facto* has the effect of constituting an authentic interpretation of the treaty, whereas a "subsequent practice" only has this effect if it "shows the common understanding of the parties as to the meaning of the terms".[454] Thus, the difference between a "subsequent agreement between the parties" and a "subsequent practice … which establishes the agreement of the parties" lies in the manner of establishing the agreement of the parties regarding the interpretation of a treaty, with the difference being in the greater ease with which an agreement is established.[455]

(11) Subsequent agreements and subsequent practice as authentic means of treaty interpretation are not to be confused with interpretations of treaties by international courts, tribunals or expert treaty bodies in specific cases. Subsequent agreements or subsequent practice under article 31, paragraph 3 (a) and (b), are "authentic" means of interpretation because they are expressions of the understanding of the treaty by the States parties themselves. The authority of international courts, tribunals and expert treaty bodies rather derives from other sources, most often from the treaty that is to be interpreted. Judgments and other pronouncements of international courts, tribunals and expert treaty bodies, however, may be indirectly relevant for the identification of subsequent agreements and

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[448] Germany, Federal Fiscal Court, BFHE, vol. 215, p. 237, at p. 241; *ibid*., vol. 181, p. 158, at p. 161.

[449] New Zealand, Court of Appeal, *Zaoui v. Attorney-General (No. 2)* [2005] 1 NZLR 690, para. 130; Hong Kong, China, Court of Final Appeal, *Ng Ka Ling and Others v. Director of Immigration* [1999] 1 HKLRD 315, 354; Austria, Supreme Administrative Court, VwGH, judgment of 30 March 2006, 2002/15/0098, 2, 5.

[450] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (14).

[451] *Ibid*., para. (15).

[452] Gardiner, *Treaty Interpretation* (see footnote 392 above), at pp. 34 and 414-415; Linderfalk, *On the Interpretation of Treaties* (see footnote 446 above), at pp. 152-153.

[453] A/CN.4/660, para. 69.

[454] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 221-222, para. (15); see also W. Karl, *Vertrag und spätere Praxis im Völkerrecht* (Berlin, Springer, 1983), p. 294.

[455] *Kasikili/Sedudu Island* (see footnote 395 above), at p. 1087, para. 63, see also below draft conclusion 4 and the commentary thereto.

subsequent practice as authentic means of interpretation if they refer to, reflect or trigger such subsequent agreements and practice of the parties themselves.[456]

(12) Draft conclusions 2 [1] and 4 distinguish between "subsequent practice" establishing the agreement of the parties under article 31, paragraph 3 (b), of the 1969 Vienna Convention, on the one hand, and other subsequent practice (in a broad sense) by one or more, but not all, parties to the treaty that may be relevant as a supplementary means of interpretation under article 32.[457] Such "other" subsequent interpretative practice that does not establish the agreement of all the parties cannot constitute an "authentic" interpretation of a treaty by all its parties and thus will not possess the same weight for the purpose of interpretation.[458]

(13) The last part of draft conclusion 3 [2] makes it clear that any reliance on subsequent agreements and subsequent practice as authentic means of interpretation should occur as part of the application of the general rule of treaty interpretation reflected in article 31 of the 1969 Vienna Convention.

**Conclusion 4**
**Definition of subsequent agreement and subsequent practice**

1. A "subsequent agreement" as an authentic means of interpretation under article 31, paragraph 3 (a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A "subsequent practice" as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. Other "subsequent practice" as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

**Commentary**

*General aspects*

(1) Draft conclusion 4 defines the three different "subsequent" means of treaty interpretation that are mentioned in draft conclusion 2 [1], paragraphs 3 and 4, namely "subsequent agreement" under article 31, paragraph 3 (a), "subsequent practice" under article 31, paragraph 3 (b), and other "subsequent practice" under article 32.

(2) In all three cases, the term "subsequent" refers to acts occurring "after the conclusion of a treaty".[459] This point in time is often earlier than the moment when the treaty enters into force (article 24). Various provisions of the 1969 Vienna Convention (for example, article 18) show that a treaty may be "concluded" before its actual entry into force.[460] For the purposes of the present topic, "conclusion" is whenever the text of the

[456] See below draft conclusion 12 [11] and Nolte, "Subsequent agreements and subsequent practice of States …" (footnote 440 above), p. 307, at pp. 381 *et seq*., para. 17.3.1.
[457] See below in particular paras. (23) to (37) of the commentary to draft conclusion 4, para. 3.
[458] See below also para. (35) of the commentary to draft conclusion 4, para. 3.
[459] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (14).
[460] See J.L. Brierly, second report on the law of treaties, *Yearbook … 1951*, vol. II, document A/CN.4/43, pp. 70 *et seq*.; and G.G. Fitzmaurice, first report on the law of treaties, *Yearbook … 1956*, vol. II,

treaty has been established as definite. It is after conclusion, not just after entry into force, of a treaty when subsequent agreements and subsequent practice can occur. Indeed, it is difficult to identify a reason why an agreement or practice that takes place between the moment when the text of a treaty has been established as definite and the entry into force of that treaty should not be relevant for the purpose of interpretation.[461]

(3) Article 31, paragraph 2, of the 1969 Vienna Convention provides that the "context" of the treaty includes certain "agreements" and "instruments"[462] that "are made in connection with the conclusion of the treaty". The phrase "in connection with the conclusion of the treaty" should be understood as including agreements and instruments that are made in a close temporal and contextual relation with the conclusion of the treaty.[463] If they are made after this period, then such "agreements" and agreed upon "instruments" constitute "subsequent agreements" or subsequent practice under article 31, paragraph 3.[464]

*Paragraph 1 — definition of "subsequent agreement" under article 31, paragraph 3 (a)*

(4) Paragraph 1 of draft conclusion 4 provides the definition of "subsequent agreement" under article 31, paragraph 3 (a).

(5) Article 31, paragraph 3 (a), uses the term "subsequent agreement" and not the term "subsequent treaty". A "subsequent agreement" is, however, not necessarily less formal than a "treaty". Whereas a treaty within the meaning of the 1969 Vienna Convention must be in written form (article 2, paragraph 1 (a)), the customary international law on treaties knows no such requirement.[465] The term "agreement" in the 1969 Vienna Convention[466] and in customary international law does not imply any particular degree of formality. Article 39 of the 1969 Vienna Convention, which lays down the general rule according to which: "[a] treaty may be amended by agreement between the parties", has been explained by the Commission to mean that: "An amending agreement may take whatever form the parties to

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document A/CN.4/101, p. 112; see also S. Rosenne, "Treaties, conclusion and entry into force", in *Encyclopedia of Public International Law*, vol. 7, R. Bernhardt, ed. (Amsterdam, North Holland, 2000), p. 465 ("[s]trictly speaking it is the negotiation that is concluded through a treaty"); Villiger, *Commentary …* (see footnote 414 above), at pp. 78-80, paras. 9-14.

[461] See, for example, Declaration on the European Stability Mechanism, agreed on by the Contracting Parties to the Treaty Establishing the Stability Mechanism, 27 September 2012.

[462] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (13); the German Federal Constitutional Court has held that this term may include unilateral declarations if the other party did not object to them, see German Federal Constitutional Court, *BVerfGE*, vol. 40, p. 141, at p. 176; see, generally, Gardiner, *Treaty Interpretation* (footnote 392 above ), at pp. 240-242.

[463] Yasseen, "L'interprétation des traités …" (see footnote 393 above ), at p. 38; Jennings and Watts, *Oppenheim's International Law* (see footnote 435 above), p. 1274, para. 632 ("… but, on the other hand, too long a lapse of time between the treaty and the additional agreement might prevent it being regarded as made in connection with 'the conclusion of' the treaty").

[464] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (14); see also Villiger, *Commentary …* (above footnote 414), at p. 431, paras. 20-21; see also K.J. Heller, "The uncertain legal status of the aggression understandings", *Journal of International Criminal Justice*, vol. 10 (2012), p. 229-248, at p. 237.

[465] Villiger, *Commentary …* (see footnote 414 above), at p. 80, para. 15; P. Gautier, "Commentary on article 2 of the Vienna Convention", in Corten and Klein, *The Vienna Conventions …* (see footnote 394 above), vol. II, at pp. 38-40, paras. 14-18; J. Klabbers, *The Concept of Treaty in International Law* (The Hague, Kluwer Law International, 1996), pp. 49-50; see also A. Aust, "The theory and practice of informal international instruments", *International and Comparative Law Quarterly*, vol. 35, No. 4 (1986), pp. 787-812, at pp. 794 *et seq*.

[466] See articles 2, para. 1 (a), 3, 24, para. 2, 39-41, 58 and 60.

the original treaty may choose."[467] In the same way, the Vienna Convention does not envisage any particular formal requirements for agreements and practice under article 31, paragraph 3 (a) and (b).[468]

(6) While every treaty is an agreement, not every agreement is a treaty. Indeed, a "subsequent agreement" under article 31, paragraph 3 (a), "shall" only "be taken into account" in the interpretation of a treaty. Therefore, it is not necessarily binding. The question under which circumstances a subsequent agreement between the parties is binding, and under which circumstances it is merely a means of interpretation among several others, is addressed in draft conclusion 10 [9].

(7) The 1969 Vienna Convention distinguishes a "subsequent agreement" under article 31, paragraph 3 (a), from "any subsequent practice … which establishes the agreement of the parties regarding its interpretation" under article 31, paragraph 3 (b). This distinction is not always clear and the jurisprudence of international courts and other adjudicative bodies shows a certain reluctance to assert it. In *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, the International Court of Justice used the expression "subsequent attitudes" to denote both what it later described as "subsequent agreements" and as subsequent unilateral "attitudes".[469] In the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan*, the International Court of Justice left the question open whether the use of a particular map could constitute a subsequent agreement or subsequent practice.[470] WTO Panels and the Appellate Body have also not always distinguished between a subsequent agreement and subsequent practice under article 31, paragraph 3 (a) and (b).[471]

(8) The Tribunal of the North American Free Trade Agreement (NAFTA) in *CCFT v. United States*,[472] however, has squarely addressed this distinction. In that case the United

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[467] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 232 and 233; see also Villiger, *Commentary …* (footnote 414 above), at p. 513, para. 7; P. Sands, "Commentary on article 39 of the Vienna Convention", in Corten and Klein, *The Vienna Conventions …* (see footnote 394 above), at pp. 971-972, paras. 31-34.

[468] Draft article 27, paragraph 3 (*b*), which later became article 31, paragraph 3 (*b*), of the Vienna Convention, contained the word "understanding", which was changed to "agreement" at the United Nations Conference on the Law of Treaties. This change was "related to drafting only", see *Official Records of the United Nations Conference on the Law of Treaties, First session, Vienna 26 March-24 May 1968* (A/CONF.39/11, sales No. E.68.V.7), p. 169; Fox, "Article 31 (3) (a) and (b) …" (see footnote 440 above ), at p. 63.

[469] See *Territorial Dispute* (see footnote 395 above), p. 6, at pp. 34 *et seq*., paras. 66 *et seq*.

[470] *Sovereignty over Pulau Ligitan and Pulau Sipadan* (see footnote 395 above), at p. 656, para. 61; in the *Gabčíkovo-Nagymaros* case, the Court spoke of "subsequent positions" in order to establish that "the explicit terms of the treaty itself were, therefore, in practice acknowledged by the parties to be negotiable", *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 77, para. 138, see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Judgment (Jurisdiction and Admissibility), I.C.J. Reports 1995*, p. 6, at p. 16, para. 28 ("subsequent conduct").

[471] See "Scheduling guidelines" in WTO Panel Report, *Mexico — Measures Affecting Telecommunications Services*, WT/DS204/R, adopted 1 June 2004, and in WTO Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R and Corr.1, adopted 20 April 2005; to qualify a "1981 Understanding" in WTO Panel Report, *United States — Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000; "Tokyo Round SCM Code" in WTO Panel Report, *Brazil — Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted 20 March 1997, and a "waiver" in WTO Appellate Body Report, *EC — Bananas III* (see footnote 445 above).

[472] *C.C.F.T. v. United States*, UNCITRAL Arbitration under NAFTA Chapter Eleven, Award on Jurisdiction, 28 January 2008; see also *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Decision on the Challenge to the President of the Committee, 3 October

States of America asserted that a number of unilateral actions by the three NAFTA parties could, if considered together, constitute a subsequent agreement.[473] In a first step, the Panel did not find that the evidence was sufficient to establish such a subsequent agreement under article 31, paragraph 3 (a).[474] In a second step, however, the Tribunal concluded that the very same evidence constituted a relevant subsequent practice that established an agreement between the parties regarding the interpretation:

> "The question remains: is there 'subsequent practice' that establishes the agreement of the NAFTA Parties on this issue within the meaning of article 31 (3) (b)? The Tribunal concludes that there is. Although there is, to the Tribunal, insufficient evidence on the record to demonstrate a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,' the available evidence cited by the Respondent demonstrates to us that there is nevertheless a 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications … ."[475]

(9) This reasoning suggests that one difference between a "subsequent agreement" and "subsequent practice" under article 31, paragraph 3, lies in different forms that embody the "authentic" expression of the will of the parties. Indeed, by distinguishing between "any subsequent agreement" under article 31, paragraph 3 (a), and "subsequent practice … which establishes the understanding of the parties" under article 31, paragraph 3 (b), of the 1969 Vienna Convention, the Commission did not intend to denote a difference concerning their possible legal effect.[476] The difference between the two concepts, rather, lies in the fact that a "subsequent agreement between the parties" *ipso facto* has the effect of constituting an authentic means of interpretation of the treaty, whereas a "subsequent practice" only has this effect if its different elements, taken together, show "the common understanding of the parties as to the meaning of the terms".[477]

(10) Subsequent agreements and subsequent practice under article 31, paragraph 3, are hence distinguished based on whether an agreement of the parties can be identified as such, in a common act, or whether it is necessary to identify an agreement through individual acts that in their combination demonstrate a common position. A "subsequent agreement" under article 31, paragraph 3 (a), must therefore be "reached" and presupposes a single common act by the parties by which they manifest their common understanding regarding the interpretation of the treaty or the application of its provisions.

(11) "Subsequent practice" under article 31, paragraph 3 (b), on the other hand, encompasses all (other) relevant forms of subsequent conduct by the parties to a treaty that contribute to the identification of an agreement, or "understanding",[478] of the parties regarding the interpretation of the treaty. It is, however, possible that "practice" and

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2001, ICSID Case No. ARB/97/3, *ICSID Reports 2004*, vol. 6 (2004), p. 168, at p. 174, para. 12; P. Merkouris and M. Fitzmaurice, "Canons of treaty interpretation: selected case studies from the World Trade Organization and the North American Free Trade Agreement", in Fitzmaurice, Elias and Merkouris, *Treaty Interpretation …* (see footnote 440 above), at pp. 217-233.

[473] *C.C.F.T. v. United States* (see footnote 472 above), paras. 174-177.

[474] *Ibid*., paras. 184-187.

[475] *Ibid*., paras. 188, see also para. 189; and in a similar sense: *Aguas del Tunari SA v. Republic of Bolivia* (Netherlands/Bolivia BIT), Decision on Respondent's Objections to Jurisdiction, ICSID Case No. ARB/02/3, 21 October 2005, *ICSID Review — Foreign Investment Law Journal*, vol. 20, No. 2 (2005), p. 450, at pp. 528 *et seq*., paras. 251 *et seq*.

[476] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 221-222, para. (15).

[477] *Ibid*.; see also Karl, *Vertrag und spätere Praxis …* (footnote 454 above), at p. 294.

[478] The word "understanding" had been used by the Commission in the corresponding draft article 27, para. 3 (*b*), on the law of treaties (see footnote 468 above).

"agreement" coincide in specific cases and cannot be distinguished. This explains why the term "subsequent practice" is sometimes used in a more general sense, which encompasses both means of interpretation that are referred to in article 31, paragraph 3 (a) and (b).[479]

(12) A group of separate subsequent agreements, each between a limited number of parties, but which, taken together, establish an agreement between all the parties to a treaty regarding its interpretation, is not normally "a" subsequent agreement under article 31, paragraph 3 (a). The term "subsequent agreement" under article 31, paragraph 3 (a), should, for the sake of clarity, be limited to a single agreement between all the parties. Different later agreements between a limited number of parties that, taken together, establish an agreement between all the parties regarding the interpretation of a treaty constitute subsequent practice under article 31, paragraph 3 (b). Different such agreements between a limited number of parties that, even taken together, do not establish an agreement between all the parties regarding the interpretation of a treaty may have interpretative value as a supplementary means of interpretation under article 32 (see below at paragraphs (23) and (24)). Thus, the use of the term "subsequent agreement" is limited to agreements among all the parties to a treaty that are manifested in one single agreement — or in a common act in whatever form that reflects the agreement of all parties.[480]

(13) A subsequent agreement under article 31, paragraph 3 (a), must be an agreement "regarding" the interpretation of the treaty or the application of its provisions. The parties must therefore purport, possibly among other aims, to clarify the meaning of a treaty or how it is to be applied.[481]

(14) Whether an agreement is one "regarding" the interpretation or application of a treaty can sometimes be determined by some reference that links the "subsequent agreement" to the treaty concerned. Such reference may also be comprised in a later treaty. In the *Jan Mayen* case between Denmark and Norway, for example, the International Court of Justice appears to have accepted that a "subsequent treaty" between the parties "in the same field" could be used for the purpose of the interpretation of the previous treaty. In that case, however, the Court ultimately declined to use the subsequent treaty for that purpose because it did not in any way "refer" to the previous treaty.[482] In *Dispute Regarding Navigation and Related Rights* between Costa Rica and Nicaragua, Judge *ad hoc* Guillaume referred to the actual practice of tourism on the San Juan River in conformity with a memorandum of understanding between the two States.[483] It was not clear, however, whether this particular memorandum was meant by the parties to serve as an interpretation of the boundary treaty under examination.

(15) The Court of Final Appeal in Hong Kong, China has provided an example of a rather strict approach when it was called upon to interpret the Sino-British Joint Declaration in the case of *Ng Ka Ling and Others v. Director of Immigration*.[484] In this case, one party

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[479] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 113, at pp. 127-128, para. 53: in this case, even an explicit subsequent verbal agreement was characterized by one of the parties as "subsequent practice".

[480] See WTO Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June, para. 371. A common act may consist of an exchange of letters … .

[481] *Ibid*., paras. 366-378, in particular para. 372; Linderfalk, *On the Interpretation of Treaties* (see footnote 446 above), at pp. 164 *et seq*.

[482] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 51, para. 28.

[483] *Dispute regarding Navigational and Related Rights* (see footnote 395 above), Declaration of Judge *ad hoc* Guillaume, p. 290, at pp. 298-299, para. 16.

[484] See *Ng Ka Ling and Others v. Director of Immigration* (footnote 449 above).

alleged that the Sino-British Joint Liaison Group, consisting of representatives of China and the United Kingdom under article 5 of the Joint Declaration, had come to an agreement regarding the interpretation of the Joint Declaration. As evidence, the party pointed to a booklet that stated that it was compiled "on the basis of the existing immigration regulations and practices and the common view of the British and Chinese sides in the [Joint Liaison Group]". The Court, however, did not find that the purpose of the booklet was to "interpret or to apply" the Joint Declaration within the meaning of article 31, paragraph 3 (a).[485]

*Paragraph 2 — definition of subsequent practice under article 31, paragraph 3 (b)*

(16) Paragraph 2 of draft conclusion 4 does not intend to provide a general definition for any form of subsequent practice that may be relevant for the purpose of the interpretation of treaties. Paragraph 2 is limited to subsequent practice as a means of authentic interpretation that establishes the agreement of all the parties to the treaty, as formulated in article 31, paragraph 3 (b). Such subsequent practice (in a narrow sense) is distinguishable from other "subsequent practice" (in a broad sense) by one or more parties that does not establish the agreement of the parties, but which may nevertheless be relevant as a subsidiary means of interpretation according to article 32 of the 1969 Vienna Convention.[486]

(17) Subsequent practice under article 31, paragraph 3 (b), may consist of any "conduct". The word "conduct" is used in the sense of article 2 of the Commission's articles on the responsibility of States for internationally wrongful acts.[487] It may thus include not only acts, but also omissions, including relevant silence, which contribute to establishing agreement.[488] The question under which circumstances omissions, or silence, can contribute to an agreement of all the parties regarding the interpretation of a treaty is addressed in draft conclusion 10 [9], paragraph 2.

(18) Subsequent practice under article 31, paragraph 3 (b), must be conduct "in the application of the treaty". This includes not only official acts at the international or at the internal level that serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, *inter alia*, official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the internal or at the international level.

(19) It may be recalled that, in one case, a NAFTA Panel denied that internal legislation can be used as an interpretative aid:

> "Finally, in light of the fact that both Parties have made references to their national legislation on land transportation, the Panel deems it appropriate to refer to article 27

[485] *Ibid*., at paras. 152-153.

[486] On the distinction between the two forms of subsequent practice see below, paras. (23) and (24) of the present commentary.

[487] *Yearbook ... 2001*, vol. II (Part Two) and Corrigendum, pp. 34-35, paras. (2)-(4) of the commentary.

[488] Waldock, third report on the law of treaties, *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1-3, pp. 61-62, paras. (32)-(33); *Case concerning the Temple of Preah Vihear (Cambodia* v *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, at p. 23; *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 410, para. 39; *Dispute between Argentina and Chile concerning the Beagle Channel*, UNRIAA, vol. XXI (Sales No. E/F.95.V2), pp. 53-264, at pp. 185-187, paras. 168-169.

> of the Vienna Convention, which states that 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' This provision directs the Panel not to examine national laws but the applicable international law. Thus, neither the internal law of the United States nor the Mexican law should be utilized for the interpretation of NAFTA. To do so would be to apply an inappropriate legal framework."[489]

Whereas article 27 of the 1969 Vienna Convention is certainly valid and important, this rule does not signify that national legislation may not be taken into account as an element of subsequent State practice in the application of the treaty. There is a difference between invoking internal law as a justification for a failure to perform a treaty and referring to internal law for the purpose of interpreting a provision of a treaty law. Accordingly, international adjudicatory bodies, in particular the WTO Appellate Body and the European Court of Human Rights, have recognized and regularly distinguish between internal legislation (and other implementing measures at the internal level) that violates treaty obligations and national legislation and other measures that can serve as a means to interpret the treaty.[490] It should be noted, however, that an element of *bona fide* is implied in any "subsequent practice in the application of the treaty". A manifest misapplication of a treaty, as opposed to a *bona fide* application (even if erroneous), is therefore not an "application of the treaty" in the sense of articles 31 and 32.

(20) The requirement that subsequent practice in the application of a treaty under article 31, paragraph 3 (b), must be "regarding its interpretation" has the same meaning as the parallel requirement under article 31, paragraph 3 (a) (see paragraphs (13) and (14) above). It may often be difficult to distinguish between subsequent practice that specifically and purposefully relates to a treaty, that is "regarding its interpretation", and other practice "in the application of the treaty". The distinction, however, is important because only conduct that the parties undertake "regarding the interpretation of the treaty" is able to contribute to an "authentic" interpretation, whereas this requirement does not exist for other subsequent practice under article 32.

(21) The question under which circumstances an "agreement of the parties regarding the interpretation of a treaty" is actually "established" is addressed in draft conclusion 10 [9].

(22) Article 31, paragraph 3 (b), does not explicitly require that the practice must be the conduct of the parties to the treaty themselves. It is, however, the parties themselves, acting through their organs,[491] or by way of conduct that is attributable to them, who engage in practice in the application of the treaty that may establish their agreement. The question of

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[489] NAFTA Arbitral Panel Final Report, *Cross-Border Trucking Services (Mexico v. United States of America)*, No. USA-MEX-98-2008-01, adopted 6 February 2001, para. 224 (footnotes omitted).

[490] For example, WTO Panel Report, *United States — Section 110(5) Copyright Act*, WT/DS160/R, adopted 27 July 2000, para. 6.55; WTO Panel Report, *United States — Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, para. 7.173; WTO Appellate Body Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, paras. 335-336; *CMS Gas Transmission Company v. Argentine Republic* (United States/Argentina Bilateral Investment Treaty), Decision on Objections to Jurisdiction, 17 July 2003, ICSID Case No. ARB/01/8, *ICSID Reports 2003*, vol. 7, p. 492, para. 47; *V. v. the United Kingdom* [GC], no. 24888/94, 16 December 1999, ECHR 1999-IX, para. 73; *Kart v. Turkey* [GC], no. 8917/05, 3 December 2009, ECHR 2009-VI, para. 54; *Sigurður A. Sigurjónsson v. Iceland*, no. 16130/90, 30 June 1993, ECHR Series A no. 264, para. 35.

[491] Karl, *Vertrag und spätere Praxis …* (see footnote 454 above), at pp. 115 *et seq.*

whether other actors can generate relevant subsequent practice is addressed in draft conclusion 5.[492]

*Paragraph 3 — "other" subsequent practice*

(23) Paragraph 3 of draft conclusion 4 addresses "other" subsequent practice, that is practice other than that referred to in article 31, paragraph 3 (b). This paragraph concerns "subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32", as mentioned in paragraph 4 of draft conclusion 2 [1]. This form of subsequent practice, which does not require the agreement of all the parties, was originally referred to in the commentary of the Commission as follows:

> "But, in general, the practice of an individual party or of only some parties as an element of interpretation is on a quite different plane from a concordant practice embracing all the parties and showing their common understanding of the meaning of the treaty. Subsequent practice of the latter kind evidences the agreement of the parties as to the interpretation of the treaty and is analogous to an interpretative agreement. For this reason the Commission considered that subsequent practice establishing the common understanding of all the parties regarding the interpretation of a treaty should be included in paragraph 3 [of what became article 31, paragraph 3, of the 1969 Vienna Convention] as an authentic means of interpretation alongside interpretative agreements. The practice of individual States in the application of a treaty, on the other hand, may be taken into account only as one of the 'further' means of interpretation mentioned in article 70."[493]

(24) Paragraph 3 of draft conclusion 4 does not enunciate a requirement, as it is contained in article 31, paragraph 3 (b), that the relevant practice be "regarding the interpretation" of the treaty. Thus, for the purposes of the third paragraph, any practice in the application of the treaty that may provide indications as to how the treaty should be interpreted may be a relevant supplementary means of interpretation under article 32.

(25) This "other" subsequent practice, since the adoption of the 1969 Vienna Convention, has been recognized and applied by international courts and other adjudicatory bodies as a means of interpretation (see paragraphs (26) to (34) below). It should be noted, however, that the WTO Appellate Body, in *Japan — Alcoholic Beverages II*,[494] has formulated a definition of subsequent practice for the purpose of treaty interpretation that seems to suggest that only such "subsequent practice in the application of the treaty" "which establishes the agreement of the parties regarding its interpretation" can at all be relevant for the purpose of treaty interpretation and not any other form of subsequent practice by one or more parties:

> "… subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation."[495]

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[492] See draft conclusion 5, para. 2.

[493] *Yearbook … 1964*, vol. II, document A/5809, p. 204, para. (13); see also *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 221-222, para. (15).

[494] WTO Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted on 1 November 1996, and WTO Report of the Panel, WT/DS8/R, WT/DS10/R and WT/DS11/R, adopted on 1 November 1996.

[495] *Ibid*. (WTO Appellate Body Report), section E, p. 16.

However, the jurisprudence of the International Court of Justice and other international courts and tribunals, and ultimately even that of the WTO Dispute Settlement Body itself (see paragraphs (33) and (34) below), demonstrate that subsequent practice that fulfils all the conditions of article 31, paragraphs 3 (b), of the 1969 Vienna Convention is not the only form of subsequent practice by parties in the application of a treaty that may be relevant for the purpose of treaty interpretation.

(26) In the case of *Kasikili/Sedudu Island*, for example, the International Court of Justice held that a report by a technical expert that had been commissioned by one of the parties and that had "remained at all times an internal document",[496] while not representing subsequent practice that establishes the agreement of the parties under article 31, paragraph 3 (b), could "nevertheless support the conclusions" that the Court had reached by other means of interpretation.[497]

(27) The ICSID Tribunals have also used subsequent State practice as a means of interpretation in a broad sense.[498] For example, when addressing the question of whether minority shareholders can acquire rights from investment protection treaties and have standing in ICSID procedures, the tribunal in *CMS Gas v. Argentina* held that:

> "State practice further supports the meaning of this changing scenario. … Minority and non-controlling participations have thus been included in the protection granted or have been admitted to claim in their own right. Contemporary practice relating to lump-sum agreements … among other examples, evidence increasing flexibility in the handling of international claims."[499]

(28) The European Court of Human Rights held in *Loizidou v. Turkey* that its interpretation was "confirmed by the subsequent practice of the Contracting Parties",[500] that is "the evidence of a practice denoting practically universal agreement amongst Contracting Parties that [a]rticles 25 and 46 … of the Convention do not permit territorial or substantive restrictions".[501] More often the European Court of Human Rights has relied on — not necessarily uniform — subsequent State practice by referring to national legislation and domestic administrative practice, as a means of interpretation. In the case of *Demir and Baykara v. Turkey*, for example, the Court held that "[a]s to the practice of European States, it can be observed that, in the vast majority of them, the right for public servants to bargain collectively with the authorities has been recognised"[502] and that "[t]he remaining exceptions can be justified only by particular circumstances".[503]

(29) The Inter-American Court of Human Rights, when taking subsequent practice of the parties into account, has also not limited its use to cases in which the practice established the agreement of the parties. Thus, in the case of *Hilaire, Constantine and Benjamin et al.*

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[496] *Kasikili/Sedudu Island* (see footnote 395 above), at p. 1,078, para. 55.

[497] *Ibid*., p. 1,096, para. 80.

[498] O.K. Fauchald, "The Legal Reasoning of ICSID Tribunals — An Empirical Analysis", *European Journal of International Law*, vol. 19, No. 2 (2008), p. 301, at p. 345.

[499] *CMS Gas Transmission Company v. Argentine Republic* (United States/Argentina Bilateral Investment Treaty), Decision on Objections to Jurisdiction, 17 July 2003, ICSID Case No. ARB/01/8, *ICSID Reports 2003*, vol. 7, p. 492, at para. 47.

[500] *Loizidou v. Turkey* (preliminary objections), no. 15318/89, 23 March 1995, ECHR Series A no. 310, para. 79.

[501] *Ibid*., para. 80; it is noteworthy that the Court described "such a State practice" as being "uniform and consistent" despite the fact that it had recognised that two States possibly constituted exceptions (Cyprus and the United Kingdom; "whatever their meaning"), paras. 80 and 82.

[502] *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR-2008, para. 52.

[503] *Ibid*., para. 151; similarly *Jorgic v. Germany*, no. 74613/01, 12 July 2007, ECHR 2007-III, para. 69.

*v*. *Trinidad and Tobago* the Inter-American Court of Human Rights held that the mandatory imposition of the death penalty for every form of conduct that resulted in the death of another person was incompatible with article 4, paragraph 2, of the American Convention on Human Rights (imposition of the death penalty only for the most serious crimes). In order to support this interpretation, the Court held that it was "useful to consider some examples in this respect, taken from the legislation of those American countries that maintain the death penalty".[504]

(30) The Human Rights Committee under the International Covenant on Civil and Political Rights is open to arguments based on subsequent practice in a broad sense when it comes to the justification of interferences with the rights set forth in the Covenant.[505] Interpreting the rather general terms contained in article 19, paragraph 3, of the Covenant (permissible restrictions on the freedom of expression), the Committee observed that "similar restrictions can be found in many jurisdictions",[506] and concluded that the aim pursued by the contested law did not, as such, fall outside the legitimate aims of article 19, paragraph 3, of the Covenant.[507]

(31) ITLOS has on some occasions referred to the subsequent practice of the parties without verifying whether such practice actually established an agreement between the parties regarding the interpretation of the treaty. In the *M/V "SAIGA"* (No. 2) case,[508] for example, the Tribunal reviewed State practice with regard to the use of force to stop a ship according to the United Nations Convention on the Law of the Sea.[509] Relying on the "normal practice used to stop a ship", the Tribunal did not specify the respective State practice but rather assumed a certain general standard to exist.[510]

(32) The International Criminal Tribunal for the former Yugoslavia, referring to the Convention on the Prevention and Punishment of the Crime of Genocide,[511] noted in the *Jelisić* judgment that:

> "… the Trial Chamber … interprets the Convention's terms in accordance with the general rules of interpretation of treaties set out in [a]rticles 31 and 32 of the Vienna Convention on the Law of Treaties. … The Trial Chamber also took account of subsequent practice grounded upon the Convention. Special significance was attached to the Judgments rendered by the Tribunal for Rwanda. … The practice of

[504] *Hilaire, Constantine and Benjamin et al*. (see footnote 400 above), Concurring Separate Opinion of Judge Sergio García Ramírez, para. 12.

[505] *Jong-Cheol v*. *The Republic of Korea*, Views, 27 July 2005, Communication No. 968/2001, Report of the Human Rights Committee, *Official Records of the General Assembly, Sixtieth Session, Supplement No*. *40* (A/60/40), vol. II, annex V, G.

[506] *Ibid*., para. 8.3.

[507] *Ibid*.; see also *Yoon and Choi v*. *The Republic of Korea*, Views, 3 November 2006, Communication Nos. 1321/2004 and 1322/2004, *ibid*., *Sixty-second Session, Supplement No*. *40* (A/62/40), vol. II, annex VII, V, para. 8.4.

[508] *M/V "SAIGA" (No*. *2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports … 1999*, p. 10, at pp. 61-62, paras. 155-156.

[509] United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3, art. 293.

[510] *M/V "SAIGA" (No*. *2)* (see footnote 508 above), at paras. 155-156; see also *"Tomimaru" (Japan v*. *Russian Federation)*, case No. 15, Prompt Release, Judgment, *ITLOS Reports … 2007*, p. 74, para. 72; *Southern Bluefin Tuna (New Zealand v*. *Japan; Australia v*. *Japan)*, Provisional Measures, Order of 27 August 1999, *ITLOS Reports … 1999*, p. 280, at paras. 45 and 50.

[511] United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.

States, notably through their national courts, and the work of international authorities in this field have also been taken into account."[512]

(33) The WTO dispute settlement bodies also occasionally distinguish between "subsequent practice" that satisfies the conditions of article 31, paragraph (b), and other forms of subsequent practice in the application of the treaty that they also recognize as being relevant for the purpose of treaty interpretation. In *US — Section 110(5) Copyright Act*[513] (not appealed), for example, the Panel had to determine whether a "minor exceptions doctrine" concerning royalty payments applied.[514] The Panel found evidence in support of the existence of such a doctrine in several member States' national legislation and noted:

> "… we recall that [a]rticle 31 (3) of the Vienna Convention provides that together with the context (a) any subsequent agreement, (b) subsequent practice, or (c) any relevant rules of international law applicable between the parties, shall be taken into account for the purposes of interpretation. We note that the parties and third parties have brought to our attention several examples from various countries of limitations in national laws based on the minor exceptions doctrine. In our view, [S]tate practice as reflected in the national copyright laws of Berne Union members before and after 1948, 1967 and 1971, as well as of WTO Members before and after the date that the TRIPS Agreement became applicable to them, confirms our conclusion about the minor exceptions doctrine."[515]

And the Panel added the following cautionary footnote:

> "By enunciating these examples of [S]tate practice we do not wish to express a view on whether these are sufficient to constitute 'subsequent practice' within the meaning of [a]rticle 31 (3) (b) of the Vienna Convention."[516]

(34) In *European Communities — Customs Classification of Certain Computer Equipment*, the WTO Appellate Body criticized the Panel for not having considered decisions by the Harmonized System Committee of the World Customs Organization (WCO) as a relevant subsequent practice:

> "A proper interpretation also would have included an examination of the existence and relevance of subsequent practice. We note that the United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO in April 1997 on the classification of certain LAN equipment as ADP machines. Singapore, a third party in the panel proceedings, also referred to these decisions. The European Communities observed that it had introduced reservations with regard to these decisions. … However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant … ."[517]

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[512] *Prosecutor v. Goran Jelisić*, Trial Chamber, Judgment, 14 December 1999, IT-95-10-T, para. 61 (footnotes omitted); similarly *Prosecutor v. Radislav Krstić*, Trial Chamber, Judgment, 2 August 2001, IT-98-33-T, para. 541.

[513] WTO Panel Report, *United States — Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000.

[514] See Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9, para. 1.

[515] WTO Panel Report, *United States — Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, para. 6.55 (footnotes omitted).

[516] *Ibid*., at footnote 69.

[517] See WTO Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, adopted 22 June 1998, at para. 90. See also I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford, Oxford University Press, 2009), p. 342.

Thus, on closer inspection, the WTO dispute settlement bodies also recognize the distinction between "subsequent practice" under article 31, paragraph 3 (b), and a broader concept of subsequent practice that does not presuppose an agreement between all the parties of the treaty.[518]

(35) In using subsequent practice by one or more, but not all, parties to a treaty as a supplementary means of interpretation under article 32 one must, however, always remain conscious of the fact that "the view of one State does not make international law".[519] In any case, the distinction between agreed subsequent practice under article 31, paragraph 3 (b), as an authentic means of interpretation, and other subsequent practice (in a broad sense) under article 32, implies that a greater interpretative value should be attributed to the former. Domestic courts have sometimes not clearly distinguished between subsequent agreements and subsequent practice under article 31, paragraph 3, and other subsequent practice under article 32.[520]

(36) The distinction between subsequent practice under article 31, paragraph 3 (b), and subsequent practice under article 32 also contributes to answering the question of whether subsequent practice requires repeated action with some frequency[521] or whether a one-time application of the treaty may be enough.[522] In the WTO framework, the Appellate Body has found:

> "An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant."[523]

If, however, the concept of subsequent practice as a means of treaty interpretation is distinguished from a possible agreement between the parties, frequency is not a necessary element of the definition of the concept of "subsequent practice" in the broad sense (under article 32).[524]

(37) Thus, "subsequent practice" in the broad sense (under article 32) covers any application of the treaty by one or more parties. It can take various forms.[525] Such "conduct by one or more parties in the application of the treaty" may, in particular, consist of a direct

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[518] See also WTO Appellate Body Report, *US — COOL*, WT/DS384/AB/R and WT/DS386/AB/R, adopted 23 July 2012, para. 452.

[519] *Sempra Energy International v. Argentine Republic*, Award, 28 September 2007, ICSID Case No. ARB/02/16, para. 385; see also *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Award, 22 May 2007, ICSID Case No. ARB/01/3, para. 337; WTO Panel Report, *US — Large Civil Aircraft (2nd Complaint)*, WT/DS353/R, adopted 23 March 2012, fn. 2420 in para. 7.953.

[520] See, for example: United Kingdom, House of Lords, *Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, paras. 54-55 and 66-85 (Lord Mance); United Kingdom, House of Lords, *R (Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58, para. 38; United Kingdom, House of Lords, *R (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 18, para. 47 (Lord Steyn); United Kingdom, House of Lords, *King v. Bristow Helicopters Ltd. (Scotland)* [2002] UKHL 7, para. 80 (Lord Hope); New Zealand, Court of Appeal, *Zaoui v. Attorney-General (No. 2)* [2005] 1 NZLR 690, para. 130 (Glazebrook J.); New Zealand, Court of Appeal, *P. v. Secretary for Justice, ex parte A.P.* [2004] 2 NZLR 28, para. 61 (Glazebrook J.); Germany, Federal Administrative Court, BVerfGE, vol. 104, p. 254, at pp. 256-257; judgment of 29 November 1988, 1 C 75/86 [1988], *Neue Zeitschrift für Verwaltungsrecht*, p. 765, at p. 766.

[521] Villiger, *Commentary …* (see footnote 414 above), at p. 431, para. 22.

[522] Linderfalk, *On the Interpretation of Treaties* (see footnote 446 above ), at p. 166.

[523] WTO Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted 1 November 1996, section E, p. 13.

[524] Kolb, *Interprétation et création du droit international* (Brussels, Bruylant, 2006), pp. 506-507.

[525] Aust, *Modern Treaty Law and Practice*, 3rd edition (Cambridge, United Kingdom, Cambridge University Press, 2013), at p. 239.

application of the treaty in question, conduct that is attributable to a State party as an application of the treaty, a statement or a judicial pronouncement regarding its interpretation or application. Such conduct may include official statements concerning the treaty's meaning, protests against non-performance or tacit acceptance of statements or acts by other parties.[526]

**Conclusion 5**
**Attribution of subsequent practice**

1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

**Commentary**

(1) Draft conclusion 5 addresses the question of possible authors of subsequent practice under articles 31 and 32 of the 1969 Vienna Convention. The phrase "under articles 31 and 32" makes it clear that this draft conclusion applies both to subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (b), and to subsequent practice as a supplementary means of interpretation under article 32. Paragraph 1 of draft conclusion 5 defines positively whose conduct in the application of the treaty may constitute subsequent practice under articles 31 and 32, whereas paragraph 2 states negatively which conduct does not, but which may nevertheless be relevant when assessing the subsequent practice of parties to a treaty.

*Paragraph 1 — conduct constituting subsequent practice*

(2) Paragraph 1 of draft conclusion 5, by using the phrase "any conduct which is attributable to a party to a treaty under international law", borrows language from article 2 (a) of the articles on responsibility of States for internationally wrongful acts.[527] Accordingly, the term "any conduct" encompasses actions and omissions and is not limited to the conduct of State organs of a State, but also covers conduct that is otherwise attributable, under international law, to a party to a treaty. The reference to the articles on responsibility of States for internationally wrongful acts does not, however, extend to the requirement that the conduct in question be "internationally wrongful" (see below paragraph (8)).

(3) An example of relevant conduct that does not directly arise from the conduct of the parties, but nevertheless constitutes an example of State practice, has been identified by the International Court of Justice in the *Kasikili/Sedudu Island* case. There the Court considered that the regular use of an island on the border between Namibia (former South-West Africa) and Botswana (former Bechuanaland) by members of a local tribe, the Masubia, could be regarded as subsequent practice in the sense of article 31, paragraph 3 (b), of the Vienna Convention if it:

[526] Karl, *Vertrag und spätere Praxis …* (see footnote 454 above), at pp. 114 *et seq*.

[527] Articles on the responsibility of States for internationally wrongful acts, with commentaries, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 35, para. (4) of the commentary; the question of the attribution of relevant subsequent conduct to international organizations for the purpose of treaty interpretation is addressed in draft conclusion 12 [11] below.

> "… was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the southern channel of the Chobe; and, second, that the Bechuanaland authorities were fully aware of and accepted this as a confirmation of the Treaty boundary."[528]

(4) By referring to any conduct in the application of the treaty that is attributable to a party to the treaty, however, paragraph 1 does not imply that any such conduct necessarily constitutes, in a given case, subsequent practice for the purpose of treaty interpretation. The use of the phrase "may consist" is intended to reflect this point. This clarification is particularly important in relation to conduct of State organs that might contradict an officially expressed position of the State with respect to a particular matter and thus contribute to an equivocal conduct by the State.

(5) The Commission debated whether draft conclusion 5 should specifically address the question under which conditions the conduct of lower State organs would be relevant subsequent practice for purposes of treaty interpretation. In this regard, several members of the Commission pointed to the difficulty of distinguishing between lower and higher State organs, particularly given the significant differences in the internal organization of State governance. The point was also made that the relevant criterion was less the position of the organ in the hierarchy of the State than its actual role in interpreting and applying any particular treaty. Given the complexity and variety of scenarios that could be envisaged, the Commission concluded that this matter should not be addressed in the text of draft conclusion 5 itself, but rather in the commentary.

(6) Subsequent practice of States in the application of a treaty may certainly be performed by the high-ranking government officials mentioned in article 7 of the 1969 Vienna Convention. Yet, since most treaties typically are not applied by such high officials, international courts and tribunals have recognized that the conduct of lower authorities may also, under certain conditions, constitute relevant subsequent practice in the application of a treaty. Accordingly, the International Court of Justice recognized in the *Case concerning rights of nationals of the United States in Morocco* that article 95 of the General Act of the International Conference of Algeciras (1906)[529] had to be interpreted flexibly in light of the inconsistent practice of local customs authorities.[530] The jurisprudence of arbitral tribunals confirms that relevant subsequent practice may emanate from lower officials. In the *German External Debts* decision, the Arbitral Tribunal considered a letter of the Bank of England to the German Federal Debt Administration as relevant subsequent practice.[531] And in the case of *Tax regime governing pensions paid to retired UNESCO officials residing in France*, the Arbitral Tribunal accepted, in principle, the practice of the French tax administration of not collecting taxes on the pensions of retired UNESCO employees as being relevant subsequent practice. Ultimately, however, the Arbitral Tribunal considered

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[528] *Kasikili/Sedudu Island* (see footnote 395 above), at p. 1094, para. 74.

[529] 34 Stat. 2905 (1902-1907).

[530] *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 176, at p. 211.

[531] *Case concerning the question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, Decision, 16 May 1980, UNRIAA, vol. XIX (Sales No. E/F.90.V.7), pp. 67-145, at pp. 103-104, para. 31.

some contrary official pronouncements by a higher authority, the French Government, to be decisive.[532]

(7) It thus appears that the practice of lower and local officials may be subsequent practice "in the application of a treaty" if this practice is sufficiently unequivocal and if the Government can be expected to be aware of this practice and has not contradicted it within a reasonable time.[533]

(8) The Commission did not consider it necessary to limit the scope of the relevant conduct by adding the phrase "for the purpose of treaty interpretation".[534] This had been proposed by the Special Rapporteur in order to exclude from the scope of the term "subsequent practice" such conduct that may be attributable to a State but that does not serve the purpose of expressing a relevant position of a State regarding the interpretation of a treaty.[535] The Commission, however, considered that the requirement, that any relevant conduct must be "in the application of the treaty", would sufficiently limit the scope of possibly relevant conduct. Since the concept of "application of the treaty" requires conduct in good faith, a manifest misapplication of a treaty falls outside this scope.[536]

*Paragraph 2 — conduct non constituting subsequent practice*

(9) Paragraph 2 of draft conclusion 5 comprises two sentences. The first sentence indicates that conduct other than that envisaged in paragraph 1, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. The phrase "other conduct" was introduced in order clearly to establish the distinction between the conduct contemplated in paragraph 2 and that contemplated in paragraph 1. At the same time, the Commission considered that conduct not covered by paragraph 1 may be relevant when "assessing" the subsequent practice of parties to a treaty.

(10) "Subsequent practice in the application of a treaty" will be brought about by those who are called to apply the treaty, which are normally the States parties themselves. The general rule has been formulated by the Iran-U.S. Claims Tribunal as follows:

> "It is a recognized principle of treaty interpretation to take into account, together with the context, any subsequent practice in the application of an international treaty. This practice must, however, be a practice of the parties to the treaty and one which establishes the agreement of the parties regarding the interpretation of that treaty.
>
> "Whereas one of the participants in the settlement negotiations, namely Bank Markazi, is an entity of Iran and thus its practice can be attributed to Iran as one of the parties to the Algiers Declarations, the other participants in the settlement negotiations and in actual settlements, namely the United States banks, are not entities of the Government of the United States, and their practice cannot be

[532] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Decision, 14 January 2003, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), pp. 231-266, at p. 257, para. 66 and p. 259, para. 74.

[533] See Chanaki, *L'adaptation des traités …* (see footnote 440 above), at pp. 323-328; Gardiner, *Treaty Interpretation* (footnote 392 above), at p. 269-270; M. Kamto, "La volonté de l'État en droit international", *Recueil des cours … 2004*, vol. 310, pp. 9-428, pp. 142-144; Dörr, "Article 31…" (see footnote 439 above), at pp. 555-556, para. 78.

[534] See A/CN.4/660, para. 144 (draft conclusion 4, para. 1).

[535] *Ibid*., p. 46, para. 120.

[536] See para. (19) of the commentary to draft conclusion 4 above.

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attributed as such to the United States as the other party to the Algiers Declarations."[537]

(11) The first sentence of the second paragraph of draft conclusion 5 is intended to reflect this general rule. It emphasizes the primary role of the States parties to a treaty who are the masters of the treaty and are ultimately responsible for its application. This does not exclude that conduct by non-State actors may also constitute a form of application of the treaty if it can be attributed to a State party.[538]

(12) "Other conduct" in the sense of paragraph 2 of draft conclusion 5 may be that of different actors. Such conduct may, in particular, be practice of parties that is not "in the application of the treaty" or statements by a State that is not party to a treaty about the latter's interpretation,[539] or a pronouncement by a treaty monitoring body or a dispute settlement body in relation to the interpretation of the treaty concerned,[540] or acts of technical bodies that are tasked by Conferences of States Parties to advise on the implementation of treaty provisions, or different forms of conduct or statements of non-State actors.

(13) The phrase "assessing the subsequent practice" in the second sentence of paragraph 2 should be understood in a broad sense as covering both the identification of the existence of a subsequent practice and the determination of its legal significance. Statements or conduct of other actors, such as international organizations or non-State actors, can reflect, or initiate, relevant subsequent practice of the parties to a treaty.[541] Such reflection or initiation of subsequent practice of the parties by the conduct of other actors should not,

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[537] See Iran-United States Claims Tribunal, *United States of America et al. v. Islamic Republic of Iran et al.*, Award No. 108-A-16/582/591-FT, *Iran-United States Claims Tribunal Reports*, vol. 5 (1984), p. 57, at p. 71; similarly Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), *The Islamic Republic of Iran v. United States of America*, *ibid.*, vol. 38 (2004-2009), p. 77, at pp. 124-125, paras. 127-128; see also Iran-United States Claims Tribunal, Interlocutory Award No. ITL 37-111-FT, *International Schools Services, Inc. (ISS) v. National Iranian Copper Industries Company (NICICO)*, *ibid.*, vol. 5 (1984), p. 338, Dissenting Opinion of President Lagergren, p. 348, at p. 353: "… the provision in the Vienna Convention on subsequent agreements refers to agreements between States parties to a treaty, and a settlement agreement between two arbitrating parties can hardly be regarded as equal to an agreement between the two States that are parties to the treaty, even though the Islamic Republic of Iran was one of the arbitrating parties in the case". For the Algiers Declarations (Declaration of the Government of the Democratic and Popular Republic of Algeria and Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, see *International Legal Materials*, vol. 20, No. 1 (1981), pp. 224 and 230 (respectively), at pp. 232-233).

[538] See, for example, Iran-United States Claims Tribunal (footnote 537 above), Dissenting Opinion of Judge Parviz Ansari, p. 97, at p. 99.

[539] See, for example, *Observations of the United States of America on the Human Rights Committee's General Comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 22 December 2008*, p. 1, para. 3 (available at: www.state.gov/documents/organization/138852.pdf). To the extent that the statement by the United States relates to the interpretation of the Optional Protocol to the International Covenant on Civil and Political Rights (United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171), to which the United States is not party nor a contracting State, its statement constitutes "other conduct" under draft conclusion 5, para. 2.

[540] See, for example, International Law Association, Committee on International Human Rights Law and Practice, "Final report on the impact of findings of United Nations Human Rights treaty bodies", *Report of the Seventy-first Conference, Berlin, 16-21 August 2004* (London, 2004), p. 621, paras. 21 *et seq*.

[541] See Gardiner, *Treaty Interpretation* (see footnote 392 above), at p. 270.

however, be conflated with the practice by the parties to the treaty themselves, including practice that is attributable to them. Activities of actors that are not State parties, as such, may only contribute to assessing subsequent practice of the parties to a treaty.

(14) Decisions, resolutions and other practice by international organizations can be relevant for the interpretation of treaties in their own right. This is recognized, for example, in article 2 (j) of the 1986 Vienna Convention, which mentions the "established practice of the organization" as one form of the "rules of the organization".[542] Draft conclusion 5 only concerns the question of whether the practice of international organizations may be indicative of relevant practice by States parties to a treaty.

(15) Reports by international organizations at the universal level, which are prepared on the basis of a mandate to provide accounts on State practice in a particular field, may enjoy considerable authority in the assessment of such practice. For example, the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* of the Office of the United Nations High Commissioner for Refugees (hereinafter "UNHCR Handbook") is an important work that reflects and thus provides guidance for State practice.[543] The same is true for the so-called 1540 Matrix, which is a systematic compilation by the United Nations Security Council Committee established pursuant to resolution 1540 (2004) of 24 April 2004 on implementation measures taken by Member States.[544] As far as the Matrix relates to the implementation of the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction,[545] as well as to the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction,[546] it constitutes evidence for and an assessment of subsequent State practice to those treaties.[547]

(16) Other non-State actors may also play an important role in assessing subsequent practice of the parties in the application of a treaty. A pertinent example is the International Committee of the Red Cross (ICRC).[548] Apart from fulfilling a general mandate conferred

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[542] This aspect of subsequent practice to a treaty will be the addressed at a later stage of the work on the topic.

[543] See UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (December 2011), HCR/1P/4/ENG/REV. 3 (www.refworld.org/docid/4f33c8d92.htm), Foreword; the view that the UNHCR Handbook itself expresses State practice has correctly been rejected by the Federal Court of Australia in *Semunigus v. Minister for Immigration and Multicultural Affairs* [1999] FCA 422 (1999), Judgment, 14 April 1999, paras. 5-13; the UNHCR Handbook nevertheless possesses considerable evidentiary weight as a correct statement of subsequent State practice. Its authority is based on article 35, paragraph 1, of the Convention Relating to the Status of Refugees, 1951 (United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137), according to which "[t]he Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for refugees … in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention".

[544] Security Council resolution 1540 (2004) of 24 April 2004, operative para. 8 (c); according to the 1540 Committee's website, "the 1540 Matrix has functioned as the primary method used by the 1540 Committee to organize information about implementation of UN Security Council resolution 1540 by Member States" (www.un.org/en/sc/1540/national-implementation/matrix.shtml (accessed 11 May 2016)).

[545] United Nations, *Treaty Series*, vol. 1015, No. 14860, p. 163.

[546] United Nations, *Treaty Series*, vol. 1974, No. 33757, p. 45.

[547] See, generally, Gardiner, *Treaty Interpretation* (footnote 392 above), at p. 270.

[548] H.-P. Gasser, "International Committee of the Red Cross (ICRC)", *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), para. 20.

on it by the Geneva Conventions for the protection of war victims and by the Statutes of the International Red Cross and Red Crescent Movement,[549] ICRC occasionally provides interpretative guidance on the 1949 Geneva Conventions[550] and the Additional Protocols[551] on the basis of a mandate from the Statutes of the Movement.[552] Article 5, paragraph 2 (g), of the Statutes provides:

> "The role of the International Committee, in accordance with its [s]tatutes, is in particular: … (g) to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof."

On the basis of this mandate, ICRC, for example, published in 2009 an *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.[553] The Interpretative Guidance is the outcome of an "expert process" based on an analysis of State treaty and customary practice and it "reflect[s] the ICRC's institutional position as to how existing [international humanitarian law] should be interpreted".[554] In this context it is, however, important to note that States have reaffirmed their primary role in the development of international humanitarian law. Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent (2011), while recalling "the important roles of the [ICRC]", "emphasiz[es] the primary role of States in the development of international humanitarian law".[555]

(17) Another example of conduct of non-State actors that may be relevant for assessing the subsequent practice of States parties is the Monitor, a joint initiative of the International Campaign to Ban Landmines and the Cluster Munitions Coalition. The Monitor acts as a *de facto* monitoring regime[556] for the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention)[557] and the 2008 Convention on Cluster Munitions (Dublin Convention).[558] The Monitor lists pertinent statements and practice by States parties and

[549] *Ibid*., para. 25.

[550] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31 ("Geneva Convention I"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949), *ibid*., No. 971, p. 85 ("Geneva Convention II"); Geneva Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), *ibid*., No. 972, p. 135 ("Geneva Convention III"); and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), *ibid*., No. 973, p. 287 ("Geneva Convention IV").

[551] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, *ibid.*, No. 17513, p. 609.

[552] Adopted by the 25th International Conference of the Red Cross at Geneva in 1986 and amended in 1995 and 2006. Available from www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf (accessed on 17 May 2016).

[553] Geneva, 2009, p. 10. Available from www.icrc.org.

[554] *Ibid*., p. 9.

[555] Resolution 1 on strengthening legal protection for victims of armed conflicts, 1 December 2011.

[556] See www.the-monitor.org.

[557] United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211.

[558] *Ibid*., vol. 2688, No. 47713, p. 39.

signatories and identifies, *inter alia*, interpretative questions concerning the Dublin Convention.[559]

(18) The examples of ICRC and the Monitor show that non-State actors can provide valuable evidence of subsequent practice of parties, contribute to assessing this evidence and even solicit its coming into being. However, non-State actors can also pursue their own goals, which may be different from those of States parties. Their assessments must thus be critically reviewed.

(19) The Commission considered whether it should also refer, in the text of draft conclusion 5, to "social practice" as an example of "other conduct … which may be relevant when assessing the subsequent practice of parties to a treaty".[560] Taking into account the concerns expressed by several members regarding the meaning and relevance of that notion, the Commission considered it preferable to address the question of the possible relevance of "social practice" in the commentary.

(20) The European Court of Human Rights has occasionally considered "increased social acceptance"[561] and "major social changes"[562] to be relevant for the purpose of treaty interpretation. The invocation of "social changes" or "social acceptance" by the Court, however, ultimately remains linked to State practice.[563] This is true, in particular, for the important cases of *Dudgeon v. the United Kingdom*[564] and *Christine Goodwin v. the United Kingdom*.[565] In *Dudgeon v. the United Kingdom*, the Court found that there was an "increased tolerance of homosexual behaviour" by pointing to the fact "that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied" and that it could therefore not "overlook the marked changes which have occurred in this regard in the domestic law of the member States".[566] The Court further pointed to the fact that "in Northern Ireland itself, the authorities have refrained in recent years from enforcing the law".[567] And in *Christine Goodwin v. the United Kingdom*, the Court attached importance "to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals".[568]

(21) The European Court of Human Rights thus verifies whether social developments are actually reflected in State practice. This was true, for example, in cases concerning the

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[559] See, for example, *Cluster Munitions Monitor 2011*, pp. 24-31.

[560] See A/CN.4/660, paras. 129 *et seq*.

[561] *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, 11 July 2002, ECHR 2002-VI, para. 85.

[562] *Ibid*., para. 100.

[563] See also *I. v. the United Kingdom* [GC], no. 25680/94, 11 July 2002, para. 65; *Burden and Burden v. the United Kingdom*, no. 13378/05, 12 December 2006, para. 57; *Shackell v. the United Kingdom* (dec.), no. 45851/99, 27 April 2000, para. 1; *Schalk and Kopf v. Austria*, no. 30141/04, 24 June 2010, para. 58.

[564] *Dudgeon v. the United Kingdom*, no. 7525/76, 22 October 1981, ECHR Series A No. 45, in particular para. 60.

[565] *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, 11 July 2002, ECHR 2002-VI, in particular para. 85.

[566] See *Dudgeon v. the United Kingdom*, no. 7525/76, 22 October 1981, ECHR Series A No. 45, para. 60.

[567] *Ibid*.

[568] *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, 11 July 2002, ECHR 2002-VI, para. 85; see also, *ibid*., para. 90.

status of children born out of wedlock[569] and in cases that concerned the alleged right of certain Roma ("Gypsy") people to have a temporary place of residence assigned by municipalities in order to be able to pursue their itinerant lifestyle.[570]

(22) It can be concluded that mere (subsequent) social practice, as such, is not sufficient to constitute relevant subsequent practice in the application of a treaty. Social practice has, however, occasionally been recognized by the European Court of Human Rights as contributing to the assessment of State practice.

## Part Three
## General aspects

### Conclusion 6
### Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not normally the case if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

**Commentary**

(1) The purpose of draft conclusion 6 is to indicate that subsequent agreements and subsequent practice, as means of interpretation, must be identified.

*Paragraph 1, first sentence — the term "regarding the interpretation"*

(2) The first sentence of paragraph 1 recalls that the identification of subsequent agreements and subsequent practice for the purposes of article 31, paragraph 3 (a) and (b), requires particular consideration of the question of whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of a treaty or whether they were motivated by other considerations.

(3) Subsequent agreements under article 31, paragraph 3 (a), must be "regarding the interpretation of the treaty or the application of its provisions" and subsequent practice under article 31, paragraph 3 (b), must be "in the application of the treaty" and thereby establish an agreement "regarding its interpretation".[571] The relationship between the terms

[569] *Mazurek v. France*, no. 34406/97, 1 February 2000, ECHR 2000-II, para. 52; see also *Marckx v. Belgium*, no. 6833/74, 13 June 1979, ECHR Series A no. 31, para. 41; *Inze v. Austria*, no. 8695/79, 28 October 1987, ECHR Series A no. 126, para. 44; *Brauer v. Germany*, no. 3545/04, 28 May 2009, para. 40.

[570] *Chapman v. the United Kingdom* [GC], no. 27238/95, 18 January 2001, ECHR 2001-I, paras. 70 and 93; see also *Lee v. the United Kingdom* [GC], no. 25289/94, 18 January 2001, paras. 95-96; *Beard v. the United Kingdom* [GC], no. 24882/94, 18 January 2001, paras. 104-105; *Coster v. the United Kingdom* [GC], no. 24876/94, 18 January 2001, paras. 107-108; *Jane Smith v. the United Kingdom* [GC], no. 25154/94, 18 January 2001, paras. 100-101.

[571] See above draft conclusion 4, paras. 1-3, and commentary thereto, paras. (17)-(20).

"interpretation" and "application" in article 31, paragraph 3, is not clear-cut. "Interpretation" is the process by which the meaning of a treaty, including of one or more of its provisions, is clarified. "Application" encompasses conduct by which the rights under a treaty are exercised or its obligations are complied with, in full or in part. "Interpretation" refers to a mental process, whereas "application" focuses on actual conduct (acts and omissions). In this sense, the two concepts are distinguishable, and may serve different purposes under article 31, paragraph 3 (see paragraphs (4) to (6) below) but they are also closely interrelated and build upon each other.

(4) Whereas there may be aspects of "interpretation" that remain unrelated to the "application" of a treaty,[572] application of a treaty almost inevitably involves some element of interpretation — even in cases in which the rule in question appears to be clear on face value.[573] Therefore, an agreement or conduct "regarding the interpretation" of the treaty and an agreement or conduct "in the application" of the treaty both imply that the parties assume, or are attributed, a position regarding the interpretation of the treaty.[574] Whereas in the case of a "subsequent agreement between the parties regarding the interpretation of the treaty" under article 31, paragraph 3 (a) (first alternative), the position regarding the interpretation of a treaty is specifically and purposefully assumed by the parties, this may be less clearly identifiable in the case of a "subsequent agreement … regarding … the application of its provisions" under article 31, paragraph 3 (a) (second alternative).[575] Assuming a position regarding interpretation "by application" is also implied in simple acts of application of the treaty under articles 31, paragraph 3 (b), that is, in "every measure taken on the basis of the interpreted treaty".[576] The word "or" in article 31, paragraph 3 (a), thus does not describe a mutually exclusive relationship between "interpretation" and "application".

(5) The significance of an "application" of a treaty, for the purpose of its interpretation, is, however, not limited to the identification of the position that the State party concerned thereby assumes regarding its interpretation. Indeed, the way in which a treaty is applied

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[572] According to G. Haraszti, "… interpretation has the elucidation of the meaning of the text as its objective while application implies the specifying of the consequences devolving on the contracting parties" (see Haraszti, *Some Fundamental Problems …* (footnote 446 above), p. 18); he recognizes, however, that "[a] legal rule manifesting itself in whatever form cannot be applied unless its content has been elucidated" (*ibid*., p. 15).

[573] Harvard Draft Convention on the Law of Treaties, *American Journal of International Law Supp*., vol. 29, 1935, p. 653, at pp. 938-939; Lord McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), p. 372; Sinclair, *The Vienna Convention …* (see footnote 393 above), p. 116; Report of the Study Group on fragmentation of international law, 2006 (A/CN.4/L.682 and Corr.1), para. 423; Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 28-30 and 238; Yasseen, "L'interprétation des traités…" (see footnote 393 above) p. 47; U. Linderfalk, "Is the hierarchical structure of articles 31 and 32 of the Vienna Convention real or not? Interpreting the rules of interpretation", *Netherlands International Law Review*, vol. 54, No. 1 (2007), pp. 141-144 and p. 147; G. Distefano, "La pratique subséquente des États parties à un traité", *Annuaire français de droit international*, vol. 40 (1994), p. 44; Villiger, "The rules on interpretation …" (see footnote 439 above ), p. 111.

[574] Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 266; Linderfalk, *On the Interpretation of Treaties* (see footnote 446 above), p. 162; Karl, *Vertrag und spätere Praxis …* (see footnote 454 above), pp. 114 and 118; Dörr, "Article 31 …" (see footnote 439 above), p. 556, paras. 80 and 82.

[575] This second alternative was introduced at the proposal of Pakistan, but its scope and purpose was never addressed or clarified, see *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna 26 March-24 May 1968 and 9 April-22 May, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publications, Sales No. E.68.V.7), 31st meeting, 19 April 1968, p. 168, para. 53.

[576] See Linderfalk, *On the Interpretation of Treaties* (footnote 446 above), pp. 164-165 and 167; see also draft conclusions 2 [1], para. 4, and 4, para. 3.

not only contributes to determining the meaning of the treaty, but also to the identification of the degree to which the interpretation that the States parties have assumed is "grounded" and thus more or less firmly established.

(6) It should be noted that an "application" of the treaty does not necessarily reflect the position of a State party that such application is the only legally possible one under the treaty and under the circumstances.[577] Further, the concept of "application" does not exclude certain conduct by non-State actors that the treaty recognizes as forms of its application that are attributable to its parties[578] and hence can constitute practice establishing the agreement of the parties. Finally, the legal significance of a particular conduct in the application of a treaty is not necessarily limited to its possible contribution to interpretation under article 31, but may also contribute to meeting the burden of proof[579] or to fulfilling the conditions of other rules.[580]

(7) Subsequent conduct that is not motivated by a treaty obligation is not "in the application of the treaty" or "regarding" its interpretation, within the meaning of article 31, paragraph 3. In the *Certain Expenses of the United Nations* case, for example, some judges doubted whether the continued payment by the Member States of the United Nations of their membership contributions signified acceptance of a certain practice of the Organization.[581] Judge Fitzmaurice formulated a well-known warning in this context, according to which "the argument drawn from practice, if taken too far, can be question-begging".[582] According to Fitzmaurice, it would be "hardly possible to infer from the mere fact that Member States pay, that they necessarily admit in all cases a positive legal obligation to do so".[583]

(8) Similarly, in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, the International Court of Justice held that an effort by the parties to the Agreement of 1987 (on the submission of a dispute to the jurisdiction of the Court) to conclude an additional Special Agreement (which would have specified the subject matter of the dispute) did not mean that the conclusion of such an additional agreement was actually considered by the parties to be required for the establishment of the jurisdiction of the Court.[584]

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[577] See below draft conclusion 7, para. 1.

[578] See Boisson de Chazournes, "Subsequent practice, practices, …" (footnote 415 above), p. 53, at pp. 54, 56 and 59-60.

[579] In the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at p. 117, para. 105, the International Court of Justice denied that certain conduct (statements) satisfied the burden of proof with respect to the Russian Federation's compliance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination between 1999 and July 2008, in particular because the conduct was not found to specifically relate to the Convention. According to Judge Simma, the burden of proof had been met to some degree, see Separate Opinion of Judge Simma, *ibid*., pp. 199-223, paras. 23-57.

[580] In the case concerning the *Kasikili/Sedudu Island* (see footnote 395 above), the International Court of Justice analysed subsequent practice not only in the context of treaty interpretation but also in the context of acquisitive prescription (see p. 1092, para. 71, p. 1096, para. 79, and p. 1105, para. 97).

[581] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151, at pp. 201-202 (Separate Opinion of Judge Fitzmaurice) and pp. 189-195 (Separate Opinion of Judge Spender).

[582] *Ibid*., p. 201.

[583] *Ibid*.

[584] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6, at p. 16, para. 28.

(9) Another example of a voluntary practice that is not meant to be "in application of" or "regarding the interpretation" of a treaty concerns "complementary protection" in the context of refugee law. Persons who are denied refugee status under the Convention relating to the Status of Refugees are nonetheless often granted "complementary protection", which is equivalent to that under the Convention. States that grant complementary protection, however, do not consider themselves as acting "in the application of" the Convention or "regarding its interpretation".[585]

(10) It is sometimes difficult to distinguish relevant subsequent agreements or practice regarding the interpretation or in the application of a treaty under article 31, paragraph 3 (a) and (b), from other conduct or developments in the wider context of the treaty, including from "contemporaneous developments" in the subject area of the treaty. Such a distinction is, however, important since only conduct regarding interpretation by the parties introduces their specific authority into the process of interpretation. The general rule would seem to be that the more specifically an agreement or a practice is related to a treaty the more interpretative weight it can acquire under article 31, paragraph 3 (a) and (b).[586]

(11) The characterization of a subsequent agreement or subsequent practice under article 31, paragraph 3 (a) and (b), as assuming a position regarding the interpretation of a treaty often requires a careful factual and legal analysis. This point can be illustrated by examples from judicial and State practice.

(12) The jurisprudence of the International Court of Justice provides a number of examples. On the one hand, the Court did not consider the "joint ministerial communiqués" of two States to "be included in the conventional basis of the right of free navigation" since the "modalities for co-operation which they put in place are likely to be revised in order to suit the Parties".[587] The Court has also held, however, that the lack of certain assertions regarding the interpretation of a treaty, or the absence of certain forms of its application, constituted a practice that indicated the legal position of the parties according to which nuclear weapons were not prohibited under various treaties regarding poisonous weapons.[588] In any case, the exact significance of a collective expression of views of the parties can only be identified by a careful consideration as to whether and to what extent such expression is meant to be "regarding the interpretation" of the treaty. Accordingly, the Court held in the *Whaling in the Antarctic* case that "relevant resolutions and Guidelines [of the International Whaling Commission] that have been approved by consensus call upon States parties to take into account whether research objectives can practically and

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[585] See A. Skordas, "General provisions: article 5", in *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, A. Zimmermann, ed. (Oxford, Oxford University Press, 2011), p. 682, para. 30; J. McAdam, *Complementary Protection in International Refugee Law* (Oxford, Oxford University Press, 2007), p. 21.

[586] On the "weight" of an agreement or practice as a means of interpretation, see draft conclusion 9 [8], paras. 1-3, below; for an example of the need, and also the occasional difficulty, to distinguish between specific conduct by the parties regarding the interpretation of a treaty and more general development, see *Maritime Dispute (Peru v. Chile)*, *Judgment*, *I.C.J. Reports 2014*, p. 3, at pp. 41-58, paras. 103-151.

[587] *Dispute regarding Navigational and Related Rights* (see footnote 395 above), at p. 234, para. 40; see also *Kasikili/Sedudu Island* (footnote 395 above), at p. 1091, para. 68, where the Court implied that one of the parties did not consider that certain forms of practical cooperation were legally relevant for the purpose of the question of boundary at issue and thus did not agree with a contrary position of the other party.

[588] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 248, paras. 55-56; see also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, para. 30; Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 262-264.

scientifically be achieved by using non-lethal research methods, but they do not establish a requirement that lethal methods be used only when other methods are not available".[589]

(13) When the Iran-United States Claims Tribunal was confronted with the question of whether the Claims Settlement Declaration obliged the United States to return military property to Iran, the Tribunal found, referring to the subsequent practice of the parties, that this treaty contained an implicit obligation of compensation in case of non-return:[590]

> "66. … Although Paragraph 9 of the General Declaration does not expressly state any obligation to compensate Iran in the event that certain articles are not returned because of the provisions of U.S. law applicable prior to 14 November 1979, the Tribunal holds that such an obligation is implicit in that Paragraph.
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> …
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> "68. Moreover, the Tribunal notes that the interpretation set forth in paragraph 66 above is consistent with the subsequent practice of the Parties in the application of the Algiers Accords and, particularly, with the conduct of the United States. Such a practice, according to article 31 (3) (b) of the Vienna Convention, is also to be taken into account in the interpretation of a treaty. In its communication informing Iran, on 26 March 1981, that the export of defense articles would not be approved, the United States expressly stated that 'Iran will be reimbursed for the cost of equipment in so far as possible'."

This position was criticized by Judge Holtzmann in his dissenting opinion:

> "Subsequent conduct by a State party is a proper basis for interpreting a treaty only if it appears that the conduct was motivated by the treaty. Here there is no evidence, or even any argument, that the United States' willingness to pay Iran for its properties was in response to a perceived obligation imposed by Paragraph 9. Such conduct would be equally consistent with a recognition of a contractual obligation to make payment. In the absence of any indication that conduct was motivated by the treaty, it is incorrect to use that conduct in interpreting the treaty."[591]

Together, the majority opinion and the dissent clearly identify the need to analyse carefully whether the parties, by an agreement, or a practice assume a position "regarding the interpretation" of a treaty.

(14) The fact that States parties assume a position regarding the interpretation of a treaty sometimes also may be inferred from the character of the treaty or of a specific provision.[592] Whereas subsequent practice in the application of a treaty often consists of conduct by different organs of the State (executive, legislative, judicial or other) in the conscious application of a treaty at different levels (domestic and international), the European Court of Human Rights, for example, does not, for the most part, explicitly address the question of whether a particular practice was undertaken "regarding the interpretation" of the Convention.[593] Thus, when describing the domestic legal situation in the member States, the

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[589] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 257, para. 83.

[590] See Iran-United States Claims Tribunal, *Islamic Republic of Iran and United States of America*, *Iran-United States Claims Tribunal Reports*, Partial Award No. 382-B1-FT vol. 19 (1989), pp. 294-295.

[591] Separate Opinion of Judge Holtzmann, Concurring in Part, Dissenting in Part, *ibid*., at p. 304.

[592] See second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/671), para. 15.

[593] See, for example, *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, ECHR Series A no. 161, para. 103; *Dudgeon v. the United Kingdom*, no. 7525/76, 22 October 1981, ECHR Series A No. 45, para. 60; *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR-2008, para.

Court rarely asks whether a particular legal situation results from a legislative process during which the possible requirements of the Convention were discussed. The Court rather presumes that the member States, when legislating or otherwise acting in a particular way, are conscious of their obligations under the Convention and that they act in a way that reflects their understanding of their obligations.[594] The Inter-American Court of Human Rights has also on occasion used legislative practice as a means of interpretation.[595] Like the International Court of Justice, the European Court of Human Rights has occasionally even considered that the "lack of any apprehension" of the parties regarding a certain interpretation of the Convention may be indicative of their assuming a position regarding the interpretation of the treaty.[596]

(15) Article 118 of the Geneva Convention relative to the Treatment of Prisoners of War[597] provides that: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." The will of a prisoner of war not to be repatriated was intentionally not declared to be relevant by the States parties in order to prevent States from abusively invoking the will of prisoners of war in order to delay repatriation.[598] ICRC has, however, always insisted as a condition for its participation that the will of a prisoner of war not to be repatriated be respected.[599] This approach, as far as it has been reflected in the practice of States parties, does not necessarily mean, however, that article 118 should be interpreted as demanding that the repatriation of a prisoner of war must not happen against his or her will. The ICRC Study on customary international humanitarian law carefully notes in its commentary on rule 128 A:

> "According to the Fourth Geneva Convention, no protected person may be transferred to a country 'where he or she may have reason to fear persecution for his or her political opinions or religious beliefs' [article 45, paragraph 4, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War]. While the Third Geneva Convention does not contain a similar clause, practice since 1949 has developed to the effect that in every repatriation in which the ICRC has played the role of neutral intermediary, the parties to the conflict, whether international or non-international, have accepted the ICRC's conditions for participation, including that the ICRC be able to check prior to repatriation (or release in case of a non-

48; however, by way of contrast, compare with *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I, para. 146; *Cruz Varas and others v. Sweden,* no. 15576/89, 20 March 1991, ECHR Series A no. 201, para. 100.

[594] See footnote 593 above; see further *Marckx v. Belgium*, no. 6833/74, 13 June 1979, ECHR Series A no. 31, para. 41; *Jorgic v. Germany*, no. 74613/01, 12 July 2007, ECHR 2007-III, para. 69; *Mazurek v. France*, no. 34406/97, 1 February 2000, ECHR 2000-II, para. 52.

[595] See, for example, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (see footnote 400 above), para. 12.

[596] *Banković et al. v. Belgium and 16 other contracting States* (dec.) [GC], no. 52207/99, ECHR 2001-XII, para. 62.

[597] See footnote 550 above.

[598] C. Shields Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities* (Zurich, Schulthess, 1977), pp. 145-156 and pp. 171-175; see in general on the duty to repatriate, S. Krähenmann, "Protection of prisoners in armed conflict", in *The Handbook of International Humanitarian Law*, 3rd edition, D. Fleck, ed. (Oxford, Oxford University Press, 2013), pp. 409-410.

[599] Thus, by its involvement, the ICRC tries to reconcile the interests in speedy repatriation and the respect of the will of prisoners of war (see Krähenmann, "Protection of prisoners in armed conflict" (footnote 598 above), pp. 409-410).

> international armed conflict), through an interview in private with the persons involved, whether they wish to be repatriated (or released).”[600]

(16) This formulation suggests that the State practice of respecting the will of the prisoner of war is limited to cases in which ICRC is involved and in which the organization has formulated such a condition. States have drawn different conclusions from this practice.[601] The 2004 United Kingdom Manual provides that:

> “A more contentious issue is whether prisoners of war *must* be repatriated even against their will. Recent practice of [S]tates indicates that they should not. It is United Kingdom policy that prisoners of war should not be repatriated against their will.”[602]

(17) This particular combination of the words “must” and “should” indicates that the United Kingdom, like other States, is not viewing the subsequent practice as demonstrating an interpretation of the treaty according to which the declared will of the prisoner of war must always be respected.[603]

(18) The preceding examples from the case law and State practice substantiate the need to identify and interpret carefully subsequent agreements and subsequent practice, in particular to ask whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty or whether they are motivated by other considerations.[604]

*Paragraph 1, second sentence — temporary non-application of a treaty or* modus vivendi

(19) The second sentence of paragraph 1 is merely illustrative. It refers to two types of cases that need to be distinguished from practice regarding the interpretation of a treaty.

(20) A common subsequent practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may instead signify their agreement

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600 J.-M. Henckaerts and L. Doswald-Beck, eds., *Customary International Humanitarian Law*, *Volume 1: Rules* (Cambridge, International Committee of the Red Cross and Cambridge University Press, 2005), p. 455 (footnotes omitted).

601 J.-M. Henckaerts and L. Doswald-Beck, eds., *Customary International Humanitarian Law*, *Volume 2: Practice* (Cambridge, International Committee of the Red Cross and Cambridge University Press, 2005), pp. 2893-2894, paras. 844-855, and online update for Australia, Israel, the Netherlands and Spain, available from www.icrc.org/customary-ihl/eng/docs/v2_rul_rule128_section d.

602 United Kingdom of Great Britain and Northern Ireland, Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press, 2004), pp. 205-206, para. 8.170 (footnote omitted).

603 The United States manual mentions only the will of prisoners of war who are sick or wounded, see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *Volume 2*: *Practice* (footnote 601 above), pp. 2893-2894, paras. 844-855; but United States practice after the Second Gulf War was to have ICRC establish the prisoner’s will and to act accordingly (United States of America, Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (United States Government Printing Office, 1992), pp. 707-708, available from www.globalsecurity.org/military/library/report/1992/cpgw.pdf).

604 A/CN.4/671, paras. 11-18. See also L. Crema, “Subsequent agreements and subsequent practice within and outside the Vienna Convention”, in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), pp. 25-26.

temporarily not to apply the treaty,[605] or an agreement on a practical arrangement (*modus vivendi*).[606] The following example is illustrative.

(21) Article 7 of the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field provides that: "A distinctive and uniform flag shall be adopted for hospitals, ambulances and evacuation parties. … [The] flag … shall bear a red cross on a white ground."[607] During the Russo-Turkish War of 1877-1878, the Ottoman Empire declared that it would in the future use the red crescent on a white ground to mark its own ambulances, while respecting the red cross sign protecting enemy ambulances and stated that the distinctive sign of the Convention "'had so far prevented Turkey from exercising its rights under the Convention because it gave offence to the Muslim soldiers'".[608] This declaration led to a correspondence between the Ottoman Empire, Switzerland (as depositary) and the other parties, which resulted in the acceptance of the red crescent only for the duration of the conflict.[609] At The Hague Peace Conferences of 1899 and 1907 and during the 1906 Conference for the Revision of the Geneva Convention of 1864, the Ottoman Empire, Persia and Siam unsuccessfully requested the inclusion of the red crescent, the red lion and sun, and the red flame in the Convention.[610] The Ottoman Empire and Persia, however, at least gained the acceptance of "reservations" that they formulated to that effect in 1906.[611] This acceptance of the reservations of the Ottoman Empire and Persia in 1906 did not mean, however, that the parties had accepted that the 1864 Geneva Convention had been interpreted in a particular way prior to 1906 by subsequent unopposed practice. The practice by the Ottoman Empire and Persia was seen rather, at least until 1906, as not being covered by the 1864 Geneva Convention, but it was accepted as a temporary and exceptional measure that left the general treaty obligation unchanged.

*Paragraph 2 — variety of forms*

(22) The purpose of paragraph 2 of draft conclusion 6 is to acknowledge the variety of forms that subsequent agreements and subsequent practice can take under article 31, paragraph 3 (a) and (b). The Commission has recognized that subsequent practice under article 31, paragraph 3 (b), consists of any "conduct" in the application of a treaty, including under certain circumstances, inaction, which may contribute to establishing an

[605] See A/CN.4/671, p. 33, para. 71.

[606] *Dispute regarding Navigational and Related Rights* (see footnote 395 above), at pp. 234-235, para. 40; *Pulp Mills on the River Uruguay* (see footnote 395 above), p. 14, at pp. 65-66, paras. 138-140; J. Crawford, "A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), p. 32; for another example, see A/CN.4/671, para. 72; and J.R. Crook, "Contemporary practice of the United States", *American Journal of International Law*, vol. 105 (2011), p. 775 *et seq*., at pp. 809-812.

[607] See ICRC, *International Red Cross Handbook*, 12th edition (Geneva, 1983), p. 20.

[608] "Bulletin international des Sociétés de Secours aux Militaires blessés", No. 29 (January 1877), pp. 35-37, quoted in F. Bugnion, *The Emblem of the Red Cross. A Brief History* (Geneva, ICRC, 1977), p. 15.

[609] *Ibid*., No. 31 (July 1877), p. 89, quoted in Bugnion, *The Emblem of the Red Cross …* (see footnote 608 above), p. 18.

[610] Bugnion, *The Emblem of the Red Cross …* (see footnote 608 above), pp. 19-31.

[611] Joined by Egypt upon accession in 1923, see Bugnion, *The Emblem of the Red Cross …* (footnote 608 above), pp. 23-26; it was only on the occasion of the revision of the Geneva Conventions in 1929, when Turkey, Persia and Egypt claimed that the use of other emblems had become a *fait accompli* and that those emblems had been used in practice without giving rise to any objections, that the Red Crescent and the Red Lion and Sun were finally recognized as a distinctive sign by article 19, paragraph 2, of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (League of Nations, *Treaty Series*, vol. 118, No. 2733, p. 303).

agreement regarding the interpretation of the treaty.[612] Depending on the treaty concerned, this includes not only externally oriented conduct, such as official acts, statements and voting at the international level, but also internal legislative, executive and judicial acts, and may even include conduct by non-State actors that is attributable to one or more States parties and that falls within the scope of what the treaty conceives as forms of its application.[613] Thus, the individual conduct that may contribute to a subsequent practice under article 31, paragraph 3 (b), need not meet any particular formal criteria.[614]

(23) Subsequent practice at the international level need not necessarily be joint conduct.[615] A parallel conduct by parties may suffice. It is a separate question whether parallel activity actually articulates a sufficient common understanding (agreement) regarding the interpretation of a treaty in a particular case (see draft conclusion 10 [9], paragraph 1, below).[616] Subsequent agreements can be found in legally binding treaties as well as in non-binding instruments like memorandums of understanding.[617] Subsequent agreements can also be found in certain decisions of a conference of States parties (see draft conclusion 11 [10], paragraphs 1, 2 and 3, below).

*Paragraph 3 — identification of subsequent practice under article 32*

(24) Paragraph 3 of this draft conclusion provides that in identifying subsequent practice under article 32, the interpreter is required to determine whether, in particular, conduct by one or more parties is in the application of the treaty.[618] The Commission decided to treat such "other subsequent practice" (see draft conclusion 4, paragraph 3)[619] under article 32 in a separate paragraph for the sake of analytical clarity (see draft conclusion 7, paragraph 2, and draft conclusion 9 [8], paragraph 3, below), but it does not thereby call into question the unity of the process of interpretation. The considerations that are pertinent for the identification of subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), also apply, *mutatis mutandis*, to the identification of "other subsequent practice" under article 32. Thus, agreements between less than all parties to a treaty regarding the interpretation of a treaty or its application are a form of subsequent practice under article 32.

(25) An example of a practical arrangement is the memorandum of understanding between the Department of Transportation of the United States of America and the Secretaría de Comunicaciones y Transportes of the United Mexican States on International

612 See above commentary to draft conclusion 4, paras. (17)-(20).

613 See, for example, commentary to draft conclusion 5 above; Boisson de Chazournes, "Subsequent practice …" (footnote 415 above), pp. 54, 56 and 59-60; Gardiner, *Treaty Interpretation* (footnote 392 above), pp. 257-259; see also *Maritime Dispute (Peru v. Chile)*, *Judgment, I.C.J. Reports 2014*, p. 3, at pp. 42-45, paras. 103-111 and pp. 48-49, paras. 119-122, and p. 50, para. 126; Dörr, "Article 31 …" (see footnote 439 above), pp. 555-556, para. 78.

614 Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 254-255.

615 *Case concerning the Temple of Preah Vihear* (see footnote 488 above), at p. 33; *Kasikili/Sedudu Island* (see footnote 395 above), at p. 1213, para. 17 (Dissenting Opinion of Judge Parra-Aranguren).

616 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 737, para. 258; but see *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 83-84, para. 117, where the Court recognized concessions granted by the parties to the dispute as evidence of their tacit agreement; see also *Maritime Dispute (Peru v. Chile)* (footnote 613 above).

617 Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 244 and 250.

618 See above, paras. (1)-(4) of the present commentary; and A/CN.4/671, paras. 3-5.

619 See above commentary to draft conclusion 2 [1], para. (10).

Freight Cross-Border Trucking Services of 6 July 2011.[620] The memorandum of understanding does not refer to Canada, the third party of the North American Free Trade Agreement (NAFTA), and specifies that it "is without prejudice to the rights and obligations of the United States and Mexico under NAFTA". These circumstances suggest that the memorandum of understanding does not claim to constitute an agreement regarding the interpretation of NAFTA under article 31, paragraph 3 (a) or (b), but that it rather remains limited to being a practical arrangement between a limited number of parties that is subject to challenge by other parties or by a judicial or quasi-judicial institution.

**Conclusion 7**
**Possible effects of subsequent agreements and subsequent practice in interpretation**

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the 1969 Vienna Convention and under customary international law.

**Commentary**

*Paragraph 1, first sentence — clarification of the meaning of a treaty*

(1) Draft conclusion 7 deals with the possible effects of subsequent agreements and subsequent practice on the interpretation of a treaty. The purpose is to indicate how subsequent agreements and subsequent practice may contribute to the clarification of the meaning of a treaty. Paragraph 1 emphasizes that subsequent agreements and subsequent practice must be seen in their interaction with other means of interpretation (see draft conclusion 2 [1], paragraph 5).[621] They are therefore not necessarily in themselves conclusive.

(2) Subsequent agreements and subsequent practice, like all means of interpretation, may have different effects on the interactive process of interpretation of a treaty, which consists of placing appropriate emphasis in any particular case on the various means of interpretation in a "single combined operation".[622] The taking into account of subsequent

[620] Crook, "Contemporary practice of the United States" (see footnote 606 above), pp. 809-812; see also: Mexico, *Diario Oficial de la Federación* (7 July 2011), "Decreto por el que se modifica el artículo 1 del diverso por el que se establece la Tasa Aplicable durante 2003, del Impuesto General de Importación, para las mercancías originarias de América del Norte", publicado el 31 de diciembre de 2002, por lo que respecta a las mercancías originarias de los Estados Unidos de América (www.dof.gob.mx).

[621] See above commentary to draft conclusion 2 [1], para. 5, paras. (12)-(15).

[622] *Ibid*.

agreements and subsequent practice under articles 31, paragraph 3, and 32 may thus contribute to a clarification of the meaning of a treaty[623] in the sense of a narrowing down (specifying) of possible meanings of a particular term or provision, or of the scope of the treaty as a whole (see paragraphs (4), (6), (7), (10) and (11) below). Alternatively, such taking into account may contribute to a clarification in the sense of confirming a wider interpretation. Finally, it may contribute to understanding the range of possible interpretations available to the parties, including the scope for the exercise of discretion by the parties under the treaty (see paragraphs (12) to (15) below).

(3) International courts and tribunals usually begin their reasoning in a given case by determining the "ordinary meaning" of the terms of the treaty.[624] Subsequent agreements and subsequent practice mostly enter into their reasoning at a later stage when courts ask whether such conduct confirms or modifies the result arrived at by the initial interpretation of the ordinary meaning (or by other means of interpretation).[625] If the parties do not wish to convey the ordinary meaning of a term, but rather a special meaning in the sense of article 31, paragraph 4, subsequent agreements and subsequent practice may shed light on this special meaning. The following examples[626] illustrate how subsequent agreements and subsequent practice as means of interpretation can contribute, in their interaction with other means in the process of interpretation, to the clarification of the meaning of a treaty.

(4) Subsequent agreements and subsequent practice can help identify the "ordinary meaning" of a particular term by confirming a narrow interpretation of different possible shades of meaning of the term. This was the case, for example,[627] in the *Nuclear Weapons Advisory Opinion* where the International Court of Justice determined that the expressions "poison or poisonous weapons":

> "… have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons."[628]

(5) On the other hand, subsequent practice may prevent specifying the meaning of a general term to just one of different possible meanings.[629] For example, in the *Case*

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[623] The terminology follows guideline 1.2 (Definition of interpretative declarations) of the Commission's Guide to Practice on Reservations to Treaties: "'Interpretative declaration' means a unilateral statement … whereby [a] State or [an] international organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions." (*Official records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. IV, guideline 1.2); see also commentary to guideline 1.2, para. (18) (A/66/10/Add.1).

[624] See above commentary to draft conclusion 2 [1], para. 5, para. (14); *Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 8.

[625] See, for example, *Sovereignty over Pulau Ligitan and Pulau Sipadan* (footnote 395 above), at p. 656, paras. 59-61 and p. 665, para. 80; *Territorial Dispute* (footnote 395 above), at p. 34, paras. 66-71; *Dispute regarding Navigational and Related Rights* (footnote 395 above), at p. 290 (Declaration of Judge *ad hoc* Guillaume).

[626] For more examples see Nolte, "Jurisprudence under special regimes" (footnote 398 above), pp. 210-306.

[627] See also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, para. 30; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 306, para. 67; *Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 9.

[628] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 248, para. 55.

[629] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 25.

*concerning rights of nationals of the United States of America in Morocco*, the Court stated:

> "The general impression created by an examination of the relevant materials is that those responsible for the administration of the customs … have made use of all the various elements of valuation available to them, though perhaps not always in a consistent manner.
>
> "In these circumstances, the Court is of the opinion that Article 95 lays down no strict rule on the point in dispute. It requires an interpretation which is more flexible than either of those which are respectively contended for by the Parties in this case."[630]

(6) Different forms of practice may contribute to both a narrow and a broad interpretation of different terms in the same treaty.[631]

(7) A treaty shall be interpreted in accordance with the ordinary meaning of its terms "in their context" (article 31, paragraph 1). Subsequent agreements and subsequent practice, in interaction with this particular means of interpretation, may also contribute to identifying a narrower or broader interpretation of a term of a treaty.[632] In the *Inter-Governmental Maritime Consultative Organization Advisory Opinion*, for example, the International Court of Justice had to determine the meaning of the expression "eight … largest ship-owning nations" under article 28 (a) of the Convention on the International Maritime Organization (IMO)[633] since this concept of "largest ship-owning nations" permitted different interpretations (such as determination by "registered tonnage" or by "property of nationals"), and since there was no pertinent practice of the organization or its members under article 28 (a) itself, the Court turned to practice under other provisions in the Convention and held:

> "This reliance upon registered tonnage in giving effect to different provisions of the Convention … persuade[s] the Court to view that it is unlikely that when [article 28 (a)] was drafted and incorporated into the Convention it was contemplated that any criterion other than registered tonnage should determine which were the largest shipping owning nations."[634]

(8) Together with the text and the context, article 31, paragraph 1, accords importance to the "object and purpose" for its interpretation.[635] Subsequent agreements and subsequent practice may also contribute to a clarification of the object and purpose of a treaty[636] or

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630 *Case concerning Rights of Nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 176, at p. 211.

631 See, *mutatis mutandis*, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151, where the International Court of Justice interpreted the term "expenses" broadly and "action" narrowly in the light of the respective subsequent practice of the United Nations, at pp. 158-161 ("expenses") and pp. 164-165 ("action").

632 See, for example, *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at p. 87, para. 40.

633 United Nations, *Treaty Series*, vol. 289, No. 4214, p. 3.

634 *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 150, at p. 169; see also pp. 167-169; *obiter dicta*: *Proceedings pursuant to the OSPAR Convention (Ireland-United Kingdom)*, 2 July 2003, UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), pp. 59-151, at p. 99, para. 141.

635 Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 211 and 219.

636 *Ibid*., pp. 212-215; see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory*

reconcile invocations of the "object and purpose" of a treaty with other means of interpretation.

(9) In the *Maritime Delimitation in the Area between Greenland and Jan Mayen*[637] and *Oil Platforms* cases,[638] for example, the International Court of Justice clarified the object and purpose of bilateral treaties by referring to subsequent practice of the parties. And in the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court held:

> "From the treaty texts and the practice analysed at paragraphs 64 and 65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not however have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter."[639]

*Paragraph 1, second sentence — narrowing or widening or otherwise determining the range of possible interpretation*

(10) State practice other than in judicial or quasi-judicial contexts confirms that subsequent agreements and subsequent practice only contribute to specifying the meaning of a term in the sense of narrowing the possible meanings of the rights and obligations under a treaty, but may also indicate a wider range of acceptable interpretations or a certain scope for the exercise of discretion that a treaty grants to States.[640]

(11) For example, whereas the ordinary meaning of the terms of article 5 of the 1944 Convention on International Civil Aviation[641] do not appear to require a charter flight to obtain permission to land while *en route*, long-standing State practice requiring such permission has led to general acceptance that this provision is to be interpreted as requiring

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*Opinion, I.C.J. Reports 1971*, p. 16, at p. 31, para. 53; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 179, para. 109; R. Higgins, "Some observations on the inter-temporal rule in international law", in *Theory of International Law at the Threshold of the 21st Century*, J. Makarczyk, ed. (The Hague, Kluwer Law International, 1996), pp. 173-181, at p. 180; Distefano, "La pratique subséquente …" (see footnote 573 above), pp. 52-54; Crema, "Subsequent agreements and subsequent practice …" (footnote 604 above), p. 21.

637 *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 50, para. 27.

638 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at pp. 813 and 815, paras. 27 and 30.

639 See also *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 306, para. 67.

640 This is not to suggest that there may ultimately be different interpretations of a treaty, but rather that the treaty may accord the parties the possibility to choose from a spectrum of different permitted acts, see Gardiner, *Treaty Interpretation* (footnote 392 above), pp. 32-33 and p. 268, quoting the House of Lords in *R v. Secretary of State for the Home Department, ex parte Adan* [2001] AC 477: "… It is necessary to determine the autonomous meaning of the relevant treaty provision. … It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of the 1969 Vienna Convention] and without taking colour from distinctive features of the legal system of any individual contracting [S]tate. In principle therefore there can only be one true interpretation of a treaty. … In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous international meaning of the treaty. And there can only be one true meaning" (The Law Reports, *Appeal Cases 2001*, vol. 2, at pp. 515-517 (Lord Steyn)).

641 United Nations, *Treaty Series*, vol. 15, No. 102, p. 2.

permission.[642] Another case is article 22, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations,[643] which provides that the means of transport used by a mission shall be immune from search, requisition, attachment or execution. While police enforcement against diplomatic properties will usually be met with the protests of States,[644] the towing of diplomatic cars that have violated local traffic and parking laws generally has been regarded as permissible in practice.[645] This practice suggests that, while punitive measures against diplomatic vehicles are forbidden, cars can be stopped or removed if they prove to be an immediate danger or obstacle for traffic and/or public safety.[646] In that sense, the meaning of the term "execution" — and, thus, the scope of protection accorded to means of transportation — is specified by the subsequent practice of parties.

(12) Another possible example concerns article 12 of Protocol II[647] to the 1949 Geneva Conventions, which provides:

> "Under the direction of the competent authority concerned, the distinctive emblem of the Red Cross, Red Crescent or Red Lion and Sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly."

Although the term "shall" suggests that it is obligatory for States to use the distinctive emblem for marking medical personnel and transports under all circumstances, subsequent practice suggests that States may possess some discretion with regard to its application.[648] As armed groups have in recent years specifically attacked medical convoys that were well recognizable due to the protective emblem, States have in certain situations refrained from marking such convoys with a distinctive emblem. Responding to a parliamentary question on its practice in Afghanistan, the Government of Germany has stated that:

> "As other contributors of ISAF contingents, the Federal Armed Forces have experienced that marked medical vehicles have been targeted. Occasionally, these

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642 S.D. Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), p. 85; A. Aust, *Modern Treaty Law and Practice* (see footnote 525 above), p. 215.

643 United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95.

644 E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, Oxford Commentaries on International Law, 3rd edition (Oxford, Oxford University Press, 2008), pp. 160-161; J. Salmon, *Manuel de droit diplomatique* (Brussels, Bruylant, 1994), p. 208, para. 315.

645 See, for example, Australia, Department of Foreign Affairs and Trade, *Privileges and Immunities of Foreign Representatives* (http://dfat.gov.au/about-us/publications/corporate/protocol-guidelines/Documents/A21.pdf); Iceland, Protocol Department, Ministry of Foreign Affairs, *Diplomatic Handbook* (Reykjavik, 2009), p. 14 (www.mfa.is/media/PDF/Diplomatic_Handbook.PDF); United Kingdom, see the statement of the Parliamentary Under-Secretary of State, Home Office (Lord Elton) in the House of Lords, HL Deb, 12 December 1983, vol. 446 cc3-4; United States, see M. Nash (Leich), "Contemporary practice of the United States relating to international law", *American Journal of International Law*, vol. 88, No. 2 (April 1994), p. 312, at pp. 312-313.

646 Denza, *Diplomatic Law …* (see footnote 644 above), p. 160; M. Richtsteig, *Wiener Übereinkommen über diplomatische und konsularische Beziehungen: Entstehungsgeschichte, Kommentierung, Praxis*, 2nd edition (Baden-Baden, Germany, Nomos, 2010), p. 70.

647 See footnote 551 above.

648 Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Dordrecht, ICRC and Martinus Nijhoff, 1987), p. 1440, paras. 4742-4744; H. Spieker, "Medical transportation", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), paras. 7-12; see also the less stringent future tense in the French version "sera arboré".

medical units and vehicles, clearly distinguished as such by their protective emblem, have even been preferred as targets. The Federal Armed Forces have thus, along with Belgium, France, the United Kingdom, Canada and the United States, decided within ISAF to cover up the protective emblem on medical vehicles."[649]

(13) Such practice by States may confirm an interpretation of article 12 according to which the obligation to use the protective emblem[650] under exceptional circumstances allows a margin of discretion for the parties.

(14) A treaty provision that grants States an apparently unconditional right may raise the question of whether this discretion is limited by the purpose of the rule. For example, according to article 9 of the Vienna Convention on Diplomatic Relations, the receiving State may notify the sending State, without having to give reasons, that a member of the mission is *persona non grata*. States mostly issue such notifications in cases in which members of the mission were found or suspected of having engaged in espionage activities or having committed other serious violations of the law of the receiving State or caused significant political irritation.[651] However, States have also made such declarations in other circumstances, such as when envoys caused serious injury to a third party[652] or committed repeated infringement of the law[653] or even to enforce their drink-driving laws.[654] It is even conceivable that declarations are made without clear reasons or for purely political motives. Other States do not seem to have asserted that such practice constitutes an abuse of the power to declare members of a mission as *personae non gratae*. Thus, such practice confirms that article 9 provides an unconditional right.[655]

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649 Deutscher Bundestag, "Antwort der Bundesregierung: Rechtlicher Status des Sanitätspersonals der Bundeswehr in Afghanistan", 9 April 2010, Bundestagsdrucksache 17/1338, p. 2 (translation by the Special Rapporteur).

650 Spieker, "Medical transportation" (see footnote 648 above), para. 12.

651 See Denza, *Diplomatic Law* ... (footnote 644 above), pp. 77-88 with further references to declarations in relation to espionage; see also Salmon, *Manuel de droit diplomatique* (footnote 644 above), p. 484, para. 630; and Richtsteig, *Wiener Übereinkommen über diplomatische* ... (footnote 646 above), p. 30.

652 The Netherlands, Protocol Department, Ministry of Foreign Affairs, *Protocol Guide for Diplomatic Missions and Consular Posts*. Available from www.government.nl/government/documents/leaflets/2015/04/15/protocol-guide-for-diplomatic-missions-en-consular-posts.

653 France, Ministère des affaires étrangères et du développement, *Guide for Foreign Diplomats Serving in France: Immunities — Respect for Local Laws and Regulations* (www.diplomatie.gouv.fr/en/ministry/guide-for-foreign-diplomats/immunities/article/respect-for-local-laws-and); Turkey, Ministry of Foreign Affairs, traffic regulations to be followed by foreign missions in Turkey, Principal Circular Note 63552, Traffic Regulations 2005/PDGY/63552 (6 April 2005) (www.mfa.gov.tr/06_04_2005--63552-traffic-regulations.en.mfa); United Kingdom, Foreign and Commonwealth Office, Circular dated 19 April 1985 to the Heads of Diplomatic Missions in London, reprinted in G. Marston, "United Kingdom materials on international law 1985", *British Yearbook of International Law*, vol. 56, No. 1 (1985), p. 437.

654 See Canada, Foreign Affairs, Trade and Development, Revised Impaired Driving Policy (www.international.gc.ca/protocol-protocole/vienna_convention_idp-convention_vienne_vfa.aspx?lang=eng); United States, Department of State, Diplomatic Note 10-181 of the Department of State (24 September 2010) (www.state.gov/documents/organization/149985.pdf), pp. 8-9.

655 See G. Hafner, "Subsequent agreements and practice: between interpretation, informal modification, and formal amendment", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), p. 105, at p. 112, for an even more far-reaching case under article 9 of the Vienna Convention on Diplomatic Relations.

*Paragraph 2 — other subsequent practice under article 32*

(15) Paragraph 2 of draft conclusion 7 concerns possible effects of "other subsequent practice" under article 32 (see draft conclusion 4, paragraph 3), which does not reflect an agreement of all parties regarding the interpretation of a treaty. Such practice, as a supplementary means of interpretation, can confirm the interpretation that the interpreter has reached in the application of article 31, or determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable. Article 32 thereby makes a distinction between a use of preparatory work or of "other subsequent practice" to confirm a meaning arrived at under article 31 and its use to "determine" the meaning. Hence, recourse may be had to "other subsequent practice" under article 32 not only to determine the meaning of the treaty in certain circumstances, but also — and always — to confirm the meaning resulting from the application of article 31.[656]

(16) Subsequent practice under article 32 can contribute, for example, to reducing possible conflicts when the "object and purpose" of a treaty appears to be in tension with specific purposes of certain of its rules.[657] In the *Kasikili/Sedudu Island* case, for example, the International Court of Justice emphasized that the "parties sought both to secure for themselves freedom of navigation on the river and to delimit as precisely as possible their respective spheres of influence".[658] The parties thereby reconciled a possible tension by taking into account a certain subsequent practice by only one of the parties as a supplementary means of interpretation (under article 32).[659]

(17) Another example of "other subsequent practice" under article 32 concerns the term "feasible precautions" in article 57, paragraph 2 (ii), of Protocol I[660] to the 1949 Geneva Conventions. This term has been used in effect by article 3, paragraph 4, of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) of 10 October 1980,[661] which provides that: "Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations." This language has come to

[656] WTO Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China — Publications and Audiovisual Products)*, WT/DS363/AB/R, adopted 19 January 2010, para. 403; "Although the Panel's application of [a]rticle 31 of the Vienna Convention to 'Sound recording distribution services' led it to a 'preliminary conclusion' as to the meaning of that entry, the Panel nonetheless decided to have recourse to supplementary means of interpretation to *confirm* that meaning. We note, in this regard, that China's argument on appeal appears to assume that the Panel's analysis under [a]rticle 32 of the *Vienna Convention* would *necessarily* have been different if the Panel had found that the application of [a]rticle 31 left the meaning of 'Sound recording distribution services' ambiguous or obscure, and if the Panel had, therefore, resorted to [a]rticle 32 to *determine*, rather than to *confirm*, the meaning of that term. We do not share this view. The elements to be examined under [a]rticle 32 are distinct from those to be analysed under [a]rticle 31, but it is the same elements that are examined under [a]rticle 32 irrespective of the outcome of the [a]rticle 31 analysis. Instead, what may differ, depending on the results of the application of [a]rticle 31, is the weight that will be attributed to the elements analysed under [a]rticle 32." See also Villiger, *Commentary ...* (footnote 414 above), p. 447, para. 11.

[657] See WTO Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products — AB-1998-4*, WT/DS58/AB/R, adopted 6 November 1998, para. 17 ("… most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes"); Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 216.

[658] *Kasikili/Sedudu Island* (see footnote 395 above), at p. 1074, para. 45.

[659] *Ibid*., at p. 1078, para. 55 and p. 1096, para. 80.

[660] *Ibid*., at p. 1077, para. 55, and p. 1096, para. 80.

[661] United Nations, *Treaty Series*, vol. 1342, No. 22495, p. 137.

be accepted by way of subsequent practice in many military manuals as a general definition of "feasible precautions" for the purpose of article 57, paragraph (2) (ii), of Protocol I to the 1949 Geneva Conventions.[662]

(18) The identification of subsequent practice under articles 31, paragraph 3 (b), and 32 has sometimes led domestic courts to arrive at broad and narrow interpretations. For example, the United Kingdom House of Lords interpreted the term "damage" under article 26, paragraph 2, of the Warsaw Convention as more generally including "loss", invoking the subsequent conduct of the parties.[663] On the other hand, the United States Supreme Court, having regard to the subsequent practice of the parties, decided that the term "accident" in article 17 of the 1929 Warsaw Convention should be interpreted narrowly in the sense that it excluded events that were not caused by an unexpected or unusual event.[664] Another example of a restrictive interpretation is a decision in which the Federal Court of Australia interpreted the term "impairment of dignity" under article 22 of the Vienna Convention on Diplomatic Relations as only requiring the receiving State to protect against breaches of the peace or the disruption of essential functions of embassies, and not against any forms of nuisance or insult.[665]

(19) Domestic courts, in particular, sometimes refer to decisions from other domestic jurisdictions and thus engage in a "judicial dialogue" even if no agreement of the parties can thereby be established.[666] Apart from thereby applying article 32, such references may add to the development of a subsequent practice together with other domestic courts.[667] However, the line between an appropriate use and a selective invocation of decisions of other domestic courts may be thin.[668] Lord Hope of the United Kingdom House of Lords,

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[662] For the military manuals of Argentina (1989), Canada (2001) and the United Kingdom (2004), see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *volume 2* … (footnote 601 above), pp. 359-360, paras. 160-164 and the online update for the military manual of Australia (2006) (www.icrc.org/customary-ihl/eng/docs/v2_rul_rule15_sectionc); see also Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols* … (footnote 648 above), p. 683, para. 2202.

[663] United Kingdom, House of Lords, *Fothergill v. Monarch Airlines Ltd*. [1981] AC 251, at p. 278 (Lord Wilberforce) and p. 279 (Lord Diplock); similarly, Germany, Federal Court (Civil Matters), BGHZ, vol. 84, p. 339, at pp. 343-344.

[664] United States, Supreme Court, *Air France v. Saks*, 470 U.S. 392, pp. 403-404.

[665] Australia, Federal Court of Australia, *Commissioner of the Australian Federal Police and the Commonwealth of Australia v. Geraldo Magno and Ines Almeida* [1992] FCA 566, paras. 30-35 (Einfeld J.); see also United Kingdom, House of Lords, *R (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 18, paras. 47-48 (Lord Steyn).

[666] See, for example, United States, Supreme Court, *Air France v. Saks*, 470 U.S. 392, pp. 397-407; United States, Supreme Court, *Abbott v. Abbott* 560 U.S. (2010), Opinion of the Court (delivered by Justice Kennedy), Slip Opinion (www.supremecourt.gov/opinions/09pdf/08-645.pdf) (accessed 9 June 2016), at pp. 12-16; Germany, Federal Administrative Court, BVerwGE, vol. 139, p. 272, at pp. 288-289; High Court of Australia, *Andrew John Macoun v. Commissioner of Taxation* [2015] HCA 44, at pp. 75-82.

[667] A. Tzanakopulos, "Judicial dialogue as a means of interpretation", in *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence*, H.P. Aust and G. Nolte, eds. (Oxford, Oxford University Press, 2016), p. 72, at p. 94; E. Benvenisti, "Reclaiming democracy: the strategic uses of foreign and international law by national courts", *American Journal of International Law*, vol. 102 (2008), at pp. 241-274.

[668] United Kingdom, Supreme Court, *R (Adams) v. Secretary of State for Justice* [2011] UKSC 18, para. 17 (Lord Philips) ("[t]his practice on the part of only one of the many signatories to the ICCPR does not provide a guide to the meaning of article 14 (6) …. It has not been suggested that there is any consistency of practice on the part of the signatories that assists in determining the meaning of article 14 (6)").

quoting the Vienna rules of interpretation, has provided a general orientation when he stated:

> "In an ideal world the Convention should be accorded the same meaning by all who are party to it. So case law provides a further potential source of evidence. Careful consideration needs to be given to the reasoning of courts of other jurisdictions which have been called upon to deal with the point at issue, particularly those which are of high standing. Considerable weight should be given to an interpretation which has received general acceptance in other jurisdictions. On the other hand, a discriminating approach is required if the decisions conflict, or if there is no clear agreement between them."[669]

(20) Much depends on how this general approach is applied. For example, selective invocation of the decisions of one particular national jurisdiction or the practice of a particular group of States should be avoided.[670] On the other hand, it may be appropriate, in a case in which the practice in different domestic jurisdictions diverges, to emphasize the practice of a representative group of jurisdictions[671] and to give more weight to the decisions of higher courts.[672]

*Paragraph 3 — interpretation versus modification or amendment*

(21) Paragraph 3 of draft conclusion 7 addresses the question of how far the interpretation of a treaty can be influenced by subsequent agreements and subsequent practice in order to remain within the realm of what is considered interpretation under article 31, paragraph 3 (a) and (b). The paragraph reminds the interpreter that agreements subsequently arrived at may serve to amend or modify a treaty, but that such subsequent agreements are subject to article 39 of the 1969 Vienna Convention and should be distinguished from subsequent agreements under article 31, paragraph 3 (a). The second sentence, while acknowledging that there are examples to the contrary in case law and diverging opinions in the literature, stipulates that the possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized.

(22) According to article 39 of the 1969 Vienna Convention: "A treaty may be amended by agreement between the parties." Article 31, paragraph 3 (a), on the other hand, refers to subsequent agreements "between the parties regarding the interpretation of the treaty and

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669 United Kingdom, House of Lords, *King v. Bristow Helicopters Ltd (Scotland)* [2002] UKHL 7, at para. 81.

670 *Ibid*., at para. 7 (Lord Mackay): "Because I consider it important that the Warsaw Convention should have a common construction in all jurisdictions that have adopted the Convention, I attach crucial importance to the decisions of the United States Supreme Court in *Eastern Airlines Inc. v. Floyd* (1991) 499 US 530 and *El Al Israel Airlines v. Tseng*, particularly as the United States is such a large participant in carriage by air"; or Einfeld J. for the Federal Court of Australia in *Commissioner of the Australian Federal Police and the Commonwealth of Australia v. Geraldo Magno and Ines Almeida* [1992] FCA 566, in a case concerning the interpretation of the term "impairment of dignity" of a diplomatic representation under article 22 of the Vienna Convention on Diplomatic Relations, recalling article 31, paragraph 3 (b), who stated that "international application of the Convention by democratic countries indicates that another significant consideration is freedom of speech in the host country. This factor is particularly weighty when dealing with political demonstrations outside embassies. It is useful to consider the practice of countries with considerable experience in dealing with this type of situation, such as the United States and the United Kingdom", at para. 30.

671 Canada, Supreme Court, *Yugraneft Corp. v. Rexx Management Corp*. [2010] 1 SCR 649, para. 21 (Rothstein J.).

672 United Kingdom, House of Lords: *Sidhu v. British Airways* [1997] AC 430, at p. 453 (Lord Hope); *Fothergill v. Monarch Airlines Ltd*. [1981] AC 251, pp. 275-276 (Lord Wilberforce).

the application of its provisions", and does not seem to address the question of amendment or modification. As the WTO Appellate Body has held:

> "… the term 'application' in Article 31 (3) (a) relates to the situation where an agreement specifies how existing rules or obligations in force are to be 'applied'; the term does not connote the creation of new or the extension of existing obligations that are subject to a temporal limitation …".[673]

(23) Articles 31, paragraph 3 (a), and 39, if read together, demonstrate that agreements that the parties reach subsequently to the conclusion of a treaty can interpret and amend or modify the treaty.[674] An agreement under article 39 need not display the same form as the treaty that it amends.[675] As the International Court of Justice has held in the *Pulp Mills on the River Uruguay* case:

> "Whatever its specific designation and in whatever instrument it may have been recorded (the [Administrative Commission of the River Uruguay] minutes), this 'understanding' is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith. They are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement."[676]

(24) It is often difficult to draw a distinction between agreements of the parties under a specific treaty provision that attributes binding force to subsequent agreements, simple subsequent agreements under article 31, paragraph 3 (a), which are not binding as such, and, finally, agreements on the amendment or modification of a treaty under articles 39 to 41.[677] International case law and State practice suggest[678] that informal agreements that are alleged to derogate from treaty obligations should be narrowly interpreted. There do not seem to be any formal criteria other than those set forth in article 39, if applicable, apart from the ones that may be provided for in the applicable treaty itself, which are recognized as distinguishing these different forms of subsequent agreements. It is clear, however, that States and international courts are generally prepared to accord States parties a rather wide

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673 WTO, Appellate Body Report, *EC — Bananas III* (see footnote 445 above), paras. 391-393.

674 Murphy, "The relevance of subsequent agreement …" (see footnote 642 above), p. 88.

675 Sinclair, *The Vienna Convention* ... (see footnote 393 above), p. 107 with reference to Waldock, *Official Records of the United Nations Conference on the Law of Treaties* ... (A/CONF.39/11) (see footnote 575 above), 37th meeting, 24 April 1968, p. 207, paras. 49-52; Villiger, *Commentary* ... (see footnote 414 above), p. 513, paras. 7, 9 and 11; K. Odendahl, "Article 39. General rule regarding the amendment of treaties", in Dörr and Schmalenbach, *Vienna Convention on the Law of Treaties* ... (see footnote 439 above), p. 706, at para. 16.

676 *Pulp Mills on the River Uruguay* (see footnote 395 above), at pp. 62-63, paras. 128 and 131; the Court then concluded, in the case under review, that these conditions had not been fulfilled, at pp. 62-66, paras. 128-142.

677 In judicial practice, it is sometimes not necessary to determine whether an agreement has the effect of interpreting or modifying a treaty, see *Territorial Dispute* (footnote 395 above), at p. 29, para. 60 ("… in the view of the Court, for the purposes of the present Judgment, there is no reason to categorize it either as confirmation or as a modification of the Declaration"); it is sometimes considered that an agreement under art. 31, para. 3 (a), can also have the effect of modifying a treaty (see Aust, *Modern Treaty Law and Practice* (see footnote 525 above), pp. 212-214 with examples.

678 *Pulp Mills on the River Uruguay* (see footnote 395 above), at p. 63, paras. 131 and 140; Crawford, "A consensualist interpretation of article 31 (3) …" (see footnote 606 above), p. 32; Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (see footnote 537 above), p. 77, at pp. 125-126, para. 132; *ADF Group Inc. v. United States of America* (Case No. ARB(AF)/00/1), ICSID Arbitration Under NAFTA Chapter Eleven, 9 January 2003, *ICSID Reports*, vol. 6 (2004), pp. 84-85, para. 177 (www.state.gov/documents/organization/16586.pdf); *Ibid.*, Part IV, chap. C, paras. 20-21; A/CN.4/671, paras. 146-165.

scope for the interpretation of a treaty by way of a subsequent agreement. This scope may even go beyond the ordinary meaning of the terms of the treaty. The recognition of this scope for the interpretation of a treaty goes hand in hand with the reluctance by States and courts to recognize that an agreement actually has the effect of amending or modifying a treaty.[679] An agreement to modify a treaty is thus not excluded, but also not to be presumed.[680]

(25) Turning to the question of whether the parties can amend or modify a treaty by a common subsequent practice, the Commission originally proposed, in its draft articles on the law of treaties, to include the following provision in the 1969 Vienna Convention, which would have explicitly recognized the possibility of a modification of treaties by subsequent practice:

> "Article 38. Modification of treaties by subsequent practice
>
> A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions."[681]

(26) This draft article gave rise to an intense debate at the Vienna Conference.[682] An amendment to delete draft article 38 was put to a vote and was adopted by 53 votes to 15, with 26 abstentions. After the Vienna Conference, the question was discussed whether the rejection of draft article 38 meant that the possibility of a modification of a treaty by subsequent practice of the parties had thereby been excluded. Many writers came to the conclusion that the negotiating States simply did not wish to address this question in the 1969 Vienna Convention and that treaties can, as a general rule under the customary law of treaties, indeed be modified by subsequent practice that establishes the agreement of the parties to that effect.[683] International courts and tribunals, on the other hand, have since the adoption of the 1969 Vienna Convention mostly refrained from recognizing this possibility.

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679 It may be that States, in diplomatic contexts outside court proceedings, tend to acknowledge more openly that a certain agreement or common practice amounts to a modification of a treaty, see Murphy, "The relevance of subsequent agreement …" (footnote 642 above), p. 83.

680 *Ibid*., p. 66, para. 140; Crawford, "A consensualist interpretation of article 31 (3) …" (see footnote 606 above), p. 32.

681 *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 236 (footnote omitted).

682 See *Official Records of the United Nations Conference on the Law of Treaties …* (A/CONF.39/11) (footnote 575 above), 37th meeting, 24 April 1968, pp. 207-215; A/CN.4/671, paras. 119-121; Distefano, "La pratique subséquente …" (footnote 573 above), pp. 56-61.

683 Sinclair, *The Vienna Convention …* (see footnote 393 above), p. 138; Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 275-280; Yasseen, "L'interprétation des traités…" (see footnote 393 above), pp. 51-52; Kamto, "La volonté de l'État …" (see footnote 533 above), pp. 134-141, at p. 134; Aust, *Modern Treaty Law and Practice* (see footnote 525 above), p. 213; Villiger, *Commentary …* (see footnote 414 above), p. 432, para. 23; Dörr, "Article 31 …" (see footnote 439 above), p. 555, para. 76 (in accord, Odendahl, "Article 39 …" (see footnote 675 above), p. 702, paras. 10-11); Distefano, "La pratique subséquente …" (see footnote 573 above), pp. 62-67; H. Thirlway, "The law and procedure of the International Court of Justice 1960-1989: supplement, 2006 — part three", *British Yearbook of International Law 2006*, vol. 77, pp. 1-82, p. 65; M.N. Shaw, *International Law*, 6th edition (Cambridge, United Kingdom, Cambridge University Press, 2008), p. 934; I. Buga, "Subsequent practice and treaty modification", in *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, M.J. Bowman and D. Kritsiotis, eds. (forthcoming), at footnote 452 with further references; disagreeing with this view, in particular, and stressing the solemnity of the conclusion of a treaty in contrast with the informality of practice Murphy, "The relevance of subsequent agreement …" (see footnote 642 above), pp. 89-90; see also Hafner, "Subsequent agreements and practice …" (see footnote 655 above), pp. 115-117 (differentiating between the perspectives of courts and States, as well as emphasizing the importance of amendment provisions in this context).

(27) In the case concerning the *Dispute regarding Navigational and Related Rights*, the International Court of Justice has held that "subsequent practice of the parties, within the meaning of Article 31, paragraph 3 (b), of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement".[684] It is not entirely clear whether the Court thereby wanted to recognize that subsequent practice under article 31, paragraph 3 (b), may also have the effect of amending or modifying a treaty, or whether it was merely making a point relating to the interpretation of treaties as the "original" intent of the parties is not necessarily conclusive for the interpretation of a treaty. Indeed, the Commission recognizes in draft conclusion 8 [3] that subsequent agreements and subsequent practice, like other means of interpretation, "may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time".[685] The scope for "interpretation" is therefore not necessarily determined by a fixed "original intent", but must rather be determined by taking into account a broader range of considerations, including certain later developments. This somewhat ambiguous dictum of the Court raises the question of how far subsequent practice under article 31, paragraph 3 (b), can contribute to "interpretation" and whether subsequent practice may have the effect of amending or modifying a treaty. Indeed, the dividing line between the interpretation and the amendment or modification of a treaty is in practice sometimes "difficult, if not impossible, to fix".[686]

(28) Apart from the dictum in *Dispute regarding Navigational and Related Rights*,[687] the International Court of Justice has not explicitly recognized that a particular subsequent practice has had the effect of modifying a treaty. This is true, in particular, for the *Namibia Advisory Opinion* as well as for the *Wall Advisory Opinion*, in which the Court recognized that subsequent practice had an important effect on the determination of the meaning of the treaty, but stopped short of explicitly recognizing that such practice had led to an amendment or modification of the treaty.[688] Since these opinions concerned treaties establishing an international organization it seems difficult to derive a general rule of the law of treaties from them. The questions of subsequent agreements and subsequent practice

[684] *Dispute regarding Navigational and Related Rights* (see footnote 395 above), at p. 242, para. 64; see also *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France* (footnote 532 above); Yasseen, "L'interprétation des traités …" (see footnote 393 above ), p. 51; Kamto, "La volonté de l'État … " (see footnote 533 above), pp. 134-141; R. Bernhardt, *Die Auslegung völkerrechtlicher Verträge* (Cologne, Berlin, Heymanns, 1963), p. 132.

[685] See draft conclusion 8 [3] and commentary thereto, paras. (1)-(18).

[686] Sinclair, *The Vienna Convention …* (see footnote 393 above), p. 138; Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 275; Murphy, "The relevance of subsequent agreement …" (see footnote 642 above), p. 90; B. Simma, "Miscellaneous thoughts on subsequent agreements and practice", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), p. 46; Karl, *Vertrag und spätere Praxis …* (see footnote 454 above), pp. 42-43; Sorel and Boré Eveno, "1969 Vienna Convention, Article 31 …" (see footnote 440 above), p. 825, para. 42; Dörr, "Article 31 …" (see footnote 439 above), p. 555, para. 76; this is true even if the two processes can theoretically be seen as being "legally quite distinct", see the Dissenting Opinion of Judge Parra-Aranguren in *Kasikili/Sedudu Island* (footnote 395 above), at pp. 1212-1213, para. 16; similarly, Hafner, "Subsequent agreements and practice …" (see footnote 655 above), p. 114; Linderfalk, *On the Interpretation of Treaties* (see footnote 446 above), p. 168.

[687] *Dispute regarding Navigational and Related Rights* (see footnote 395 above), at p. 242, para. 64.

[688] Thirlway, "The law and procedure of the International Court of Justice 1960-1989 …" (see footnote 683 above), p. 64.

relating to constituent instruments of international organizations are addressed in draft conclusion 12 [11].[689]

(29) Other important cases in which the International Court of Justice has raised the issue of possible modification by the subsequent practice of the parties concern boundary treaties. As the Court said in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*:

> "Hence the conduct of Cameroon in that territory has pertinence only for the question of whether it acquiesced in the establishment of a change in treaty title, which cannot be wholly precluded as a possibility in law … ."[690]

(30) The Court found such acquiescence in the case concerning the *Temple of Preah Vihear*, where it placed decisive emphasis on the fact that there had been clear assertions of sovereignty by one side (France), which, according to the Court, required a reaction on the part of the other side (Thailand).[691] This judgment, however, was rendered before the adoption of the Vienna Convention and thus, at least implicitly, was taken into account by States in their debate at the Vienna Conference.[692] The judgment also stops short of explicitly recognizing the modification of a treaty by subsequent practice as the Court left open whether the line on the French map was compatible with the watershed line that had been agreed upon in the original boundary treaty between the two States — although it is often assumed that this was not the case.[693]

(31) Thus, while leaving open the possibility that a treaty might be modified by the subsequent practice of the parties, the International Court of Justice has so far not explicitly recognized that such an effect has actually been produced in a specific case. Rather the Court has reached interpretations that were difficult to reconcile with the ordinary meaning of the text of the treaty, but which coincided with the identified practice of the parties.[694]

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689 See already *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10*, A/67/10, p. 124, para. 238, and, *ibid., Sixty-third Session, Supplement No. 10,* A/63/10, annex A, para. 42.

690 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 353, para. 68.

691 *Case concerning the Temple of Preah Vihear* (see footnote 488 above): "an acknowledgement by conduct was undoubtedly made in a very definite way … it is clear that the circumstances were such as called for some reaction" (p. 23); "[a] clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined" and therefore "demanded a reaction" (p. 30).

692 M. Kohen, "*Uti possidetis*, prescription et pratique subséquente à un traité dans l'affaire de l'île de Kasikili/Sedudu devant la Cour internationale de Justice", *German Yearbook of International Law*, vol. 43 (2000), p. 253, at p. 272.

693 *Case concerning the Temple of Preah Vihear* (see footnote 488 above), at p. 26: "a fact, which if true, must have been no less evident in 1908". Judge Parra-Aranguren has opined that the *Temple of Preah Vihear* case demonstrated "that the effect of subsequent practice on that occasion was to amend the treaty" (see *Kasikili/Sedudu Island* (footnote 395 above), Dissenting Opinion of Judge Parra-Aranguren, at pp. 1212-1213, para. 16); Buga, "Subsequent practice and treaty modification" (see footnote 683 above), at footnote 500.

694 In particular the Namibia opinion (see footnote 636 above) has been read as implying that subsequent practice has modified Article 27, paragraph 3, of the Charter of the United Nations, see Alain Pellet, "Article 38", in *The Statute of the International Court of Justice A Commentary*, 2nd edition, A. Zimmermann and others, eds. (Oxford, Oxford University Press, 2012), p. 844, para. 279, note 809; *cf*. A/CN.4/671, paras. 124-126.

Contrary holdings by arbitral tribunals have been characterized either as an "isolated exception"[695] or rendered before the Vienna Conference and critically referred to there.[696]

(32) The WTO Appellate Body has made clear that it would not accept an interpretation that would result in a modification of a treaty obligation, as this would not be an "application" of an existing treaty provision.[697] The Appellate Body's position may be influenced by article 3, paragraph 2, of the Understanding on Rules and Procedures Governing the Settlement of Disputes, according to which: "Recommendations and rulings of the [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements."[698]

(33) The European Court of Human Rights has occasionally recognized the subsequent practice of the parties as a possible source for a modification of the Convention. In an *obiter dictum* in the 1989 case of *Soering v. the United Kingdom*, the Court held:

> " … that an established practice within the member States could give rise to an amendment of the Convention. In that case the Court accepted that subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence remove a textual limit on the scope for evolutive interpretation of Article 3 (*ibid*., pp. 40-41, § 103)."[699]

(34) Applying this reasoning, the Court came to the following conclusion in *Al-Saadoon and Mufdhi v. the United Kingdom*:

> "All but two of the member States have now signed Protocol No. 13 and all but three of the States which have signed have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to

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695 M. Kohen, "Keeping subsequent agreements and practice in their right limits", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), pp. 34 *et seq*., at p. 43 regarding *Decision regarding delimitation of the border between Eritrea and Ethiopia*, 13 April 2002, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), pp. 83-195, at pp. 110-111, paras. 3.6-3.10; see also *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 29 September 1988, UNRIAA, vol. XX (Sales No. E/F.93.V.3), pp. 1-118, see pp. 56-57, paras. 209-210, in which the Arbitral Tribunal held, in an *obiter dictum*, "that the demarcated boundary line would prevail over the Agreement if a contradiction could be detected" (*ibid*., p. 57); but see R. Kolb, "La modification d'un traité par la pratique subséquente des parties", *Revue suisse de droit international et de droit européen*, vol. 14 (2004), pp. 9-32, at p. 20.

696 *Interpretation of the Air Transport Services Agreement between the United States of America and France*, 22 December 1963, UNRIAA, vol. XVI (Sales No. E/F.69.V.1), pp. 5-74, at pp. 62-63; *Official Records of the United Nations Conference on the Law of Treaties …* (A/CONF.39/11) (see footnote 575 above), 37th meeting, 24 April 1968, p. 208, para. 58 (Japan); Murphy, "The relevance of subsequent agreement …" (footnote 642 above), p. 89.

697 WTO, Appellate Body Report, *EC — Bananas III* (see footnote 445 above), Second Recourse to Article 21.5, WT/DS27/AB/RW2/ECU and Corr.1 adopted 11 December 2008, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, paras. 391-393.

698 Marrakesh Agreement establishing the World Trade Organization (see footnote 445 above), Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, at p. 401.

699 See *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, 4 October 2010, para. 119, referring to *Öcalan v. Turkey* [GC], no. 46221/99, 12 May 2005, ECHR 2005-IV, and quoting *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, ECHR Series A no. 161.

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its interpreting the words 'inhuman or degrading treatment or punishment' in Article 3 as including the death penalty (compare *Soering*, cited above, §§ 102-04)."[700]

(35) The case law of international courts and tribunals allows the following conclusions: the WTO situation suggests that a treaty may preclude the subsequent practice of the parties from having a modifying effect. Thus, the treaty itself governs the question in the first place. Conversely, the European Court of Human Rights cases suggest that a treaty may permit the subsequent practice of the parties to have a modifying effect. Thus, ultimately, much depends on the treaty or on the treaty provisions concerned.[701]

(36) The situation is more complicated in the case of treaties for which such indications do not exist. No clear residual rule for such cases can be discerned from the jurisprudence of the International Court of Justice. The conclusion can be drawn, however, that the Court, while finding that the possibility of a modification of a treaty by subsequent practice of the parties "cannot be wholly precluded as a possibility in law",[702] considered that finding such a modification should be avoided, if at all possible. Instead the Court prefers to accept broad interpretations that may stretch the ordinary meaning of the terms of the treaty.

(37) This conclusion from the jurisprudence of the International Court of Justice is in line with certain considerations that were articulated during the debates among States on draft article 38 of the 1969 Vienna Convention.[703] Today, the consideration that amendment procedures that are provided for in a treaty are not to be circumvented by informal means seems to have gained more weight in relation to the equally true general observation that international law is often not as formalist as national law.[704] The concern that was expressed by a number of States at the Vienna Conference, according to which the possibility of modifying a treaty by subsequent practice could create difficulties for domestic constitutional law, has also since gained in relevance.[705] And, while the principle *pacta sunt servanda* is not formally called into question by an amendment or modification of a treaty by subsequent practice that establishes the agreement of all the parties, it is equally true that

[700] *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, 4 October 2010, para. 120; B. Malkani, "The obligation to refrain from assisting the use of the death penalty", *International and Comparative Law Quarterly*, vol. 62, No. 3 (2013), pp. 523-556.

[701] See Buga, "Subsequent practice and treaty modification" (footnote 683 above), at footnotes 126-132.

[702] See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 353, para. 68.

[703] A/CN.4/671, paras. 119-121.

[704] Murphy, "The relevance of subsequent agreement and subsequent practice …" (footnote 642 above), p. 89; Simma, "Miscellaneous thoughts on subsequent agreements …" (footnote 686 above), p. 47; Hafner, "Subsequent agreements and practice …" (see footnote 655 above), pp. 115-117; J.E. Alvarez, "Limits of change by way of subsequent agreements and practice", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), p. 130.

[705] See *NATO Strategic Concept Case*, German Federal Constitutional Court, Judgment of 19 June 2001, Application 2 BvE 6/99 (English translation available from www.bundesverfassungsgericht.de/entscheidungen/es20011122_2bve000699en.html), paras. 19-21; German Federal Fiscal Court, BFHE, vol. 157, p. 39, at pp. 43-44; *ibid*., vol. 227, p. 419, at p. 426; *ibid*., vol. 181, p. 158, at p. 161; S. Kadelbach, "Domestic constitutional concerns with respect to the use of subsequent agreements and practice at the international level", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), pp. 145-148; Alvarez, "Limits of change …" (see footnote 704 above), p. 130; I. Wuerth, "Treaty interpretation, subsequent agreements and practice, and domestic constitutions", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), pp. 154-159; and H. Ruiz Fabri, "Subsequent practice, domestic separation of powers, and concerns of legitimacy", in Nolte, *Treaties and Subsequent Practice* (see footnote 398 above), pp. 165-166.

the stability of treaty relations may be called into question if an informal means of identifying agreement as subsequent practice could easily modify a treaty.[706]

(38) In conclusion, while there exists some support in international case law that, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties theoretically may lead to modifications of a treaty, the actual occurrence of that effect is not to be presumed. Instead, States and courts prefer to make every effort to conceive of an agreed subsequent practice of the parties as an effort to interpret the treaty in a particular way. Such efforts to interpret a treaty broadly are possible since article 31 of the 1969 Vienna Convention does not accord primacy to one particular means of interpretation contained therein, but rather requires the interpreter to take into account all means of interpretation as appropriate.[707] In this context an important consideration is how far an evolutive interpretation of the treaty provision concerned is possible.[708]

**Conclusion 8 [3]**
**Interpretation of treaty terms as capable of evolving over time**

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

**Commentary**

(1) Draft conclusion 8 [3] addresses the role that subsequent agreements and subsequent practice may play in the context of the more general question of whether the meaning of a term of a treaty is capable of evolving over time.

(2) In the case of treaties, the question of the so-called intertemporal law[709] has traditionally been put in terms of whether a treaty should be interpreted in the light of the circumstances and the law at the time of its conclusion ("contemporaneous" or "static" interpretation), or in the light of the circumstances and the law at the time of its application

[706] See, for example, Kohen, "*Uti possidetis*, prescription et pratique subséquente …" (footnote 692 above), p. 274 (in particular with respect to boundary treaties).

[707] See above draft conclusion 2 [1], para. 5, and the commentary thereto; Hafner, "Subsequent agreements and practice …" (see footnote 655 above), p. 117; some authors support the view that the range of what is conceivable as an "interpretation" is wider in case of a subsequent agreement or subsequent practice under article 31, paragraph 3, than in the case of interpretations by other means of interpretation, including the range for evolutive interpretations by courts or tribunals, for example, Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 275; Dörr, "Article 31 …" (see footnote 439 above), pp. 554-555, para. 76.

[708] See draft conclusion 8 [3]; in the case concerning the *Dispute regarding Navigational and Related Rights*, for example, the International Court of Justice could leave the question open as to whether the term "comercio" had been modified by the subsequent practice of the parties since it decided that it was possible to give this term an evolutive interpretation. *Dispute regarding Navigational and Related Rights* (see footnote 395 above), at pp. 242-243, paras. 64-66.

[709] T.O. Elias, "The doctrine of intertemporal law", *American Journal of International Law*, vol. 74 (1980), pp. 285 *et seq*.; D.W. Greig, *Intertemporality and the Law of Treaties* (London, British Institute of International and Comparative Law, 2001); M. Fitzmaurice, "Dynamic (evolutive) interpretation of treaties, Part I", *The Hague Yearbook of International Law*, vol. 21 (2008), pp. 101-153; M. Kotzur, "Intertemporal law", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com); U. Linderfalk, "Doing the right thing for the right reason: why dynamic or static approaches should be taken in the interpretation of treaties", *International Community Law Review*, vol. 10, No. 2 (2008), pp. 109 *et seq*.; A. Verdross and B. Simma, *Universelles Völkerrecht*, 3rd edition (Berlin, Duncker & Humblot, 1984), pp. 496 *et seq*., paras. 782 *et seq*.

("evolutive", "evolutionary", or "dynamic" interpretation).[710] Arbitrator Max Huber's dictum in the *Island of Palmas* case according to which "a judicial fact must be appreciated in the light of the law contemporary with it"[711] led many international courts and tribunals, as well as many writers, to generally favour contemporaneous interpretation.[712] At the same time, the Arbitral Tribunal in the *Iron Rhine* case asserted that there was, "general support among the leading writers today for evolutive interpretation of treaties".[713]

(3) The Commission, in its commentary on the draft articles on the law of treaties, considered in 1966 that "to attempt to formulate a rule covering comprehensively the temporal element would present difficulties" and it, therefore, "concluded that it should omit the temporal element".[714] Similarly, the debates within the Commission's Study Group on fragmentation led to the conclusion in 2006 that it is difficult to formulate and to agree on a general rule that would give preference either to a "principle of contemporaneous interpretation" or to one that generally recognizes the need to take account of an "evolving meaning" of treaties.[715]

(4) Draft conclusion 8 [3] should not be read as taking any position regarding the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation in general. Draft conclusion 8 [3] rather emphasizes that subsequent agreements and subsequent practice, as any other means of treaty interpretation, can support both a contemporaneous and an evolutive interpretation (or, as it is often called, evolutionary interpretation), where appropriate. The Commission, therefore, concluded that these means of treaty interpretation "may assist in determining whether or not" an evolutive interpretation is appropriate with regard to a particular treaty term.

(5) This approach is confirmed by the jurisprudence of international courts and tribunals. The various international courts and tribunals that have engaged in evolutive interpretation — albeit in varying degrees — appear to have followed a case-by-case approach in determining, through recourse to the various means of treaty interpretation that are referred to in articles 31 and 32, whether or not a treaty term should be given a meaning capable of evolving over time.

(6) The International Court of Justice, in particular, is seen as having developed two strands of jurisprudence, one tending towards a more "contemporaneous" and the other towards a more "evolutionary" interpretation, as Judge *ad hoc* Guillaume has pointed out in

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[710] M. Fitzmaurice, "Dynamic (evolutive) interpretation …" (see footnote 709 above).

[711] *Island of Palmas* case *(the Netherlands/United States of America)*, award of 4 April 1928, UNRIAA, vol. II (Sales No. 1949.V.1), pp. 829-871, at p. 845.

[712] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 220-221, para. (11).

[713] *Award in Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway* (see footnote 397 above), p. 35, at para. 81; see, for example, A. Aust, *Modern Treaty Law and Practice* (see footnote 525 above), pp. 215-216; M. Fitzmaurice, "Dynamic (evolutive) interpretation …" (see footnote 709 above), at pp. 29-31; G. Distefano, "L'interprétation évolutive de la norme internationale", *Revue générale de droit international public*, vol. 115, No. 2 (2011), pp. 373-396, at pp. 384 and 389 *et seq*.; Higgins, "Some observations on the inter-temporal rule …" (see footnote 636 above), at pp. 174 *et seq*.; Sorel and Boré Eveno, "1969 Vienna Convention, Article 31 …" (see footnote 440 above), at p. 807, para. 8; P.-M. Dupuy, "Evolutionary interpretation of treaties", in Cannizzaro, *The Law of Treaties …* (see footnote 439 above), at pp. 125 *et seq*.; M. Kotzur, "Intertemporal Law" (see footnote 709 above), at para. 14.

[714] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 222, para. (16); Higgins, "Some observations on the inter-temporal rule …" (see footnote 636 above), at p. 178.

[715] Report of the Study Group on fragmentation of international law, 2006 (A/CN.4/L.682 and Corr.1), para. 478.

his Declaration in *Dispute regarding Navigational and Related Rights*.[716] The decisions that favour a more contemporaneous approach mostly concern specific treaty terms ("water-parting";[717] "main channel or Thalweg";[718] names of places;[719] and "mouth" of a river[720]). On the other hand, the cases that support an evolutive interpretation seem to relate to more general terms. This is true, in particular, for terms that are by definition evolutionary, such as "the strenuous conditions of the modern world" or "the well-being and development of such peoples" in article 22 of the Covenant of the League of Nations. The International Court of Justice, in its *Namibia Opinion*, has given those terms an evolving meaning by referring to the evolution of the right of peoples to self-determination after the Second World War.[721] The "generic" nature of a particular term in a treaty[722] and the fact that the treaty is designed to be "of continuing duration"[723] may also give rise to an evolving meaning.

(7) Other international judicial bodies sometimes also employ an evolutive approach to interpretation, though displaying different degrees of openness towards such interpretation. The WTO Appellate Body has only occasionally resorted to evolutive interpretation. In a well-known case it has, however, held that "the generic term 'natural resources' in article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'".[724] The ITLOS Seabed Disputes Chamber has held that the meaning of certain obligations to ensure[725] "may change over time",[726] and has emphasized that the rules of State liability in the United Nations Convention on the Law of the Sea are apt to follow developments in the law and are "not considered to be static".[727] The European Court of Human Rights has held more generally "that the Convention is a living instrument which … must be interpreted in the light of present-day conditions".[728] The Inter-American Court of Human Rights also more generally follows an evolutive approach to interpretation, in particular in connection

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[716] *Dispute regarding Navigational and Related Rights* (see footnote 395 above), Declaration of Judge *ad hoc* Guillaume, p. 290, at pp. 294 *et seq*., paras. 9 *et seq*.; see also *Yearbook … 2005*, vol. II (Part Two), p. 89, para. 479; Report of the Study Group on fragmentation of international law (A/CN.4/L.682 and Corr.1), para. 478; Institut de droit international, resolution on "Le problème intertemporel en droit international public", *Annuaire de l'Institut de droit international*, vol. 56 (Wiesbaden session, 1975), pp. 536 *et seq*. (www.idi-iil.org).

[717] *Case concerning a boundary dispute between Argentina and Chile concerning the delimitation of the frontier line between boundary post 62 and Mount Fitzroy*, decision of 21 October 1994, UNRIAA, vol. XXII (Sales No. E/F.00.V.7), pp. 3-149, at p. 43, para. 130; see also, with respect to the term "watershed", *Case concerning the Temple of Preah Vihear* (see footnote 488 above), at pp. 16-22.

[718] *Kasikili/Sedudu Island* (see footnote 395 above), at pp. 1060-1062, paras. 21 and 25.

[719] *Decision regarding delimitation of the border between Eritrea and Ethiopia (Eritrea v. Ethiopia)*, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), pp. 83-195, p. 110, para. 3.5.

[720] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 338 and 339, para. 48, and p. 346, para. 59.

[721] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see footnote 432 above), at p. 31, para. 53.

[722] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at p. 32, para. 77; Report of the Study Group on fragmentation of international law, 2006 (A/CN.4/L.682 and Corr.1), para. 478.

[723] *Dispute regarding Navigational and Related Rights* (see footnote 395 above), at p. 243, para. 66.

[724] WTO Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products* (*US — Shrimp)*, WT/DS58/AB/R, adopted 6 November 1998, para. 130.

[725] See United Nations Convention on the Law of the Sea, 1982, United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3, art. 153, para. 4, and art. 4, para. 4 in annex III.

[726] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the area* (see footnote 396 above), at para. 117.

[727] *Ibid*., para. 211.

[728] *Tyrer v. the United Kingdom*, no. 5856/72, ECHR Series A, no. 26, para. 31.

with its so-called *pro homine* approach.[729] In the *Iron Rhine* case, the continued viability and effectiveness of a multidimensional cross-border railway arrangement was an important reason for the Arbitral Tribunal to accept that even rather technical rules may have to be given an evolutive interpretation.[730]

(8) In the final analysis, most international courts and tribunals have not recognized evolutive interpretation as a separate form of interpretation, but instead have arrived at such an evolutive interpretation in application of the various means of interpretation that are mentioned in articles 31 and 32 of the 1969 Vienna Convention, by considering certain criteria (in particular those mentioned in paragraph (6) above) on a case-by-case basis. Any evolutive interpretation of the meaning of a term over time must therefore result from the ordinary process of treaty interpretation.[731]

(9) The Commission considers that this state of affairs confirms its original approach to treaty interpretation:

> "… the Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation … making the ordinary meaning of the terms, the context of the treaty, its object and purpose, and the general rules of international law, together with authentic interpretations by the parties, the primary criteria for interpreting a treaty".[732]

Accordingly, draft conclusion 8 [3], by using the phrase "presumed intention", refers to the intention of the parties as determined through the application of the various means of interpretation that are recognized in articles 31 and 32. The "presumed intention" is thus not a separately identifiable original will, and the *travaux préparatoires* are not the primary

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[729] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (see footnote 431 above), para. 114 ("This guidance is particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. Both this Court, in the Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man (1989) and the European Court of Human Rights, in *Tyrer v. United Kingdom* (1978), *Marckx v. Belgium* (1979), *Loizidou v. Turkey* (1995), among others, have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions") (footnotes omitted).

[730] See *Arbitration regarding the Iron Rhine* (see footnote 397 above), at para. 80: "In the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway"; and also *Aegean Sea Continental Shelf* case (see footnote 722 above), at p. 32, para. 77; *Case concerning the delimitation of the maritime boundary between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)*, Award, 31 July 1989, UNRIAA, vol. XX (Sales No. E/F.93.V.3), pp. 119-213, at pp. 151-152, para. 85.

[731] As the Study Group on fragmentation of international law has phrased it in its 2006 report, "[t]he starting-point must be … the fact that deciding [the] issue [of evolutive interpretation] is a matter of interpreting the treaty itself" (see A/CN.4/L.682 and Corr.1, para. 478).

[732] *Yearbook ... 1964*, vol. II, document A/5809, pp. 204-205, para. (15); see also para. (13), "[p]aragraph 3 specifies as further authentic elements of interpretation: (*a*) agreements between the parties regarding the interpretation of the treaty, and (*b*) any subsequent practice in the application of the treaty which clearly established the understanding of all the parties regarding its interpretation" (*ibid*., pp. 203-204); on the other hand, Waldock in his third report on the law of treaties explained that *travaux préparatoires* are not, as such, an authentic means of interpretation (*ibid*., document A/CN.4/167 and Add.1-3, pp. 58-59, para. (21)).

basis for determining the presumed intention of the parties, but they are only, as article 32 indicates, a supplementary means of interpretation. And although interpretation must seek to identify the intention of the parties, this must be done by the interpreter on the basis of the means of interpretation that are available at the time of the act of interpretation and that include subsequent agreements and subsequent practice of parties to the treaty. The interpreter thus has to answer the question of whether parties can be presumed to have intended, upon the conclusion of the treaty, to give a term used a meaning that is capable of evolving over time.

(10) Draft conclusion 8 [3] does not take a position regarding the question of the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation in general (see above commentary, at paragraph (4)). The conclusion should, however, be understood as indicating the need for some caution with regard to arriving at a conclusion in a specific case whether to adopt an evolutive approach. For this purpose, draft conclusion 8 [3] points to subsequent agreements and subsequent practice as means of interpretation that may provide useful indications to the interpreter for assessing, as part of the ordinary process of treaty interpretation, whether the meaning of a term is capable of evolving over time.[733]

(11) This approach is based on and confirmed by the jurisprudence of the International Court of Justice and other international courts and tribunals. In the *Namibia* Advisory Opinion, the International Court of Justice referred to the practice of United Nations organs and of States in order to specify the conclusions that it derived from the inherently evolutive nature of the right to self-determination.[734] In the *Aegean Sea* case, the Court found it "significant" that what it had identified as the "ordinary, generic sense" of the term "territorial status" was confirmed by the administrative practice of the United Nations and by the behaviour of the party that had invoked the restrictive interpretation in a different context.[735] In any case, the decisions in which the International Court of Justice has undertaken an evolutive interpretation have not strayed from the possible meaning of the text and from the presumed intention of the parties to the treaty, as they had also been expressed in their subsequent agreements and subsequent practice.[736]

(12) The judgment of the International Court of Justice in *Dispute regarding Navigational and Related Rights* also illustrates how subsequent agreements and subsequent practice of the parties can assist in determining whether a term has to be given a meaning that is capable of evolving over time. Interpreting the term "comercio" in a treaty of 1858, the Court held:

> "On the one hand, the subsequent practice of the parties, within the meaning of article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was … to give the terms used … a meaning or content capable of evolving, not one

[733] See also Gardiner, *Treaty Interpretation* (above footnote 392), at pp. 292-294; R. Kolb, *Interprétation et création du droit international* (see footnote 524 above), pp. 488-501; J. Arato, "Subsequent practice and evolutive interpretation", *The Law & Practice of International Courts and Tribunals*, vol. 9-3 (2010), pp. 443-494, at pp. 444-445, 465 *et seq*.

[734] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see footnote 432 above), at pp. 30-31, paras. 49-51.

[735] *Aegean Sea Continental Shelf* case (see footnote 722 above), at p. 31, para. 74.

[736] See also *Case concerning the delimitation of the maritime boundary between Guinea-Bissau and Senegal* (see footnote 730 above), at pp. 151-152, para. 85.

> fixed once and for all, so as to make allowance for, among other things, developments in international law."[737]

The Court then found that the term "comercio" was a "generic term" of which "the parties necessarily" had "been aware that the meaning … was likely to evolve over time" and that "the treaty has been entered into for a very long period", and concluded that "the parties must be presumed … to have intended" this term to "have an evolving meaning".[738] Judge Skotnikov, in a Separate Opinion, while disagreeing with this reasoning, ultimately arrived at the same result by accepting that a more recent subsequent practice of Costa Rica related to tourism on the San Juan River "for at least a decade" against which Nicaragua "never protested" but rather "engaged in consistent practice of allowing tourist navigation" and concluded that this "suggests that the parties have established an agreement regarding its interpretation".[739]

(13) The International Criminal Tribunal for the former Yugoslavia has sometimes taken more general forms of State practice into account, including trends in the legislation of States that, in turn, can give rise to a changed interpretation of the scope of crimes or their elements. In *Prosecutor v. Furundžija*,[740] for example, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, in search of a definition for the crime of rape as prohibited by article 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War,[741] article 76, paragraph 1, of the first Additional Protocol (Protocol I)[742] and article 4, paragraph 2 (e), of the second Additional Protocol (Protocol II),[743] examined the principles of criminal law common to the major legal systems of the world and held:

> "… 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 …."[744]

(14) The "living instrument" approach of the European Court of Human Rights is also based, *inter alia*, on different forms of subsequent practice.[745] While the Court does not generally require "the agreement of the parties regarding its interpretation" in the sense of article 31, paragraph 3 (b), the decisions in which it adopts an evolutive approach are

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737 *Dispute regarding Navigational and Related Rights* (see footnote 395 above), at p. 242, para. 64.

738 *Ibid*., paras. 66-68.

739 *Ibid*., Separate Opinion of Judge Skotnikov, p. 283, at p. 285, paras. 9-10.

740 *Prosecutor v. Anto Furundžija*, Trial Chamber, Judgment, 10 December 1998, case No. IT-95-17/1-T, ICTY *Judicial Reports 1998*, vol. I, paras. 165 *et seq*.

741 United Nations, *Treaty Series*, vol. 75, No. 973, p. 287.

742 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I**),** United Nations, *Treaty Series*, vol. 1125, no. 17512, p. 3.

743 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), United Nations, *Treaty Series*, vol. 1125, no. 17513, p. 609.

744 See *Prosecutor v. Anto Furundžija* (footnote 740 above), para. 179; similarly *The Prosecutor v. Alfred Musema*, International Criminal Tribunal for Rwanda, Trial Chamber I, Judgment, 27 January 2000, case No. ICTR-96-13-A, paras. 220 *et seq*., in particular para. 228.

745 See Nolte, "Jurisprudence under special regimes …" (footnote 398 above ), at pp. 246 *et seq*.

regularly supported by an elaborate account of subsequent (State, social and international legal) practice.[746]

(15) The Inter-American Court of Human Rights, despite its relatively rare mentioning of subsequent practice, frequently refers to broader international developments, an approach that falls somewhere between subsequent practice and other "relevant rules" under article 31, paragraph 3 (c).[747] In the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, for example, the Court pointed out that:

> "… human rights treaties are live instruments ["instrumentos vivos"] whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions."[748]

(16) The Human Rights Committee also on occasion adopts an evolutive approach that is based on developments of State practice. Thus, in *Judge v. Canada*, the Committee abandoned its *Kindler*[749] jurisprudence, elaborating that:

> "The Committee is mindful of the fact that the above-mentioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in States which have retained the death penalty, a broadening consensus not to carry it out."[750]

In *Yoon and Choi*, the Committee stressed that the meaning of any right contained in the International Covenant on Civil and Political Rights[751] evolved over time and concluded that article 18, article 3, now provided at least some protection against being forced to act against genuinely held religious beliefs. The Committee reached this conclusion since "an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service".[752]

(17) Finally, the tribunals established under the auspices of the International Centre for the Settlement of Investment Disputes have emphasized that subsequent practice can be a particularly important means of interpretation for such provisions that the parties to the treaty intended to evolve in the light of their subsequent treaty practice. In the case of

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[746] *Öcalan v. Turkey* [GC], no. 46221/99, 12 May 2005, ECHR 2005-IV, para. 163; *VO v. France* [GC], no. 53924/00, 8 July 2004, ECHR 2004-VIII, paras. 4 and 70; *Johnston and Others. v. Ireland*, no. 9697/82, 18 December 1986, ECHR Series A no. 112, para. 53; *Bayatyan v. Armenia* [GC], no. 23459/03, 7 July 2011, para. 63; *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, ECHR Series A no. 161, para. 103; *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, 4 October 2010, paras. 119-120, ECHR 2010 (extracts); *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, ECHR-2008, para. 76.

[747] See, for example, *Velásquez-Rodríguez v. Honduras*, Judgment, Merits, 29 July 1988, Inter-Am. Ct. H.R. Series C No. 4, para. 151; *The Right to Information on Consular Assistance In the Framework of the Guarantees of the Due Process of Law* (see footnote 431 above), paras. 130-133 and 137.

[748] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment (Merits, Reparations and Costs), 31 August 2001, Series C No. 79, para. 146; also see *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion, 14 July 1989, OC-10/89, Series A No. 10, para. 38.

[749] *Kindler v. Canada*, Views, 30 July 1993, Communication No. 470/1991, Human Rights Committee report, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40* (A/48/40), vol. II, Annex XII, U.

[750] *Judge v. Canada*, Views, 5 August 2002, Communication No. 829/1998, *ibid.*, *Fifty-eighth Session, Supplement No. 40* (A/58/40), vol. II, annex V, G, para. 10.3.

[751] United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

[752] *Yoon and Choi v. the Republic of Korea*, Views, 3 November 2006, Communication Nos. 1321/2004 and 1322/2004, *ibid.*, *Sixty-second Session, Supplement No. 40* (A/62/40), vol. II, Annex VII, V, para. 8.4.

*Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, for example, the Tribunal held that:

> "Neither party asserted that the ICSID Convention contains any precise *a priori* definition of '*investment*'. Rather, the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment."[753]

(18) The jurisprudence of international courts and tribunals and the pronouncements of expert treaty bodies thus confirm that subsequent agreements and subsequent practice under articles 31 and 32 "may assist in determining" whether or not a "term" shall be given "a meaning which is capable of evolving over time". The expression "term" is not limited to specific words (like "commerce", "territorial status", "rape" or "investment"), but may also encompass more interrelated or cross-cutting concepts (such as "by law" (article 9 of the International Covenant on Civil and Political Rights) or "necessary" (article 18 of the Covenant), as they exist, for example, in human rights treaties). Since the "terms" of a treaty are elements of the rules which are contained therein, the rules concerned are covered accordingly.

(19) In a similar manner, subsequent practice under articles 31, paragraph 3 (b), and 32 has contributed to whether domestic courts arrive at a more evolutive or static interpretation of a treaty. For example, in a case concerning the Convention on the Civil Aspects of International Child Abduction,[754] the New Zealand Court of Appeal interpreted the term "custody rights" as encompassing not only legal rights but also "*de facto* rights". On the basis of a review of legislative and judicial practice in different States and referring to article 31, paragraph 3 (b), the Court reasoned that this practice "evidence[d] a fundamental change in attitudes", which then led it to adopt a modern understanding of the term "custody rights" rather than an understanding "through a 1980 lens".[755] The German Federal Constitutional Court, in a series of cases concerning the interpretation of the North Atlantic Treaty[756] in the light of the changed security context after the end of the Cold War, also held that subsequent agreements and subsequent practice under article 31, paragraph 3 (b), "could acquire significance for the meaning of the treaty" and ultimately held that this had been the case.[757]

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[753] *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* (United States/Sri Lanka BIT), Award and Concurring Opinion, 15 March 2002, ICSID Case No. ARB/00/2, *ICSID Reports*, vol. 6 (2004), p. 308 *et seq*., at p. 317, para. 33; similarly, *Autopista Concesionada de Venezuela, CA v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction, 27 September 2001, ICSID Case No. ARB/00/5, *ibid*., p. 419, para. 97.

[754] United Nations, *Treaty Series*, vol. 1343, No. 22514, p. 89.

[755] New Zealand, Court of Appeal, *C v. H* [2009] NZCA 100, paras. 175-177 and 195-196 (Baragwanath J.); see also para. 31 (Chambers J.): "Revision of the text as drafted and agreed in 1980 is simply impracticable, given that any revisions would have to be agreed among such a large body of Contracting States. Therefore evolutions necessary to keep pace with social and other trends must be achieved by evolutions in interpretation and construction. This is a permissible exercise given the terms of the Vienna Convention on the Law of Treaties, which also came in force in 1980. Article 31 (3) (b) permits a construction that reflects 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'." Similarly, Canada, Supreme Court, *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, para. 129 (Cory J.).

[756] United Nations, *Treaty Series*, vol. 34, No. 541, p. 243.

[757] Germany, Federal Constitutional Court, BVerfGE, vol. 90, p. 286, at pp. 363-364, para. 276; *ibid*., vol. 104, p. 151, at pp. 206-207.

(20) Other decisions of domestic courts have confirmed that subsequent agreements and subsequent practice under articles 31, paragraph 3, and 32 do not necessarily support evolutive interpretations of a treaty. In *Eastern Airlines, Inc. v. Floyd et al.*, for example, the United States Supreme Court was confronted with the question of whether the term "bodily injury" in article 17 of the Warsaw Convention of 1929[758] covered not only physical but also purely mental injuries. The Court, taking account of the "post-1929 conduct" and "interpretations of the signatories", emphasized that, despite some initiatives to the contrary, most parties had always continued to understand that the term covered only bodily injuries.[759]

**Conclusion 9 [8]**
**Weight of subsequent agreements and subsequent practice as a means of interpretation**

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.

2. The weight of subsequent practice under article 31, paragraph 3 (b), depends, in addition, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

**Commentary**

(1) Draft conclusion 9 [8] identifies some criteria that may be helpful in determining the interpretative weight to be accorded to a specific subsequent agreement or subsequent practice in the process of interpretation in a particular case. Naturally, the weight accorded to subsequent agreements or subsequent practice must also be determined in relation to other means of interpretation (see draft conclusion 2 [1], paragraph 5).

*Paragraph 1 — weight: clarity, specificity and other factors*

(2) Paragraph 1 addresses the weight of a subsequent agreement or subsequent practice under article 31, paragraph 3, thus dealing with both subparagraphs (a) and (b) from a general point of view. Paragraph 1 specifies that the weight to be accorded to a subsequent agreement or subsequent practice as a means of interpretation depends, *inter alia*, on its clarity and specificity. The use of the term "*inter alia*" indicates that these criteria should not be seen as exhaustive. Other criteria may relate to the time when the agreement or practice occurred,[760] the emphasis given by the parties to a particular agreement or practice or the applicable burden of proof.

(3) The interpretative weight of subsequent agreements or practice in relation to other means of interpretation often depends on their clarity and specificity in relation to the treaty

[758] Convention for the Unification of Certain Rules regarding International Transport, League of Nations, *Treaty Series*, vol. CXXXVII, p. 11.

[759] United States of America, Supreme Court, *Eastern Airlines, Inc. v. Floyd et al.*, 499 U.S. 530, pp. 546-549; see also United Kingdom, House of Lords, *King v. Bristow Helicopters Ltd. (Scotland)* [2002] UKHL 7, paras. 98 and 125 (Lord Hope).

[760] In the case concerning the *Maritime Dispute (Peru v. Chile)*, the Court privileged the practice that was closer to the date of entry into force, *Maritime Dispute (Peru v. Chile)*, *Judgment*, *I.C.J. Reports 2014*, p. 3, at p. 50, para. 126.

concerned.[761] This is confirmed, for example, by decisions of the International Court of Justice, arbitral awards and reports of the WTO Panels and Appellate Body.[762] The award of the ICSID Tribunal in *Plama Consortium Limited v. Republic of Bulgaria* is instructive:

> "It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into. The Claimant has provided a very clear and insightful presentation of Bulgaria's practice in relation to the conclusion of investment treaties subsequent to the conclusion of the Bulgaria-Cyprus BIT in 1987. In the 1990s, after Bulgaria's communist regime changed, it began concluding BITs with much more liberal dispute resolution provisions, including resort to ICSID arbitration. However, that practice is not particularly relevant in the present case since subsequent negotiations between Bulgaria and Cyprus indicate that these Contracting Parties did not intend the MFN provision to have the meaning that otherwise might be inferred from Bulgaria's subsequent treaty practice. Bulgaria and Cyprus negotiated a revision of their BIT in 1998. The negotiations failed but specifically contemplated a revision of the dispute settlement provisions … It can be inferred from these negotiations that the Contracting Parties to the BIT themselves did not consider that the MFN provision extends to dispute settlement provisions in other BITs."[763]

(4) Whereas the International Court of Justice and arbitral tribunals tend to accord more interpretative weight to rather specific subsequent practice by States, the European Court of Human Rights often relies on broad comparative assessments of the domestic legislation or international positions adopted by States.[764] In this latter context, it should be borne in mind that the rights and obligations under human rights treaties must be correctly transformed, within the given margin of appreciation, into the law, the executive practice and international arrangements of the respective State party. For this purpose, sufficiently strong commonalities in the national legislation of States parties can be relevant for the determination of the scope of a human right or the necessity of its restriction. In addition, the character of certain rights or obligations sometimes speaks in favour of taking less specific practice into account. For example, in the case of *Rantsev v. Cyprus*, the Court held that:

> "It is clear from the provisions of these two [international] instruments that the Contracting States … have formed the view that only a combination of measures addressing all three aspects can be effective in the fight against trafficking … Accordingly, the duty to penalise and prosecute trafficking is only one aspect of member States' general undertaking to combat trafficking. The extent of the positive

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[761] Murphy, "The relevance of subsequent agreement and subsequent practice …" (footnote 642 above), p. 91.

[762] See, for example, *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 55, para. 38; *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France* (see footnote 532 above), p. 231, at p. 259, para. 74; WTO Panel Report, *United States — Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, WTO Appellate Body Report, *United States — Subsidies on Upland Cotton (US — Upland Cotton)*, WT/DS267/AB/R, adopted 21 March 2005, para. 625.

[763] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, *ICSID Review — Foreign Investment Law Journal*, vol. 20, No. 1 (Spring 2005), p. 262, at pp. 323-324, para. 195.

[764] See, for example, *Cossey v. the United Kingdom*, no. 10843/84, 27 September 1990, ECHR Series A no. 184, para. 40; *Tyrer v. the United Kingdom*, no. 5856/72, ECHR Series A, no. 26, para. 31; *Norris v. Ireland*, no. 10581/83, 26 October 1988, ECHR Series A no. 142, para. 46.

> obligations arising under Article 4 [prohibition of forced labour] must be considered within this broader context."[765]

(5) On the other hand, in the case of *Chapman v. the United Kingdom*, the Court observed "that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle",[766] but ultimately said that it was "not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation".[767]

*Paragraph 2 — weight: repetition of a practice*

(6) Paragraph 2 of draft conclusion 9 [8] deals only with subsequent practice under article 31, paragraph 3 (b), and specifies that the weight of subsequent practice also depends on whether and how it is repeated. This formula "whether and how it is repeated" brings in the elements of time and the character of a repetition. It indicates, for example, that, depending on the treaty concerned, something more than just a technical or unmindful repetition of a practice may contribute to its interpretative value in the context of article 31, paragraph 3 (b). The element of time and the character of the repetition also serves to indicate the "grounding" of a particular position of the parties regarding the interpretation of a treaty. Moreover, the non-implementation of a subsequent agreement may also suggest a lack of its weight as a means of interpretation under article 31, paragraph 3 (a).[768]

(7) The question of whether "subsequent practice" under article 31, paragraph 3 (b),[769] requires more than a one-off application of the treaty was addressed by the WTO Appellate Body in *Japan — Alcoholic Beverages II*:

> "… subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation".[770]

(8) This definition suggests that subsequent practice under article 31, paragraph 3 (b), requires more than one "act or pronouncement" regarding the interpretation of a treaty; rather action of such frequency and uniformity that it warrants a conclusion that the parties have reached a settled agreement regarding the interpretation of the treaty. Such a threshold would imply that subsequent practice under article 31, paragraph 3 (b), requires a broad-based, settled and qualified form of collective practice in order to establish agreement among the parties regarding interpretation.

(9) The International Court of Justice, on the other hand, has applied article 31, paragraph 3 (b), more flexibly, without adding further conditions. This is true, in particular, for its judgment in the case of *Kasikili/Sedudu Island*.[771] Other international courts have

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[765] *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010, ECHR 2010 (extracts), para. 285; see also paras. 273-274.

[766] *Chapman v. the United Kingdom* [GC], no. 27238/95, 18 January 2001, ECHR 2001-I, para. 93.

[767] *Ibid*., para. 94.

[768] *Pulp Mills on the River Uruguay* (see footnote 395 above), at p. 63, para. 131.

[769] See above draft conclusion 4, para. 2.

[770] WTO Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted on 1 November 1996, sect. E, pp. 12-13 (footnotes omitted).

[771] *Kasikili/Sedudu Island* (see footnote 395 above), at pp. 1075-1076, paras. 47-50 and p. 1087, para. 63; *Territorial Dispute* (see footnote 395 above), at pp. 34-37, paras. 66-71.

mostly followed the approach of the International Court of Justice. This is true for the Iran-United States Claims Tribunal[772] and the European Court of Human Rights.[773]

(10) The difference between the standard formulated by the WTO Appellate Body, on the one hand, and the approach of the International Court of Justice, on the other, is, however, more apparent than real. The WTO Appellate Body seems to have taken the "concordant, common and consistent" formula from a publication[774] that stated that "the value of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent".[775] The formula "concordant, common and consistent" thus provides an indication as to the circumstances under which subsequent practice under article 31, paragraph 3 (b), has more or less weight as a means of interpretation in a process of interpretation, rather than require any particular frequency in the practice.[776] The WTO Appellate Body itself on occasion has relied on this nuanced view.[777]

(11) The Commission, while finding that the formula "concordant, common and consistent" may be useful for determining the weight of subsequent practice in a particular case, also considers it as not being sufficiently well established to articulate a minimum threshold for the applicability of article 31, paragraph 3 (b), and as carrying the risk of being misconceived as overly prescriptive. Ultimately, the Commission continues to find that: "The value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms."[778] This implies that a one-off practice of the parties that establishes their agreement regarding the interpretation needs to be taken into account under article 31, paragraph 3 (b).[779]

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[772] Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (see footnote 537 above), p. 77, at pp. 116-126, paras. 109-133.

[773] *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, ECHR Series A no. 161, para. 103; *Loizidou v. Turkey* (preliminary objections), no. 15318/89, 23 March 1995, ECHR Series A no. 310, paras. 73 and 79-82; *Banković et al. v. Belgium and 16 other contracting States* (dec.) [GC], no. 52207/99, ECHR 2001-XII, paras. 56 and 62; concerning the jurisprudence of ICSID tribunals, see Fauchald (footnote 498 above), p. 345; see also A. Roberts, "Power and persuasion in investment treaty interpretation: the dual role of States", *American Journal of International Law*, vol. 104, 2010, pp. 207-215.

[774] Sinclair, *The Vienna Convention …* (see footnote 393 above), p. 137; see also Yasseen, "L'interprétation des traités…" (see footnote 393 above), pp. 48-49; whilst "commune" is taken from the work of the International Law Commission, "d'une certaine constance" and "concordante" are conditions that Yasseen derives through further reasoning; see *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 98-99, paras. 17-18 and p. 221-222, para. 15.

[775] Sinclair, *The Vienna Convention …* (see footnote 393 above); Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (see footnote 537 above), p. 77, at p. 118, para. 114.

[776] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, pp. 53-264, at p. 187, para. 169; J.-P Cot, "La conduite subséquente des parties a un traité", *Revue générale de droit international public*, vol. 70, 1966, pp. 644-647 ("valeur probatoire"); Distefano, "La pratique subséquente …" (see footnote 573 above), p. 46; Dörr, "Article 31 …" (see footnote 439 above), p. 556, para. 79; see also the oral argument before the International Court of Justice in *Maritime Dispute (Peru v. Chile)*, CR 2012/33, pp. 32-36, paras. 7-19 (Wood), available from www.icj-cij.org/docket/files/137/17218.pdf and CR 2012/36, pp. 13-18, paras. 6-21 (Wordsworth), available from www.icj-cij.org/docket/files/137/17234.pdf.

[777] WTO Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, 22 June 1998, para. 93.

[778] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 222, para. (15); Cot, "La conduite subséquente des parties …" (see footnote 776 above), p. 652.

[779] In practice, a one-off practice will often not be sufficient to establish an agreement of the parties regarding a treaty's interpretation, as a general rule, however, subsequent practice under article 31,

*Paragraph 3 — weight of other subsequent practice under article 32*

(12) Paragraph 3 of draft conclusion 9 [8] addresses the weight that should be accorded to "other subsequent practice" under article 32 (see draft conclusion 4, paragraph 3). It does not address when and under which circumstances such practice can be considered. The WTO Appellate Body has emphasized, in a comparable situation, that those two issues must be distinguished from each other:

> "… we consider that the European Communities conflates the preliminary question of what may qualify as a 'circumstance' of a treaty's conclusion with the separate question of ascertaining the degree of relevance that may be ascribed to a given circumstance, for purposes of interpretation under Article 32."[780]

The Appellate Body also held that:

> "… first, the Panel did *not* examine the classification practice in the European Communities during the Uruguay Round negotiations *as a supplementary means of interpretation* within the meaning of Article 32 of the *Vienna Convention*; and, second, the value of the classification practice as a supplementary means of interpretation …".[781]

In order to determine the "relevance" of such subsequent practice, the Appellate Body referred to "objective factors":

> "These include the type of event, document, or instrument and its legal nature; temporal relation of the circumstance to the conclusion of the treaty; actual knowledge or mere access to a published act or instrument; subject matter of the document, instrument, or event in relation to the treaty provision to be interpreted; and whether or how it was used or influenced the negotiations of the treaty."[782]

(13) Whereas the Appellate Body did not use the term "specificity", it referred to the criteria mentioned above. Instead of clarity, the Appellate Body spoke of "consistency" and stated that consistency should not set a benchmark but rather determine the degree of relevance. "Consistent prior classification practice may often be significant. Inconsistent classification practice, however, *cannot* be relevant in interpreting the meaning of a tariff concession".[783]

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paragraph 3 (b), does not require any repetition but only an agreement regarding the interpretation. The likelihood of an agreement established by an one-off practice thus depends on the act and the treaty in question, see E. Lauterpacht, "The development of the law of international organization by the decisions of international tribunals", *Recueil des cours ... 1976*, vol. 152, pp. 377-466, at p. 457; Linderfalk, *On the Interpretation of Treaties* (footnote 446 above), p. 166; C.F. Amerasinghe, "Interpretation of texts in open international organizations", *British Yearbook of International Law 1994*, vol. 65, p. 175, at p. 199; Villiger argues in favour of a certain frequency, but emphasizes that the important point is the establishment of an agreement, Villiger, *Commentary ...* (see footnote 414 above), p. 431, para. 22. Yasseen and Sinclair write that practice cannot "in general" be established by one single act, Yasseen, "L'interprétation des traités …" (see footnote 393 above), p. 47; Sinclair, *The Vienna Convention ...* (see footnote 393 above), p. 137; *cf*. Nolte, "Subsequent agreements and subsequent practice of States …" (see footnote 440 above), at p. 310.

780 WTO Appellate Body Report, *EC — Chicken Cuts*, WT/DS269/AB/R and Corr.1, and WT/DS286/AB/R and Corr.1, adopted 27 September 2005, para. 297.

781 WTO Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, adopted 22 June 1998, para. 92 (footnote omitted and original emphasis).

782 *EC — Chicken Cuts* (see footnote 780 above), para. 290 (footnote omitted).

783 *Ibid*., para. 307 (footnote omitted and original emphasis); *cf*. also *EC — Computer Equipment* (see footnote 781 above), para. 95.

(14) A further factor that helps determine the relevance under article 32 may be the number of affected states that engage in that practice. The Appellate Body has stated:

> "To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance."[784]

**Conclusion 10 [9]**
**Agreement of the parties regarding the interpretation of a treaty**

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

**Commentary**

*Paragraph 1, first sentence — "common understanding"*

(1) The first sentence of paragraph 1 sets forth the principle that an "agreement" under article 31, paragraph 3 (a) and (b), requires a common understanding by the parties regarding the interpretation of a treaty. In order for that common understanding to have the effect provided for under article 31, paragraph 3, the parties must be aware of it and accept the interpretation contained therein. While the difference regarding the form of an "agreement" under subparagraph (a) and subparagraph (b) has already been set out in draft conclusion 4 and its accompanying commentary,[785] paragraph 1 of draft conclusion 10 [9] intends to capture what is common in the two subparagraphs, which is the agreement between the parties, in substance, regarding the interpretation of the treaty.

(2) The element that distinguishes subsequent agreements and subsequent practice as authentic means of interpretation under article 31, paragraph 3 (a) and (b), on the one hand, and other subsequent practice as a supplementary means of interpretation under article 32,[786] on the other, is the "agreement" of all the parties regarding the interpretation of the treaty. It is this agreement of the parties that provides the means of interpretation under article 31, paragraph 3,[787] their specific function and weight for the interactive process of interpretation under the general rule of interpretation of article 31.[788]

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[784] *EC — Computer Equipment* (see footnote 781 above), para. 93 (original emphasis).
[785] See above commentary to draft conclusion 4, para. (10).
[786] See above draft conclusions 3 [2] and 4, para. 3.
[787] See Crawford, "A consensualist interpretation of article 31 (3) …" (footnote 606 above), p. 30: "There is no reason to think that the word 'agreement' in para. (b) has any different meaning as compared to the meaning it has in para. (a)."
[788] See above commentary to draft conclusion 2 [1], paras. (12)-(15); article 31 must be "read as a whole" and conceives of the process of interpretation as "a single combined operation" and is "not laying down a legal hierarchy of norms for the interpretation of treaties", *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 219, para. (8), and p. 220, para. (9).

(3) Conflicting positions expressed by different parties to a treaty preclude the existence of an agreement. This has been confirmed, *inter alia*, by the Arbitral Tribunal in the case of *German External Debts*, which held that a "tacit subsequent understanding" could not be derived from a number of communications by administering agencies since one of those agencies, the Bank of England, had expressed a divergent position.[789]

(4) However, agreement is only absent to the extent that the positions of the parties conflict and for as long as their positions conflict. The fact that parties apply a treaty differently does not, as such, permit a conclusion that there are conflicting positions regarding the interpretation of the treaty. Such a difference may indicate a disagreement over the one correct interpretation, but it may also simply reflect a common understanding that the treaty permits a certain scope for the exercise of discretion in its application.[790] Treaties that are characterized by considerations of humanity or other general community interests, such as treaties relating to human rights or refugees, tend to aim at a uniform interpretation but also to leave a margin of appreciation for the exercise of discretion by States.

(5) Whereas equivocal conduct by one or more parties will normally prevent the identification of an agreement,[791] not every element of the conduct of a State that does not fully fit into a general picture necessarily renders the conduct of that State equivocal. The Court of Arbitration in the *Beagle Channel* case, for example, found that although at one point the parties had a difference of opinion regarding the interpretation of a treaty, that fact did not necessarily establish that the lack of agreement was permanent:

> "In the same way, negotiations for a settlement, that did not result in one, could hardly have any permanent effect. At the most they might temporarily have deprived the acts of the Parties of probative value in support of their respective interpretations of the Treaty, insofar as these acts were performed during the process of the negotiations. The matter cannot be put higher than that."[792]

(6) Similarly, in *Loizidou v. Turkey*, the European Court of Human Rights held that the scope of the restrictions that the parties could place on their acceptance of the competence of the Commission and the Court was "confirmed by the subsequent practice of the Contracting Parties", that is, "the evidence of a practice denoting practically universal agreement amongst Contracting Parties that Articles 25 and 46 … of the Convention do not permit territorial or substantive restrictions".[793] The Court, applying article 31, paragraph 3 (b), described "such a State practice" as being "uniform and consistent", despite the fact

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[789] *Case concerning the question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, Award of 16 May 1980, UNRIAA, vol. XIX, part III, pp. 67-145, pp. 103-104, para. 31; see also *EC — Computer Equipment* (footnote 781 above), para. 95; *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau* (footnote 730 above), at p. 175, para. 66.

[790] See above commentary to draft conclusion 7, paras. (12)-(15).

[791] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France* (see footnote 532 above), at p. 258, para. 70; Kolb, "La modification d'un traité …" (see footnote 695 above), p. 16.

[792] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, pp. 53-264, at p. 188, para. 171.

[793] *Loizidou v. Turkey* (preliminary objections), no. 15318/89, 23 March 1995, ECHR Series A no. 310, paras. 79 and 81.

that it simultaneously recognized that two States possibly constituted exceptions.[794] The decision suggests that interpreters, at least under the European Convention, possess some margin when assessing whether an agreement of the parties regarding a certain interpretation is established.[795]

(7) The term "agreement" in the 1969 Vienna Convention[796] does not imply any particular requirements of form,[797] including for an "agreement" under article 31, paragraph 3 (a) and (b).[798] The Commission, however, has noted that, in order to distinguish a subsequent agreement under article 31, paragraph 3 (a), and a subsequent practice that "establishes the agreement" of the parties under article 31, paragraph 3 (b), the former presupposes a "single common act".[799] There is no requirement that an agreement under article 31, paragraph 3 (a), be published or registered under Article 102 of the Charter of the United Nations.[800]

(8) For an agreement under article 31, paragraph 3, it is not sufficient that the positions of the parties regarding the interpretation of the treaty happen to overlap, the parties must also be aware of and accept that these positions are common. Thus, in the *Kasikili/Sedudu Island* case, the International Court of Justice required that, for practice to fall under article 31, paragraph 3 (b), the "authorities were fully aware of and accepted this as a confirmation of the Treaty boundary".[801] Indeed, only the awareness and acceptance of the position of the other parties regarding the interpretation of a treaty justifies the characterization of an agreement under article 31, paragraph 3 (a) or (b), as an "authentic" means of

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[794] *Ibid*., paras. 80 and 82; the case did not concern the interpretation of a particular human right, but rather the question of whether a State was bound by the Convention at all.

[795] The more restrictive jurisprudence of the WTO Dispute Settlement Body suggests that different interpreters may evaluate matters differently, see *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/R, adopted 9 May 2006, para. 7.218: "… even if it were established conclusively that all the 76 Members referred to by the European Communities have adopted a [certain] practice … this would only mean that a considerable number of WTO Members have adopted an approach different from that of the United States. … We note that one third party in this proceeding submitted arguments contesting the view of the European Communities … ."

[796] See articles 2, para. 1 (a), 3, 24, para. 2, 39-41, 58 and 60.

[797] See above commentary to draft conclusion 4, para. (5); confirmed by the Permanent Court of Arbitration in the *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award of 7 July 2014, available at www.pca-cpa.org/showfile.asp?fil_id=2705, p. 47, para. 165; Yasseen, "L'interprétation des traités …" (see footnote 393 above), p. 45; Distefano, "La pratique subséquente …" (see footnote 573 above), p. 47.

[798] See above commentary to draft conclusion 4, para. (5); Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 231-232 and 243-247; Aust, *Modern Treaty Law and Practice* (see footnote 525 above), p. 213; Dörr, "Article 31 …" (see footnote 439 above), p. 554, para. 75; R. Gardiner, "The Vienna Convention rules on treaty interpretation", in *The Oxford Guide to Treaties*, D.B. Hollis, ed. (Oxford, Oxford University Press, 2012), pp. 475 and 483.

[799] See above commentary to draft conclusion 4, para. (10); a "single common act" may also consist of an exchange of letters, see *European Molecular Biology Laboratory Arbitration (EMBL v. Germany)*, 29 June 1990, *International Law Reports*, vol. 105 (1997), p. 1, at pp. 54-56; Fox, "Article 31 (3) (a) and (b) …" (footnote 440 above), p. 63; Gardiner, *Treaty Interpretation* (footnote 392 above), pp. 248-249.

[800] Aust, "The theory and practice of informal international instruments" (see footnote 465 above), pp. 789-790.

[801] *Kasikili/Sedudu Island* (see footnote 395 above ), at p. 1094, para. 74 ("occupation of the island by the Masubia tribe") and pp. 1077, para. 55 ("Eason Report", which "appears never to have been made known to Germany"); Dörr, "Article 31 …" (see footnote 439 above), p. 560, para. 88.

interpretation.[802] In certain circumstances, the awareness and acceptance of the position of the other party or parties may be assumed, particularly in the case of treaties that are implemented at the national level.

*Paragraph 1, second sentence — possible legal effects of agreement under article 31, paragraph 3 (a) and (b)*

(9) The aim of the second sentence of paragraph 1 is to reaffirm that "agreement", for the purpose of article 31, paragraph 3, need not, as such, be legally binding,[803] in contrast to other provisions of the 1969 Vienna Convention in which the term "agreement" is used in the sense of a legally binding instrument.[804]

(10) This is confirmed by the fact that the Commission, in its final draft articles on the law of treaties, used the expression "any subsequent practice which establishes the understanding [emphasis added] of the parties".[805] The expression "understanding" indicates that the term "agreement" in article 31, paragraph 3, does not require that the parties thereby undertake or create any legal obligation existing in addition to, or independently of, the treaty.[806] The Vienna Conference replaced the expression "understanding" by the word "agreement" not for any substantive reason but "related to drafting only" in order to emphasize that the understanding of the parties was to be their "common" understanding.[807] An "agreement" under article 31, paragraph 3 (a), being distinguished from an agreement under article 31, paragraph 3 (b), only in form and not in substance, equally need not be legally binding.[808]

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[802] In this respect, the ascertainment of subsequent practice under article 31, para. 3 (b), may be more demanding than what the formation of customary international law requires, but see Boisson de Chazournes, "Subsequent practice, practices …" (footnote 415 above), pp. 53-55.

[803] See above commentary to draft conclusion 4, para. (6); P. Gautier, "Non-binding agreements", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), para. 14; Benatar, "From probative value to authentic interpretation …" (see footnote 440 above), at pp. 194-195; Aust, *Modern Treaty Law and Practice* (see footnote 525 above), p. 213; Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 244; see also Nolte, "Subsequent agreements and subsequent practice of States …" (footnote 440 above), p. 307, at p. 375.

[804] See articles 2, para. 1 (a), 3, 24, para. 2, 39-41, 58 and 60.

[805] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 222, para. (15).

[806] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, pp. 53-264, at p. 187, para. 169; *The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, 16 May 1980, *ibid*., vol. XIX, pp. 67-145, pp. 103-104, para. 31; Karl, *Vertrag und spätere Praxis …* (see footnote 454 above), pp. 190-195; Kolb, "La modification d'un traité …" (see footnote 695 above), pp. 25-26; Linderfalk, *On the Interpretation of Treaties* (see footnote 446 above), pp. 169-171.

[807] *Official Records of the United Nations Conference on the Law of Treaties …* (A/CONF.39/11) (see footnote 575 above), thirty-first meeting, 19 April 1968, p. 169, at para. 59 (Australia); P. Gautier, "Les accords informels et la Convention de Vienne sur le droit des traités entre États", in *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon*, N. Angelet, ed. (Brussels, Bruylant, 2007), pp. 425-454, at pp. 430-431 ("La lettre [a] du paragraphe 3 fait référence à un accord interprétatif et l'on peut supposer que le terme 'accord' est ici utilisé dans un sens générique, qui ne correspond pas nécessairement au 'traité' défini à l'article 2 de la convention de Vienne. Ainsi, l'accord interprétatif ultérieur pourrait être un accord verbal, voire un accord politique").

[808] See Gautier, "Non-binding agreements" (footnote 803 above), para. 14; Aust, *Modern Treaty Law and Practice* (see footnote 525 above), pp. 211, 213.

(11) It is thus sufficient that the parties, by a subsequent agreement or a subsequent practice under article 31, paragraph 3, attribute a certain meaning to the treaty[809] or, in other words, adopt a certain "understanding" of the treaty.[810] Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), even if they are not in themselves legally binding, can thus nevertheless, as means of interpretation, give rise to legal consequences as part of the process of interpretation according to article 31.[811] Accordingly, international courts and tribunals have not required that an "agreement" under article 31, paragraph 3, reflect the intention of the parties to create new, or separate, legally binding undertakings.[812] Similarly, memoranda of understanding have been recognized, on occasion, as "a potentially important aid to interpretation" — but "not a source of independent legal rights and duties".[813]

(12) Some members considered, on the other hand, that the term "agreement" has the same meaning in all provisions of the 1969 Vienna Convention. According to those members, this term designates any understanding that has legal effect between the States concerned and the case law referred to in the present commentary does not contradict this definition. Such a definition would not prevent taking into account, for the purpose of interpretation, a legally non-binding understanding under article 32.

*Paragraph 2 — forms of participation in subsequent practice*

(13) The first sentence of paragraph 2 confirms the principle that not all the parties must engage in a particular practice to constitute agreement under article 31, paragraph 3 (b). The second sentence clarifies that acceptance of such practice by those parties not engaged in the practice can under certain circumstances be brought about by silence or inaction.

(14) From the outset, the Commission has recognized that an "agreement" deriving from subsequent practice under article 31, paragraph 3 (b), can result, in part, from silence or

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[809] This terminology follows the commentary of guideline 1.2. (Definition of interpretative declarations) of the Commission's guide to practice on reservations to treaties (see *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10,* A/66/10/Add.1, paras. (18) and (19)).

[810] See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 221-222, paras. (15) and (16) (uses of the term "understanding" both in the context of what became article 31, para. 3 (a), as well as what became article 31, para. 3 (b)).

[811] *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges, Award on the First Question*, 30 November 1992, UNRIAA, vol. XXIV (Sales No. E/F.04.V.18), pp. 1-359, at p. 131, para. 6.7; Aust, "The theory and practice of informal international instruments" (see footnote 465 above), pp. 787 and 807; Linderfalk, *On the Interpretation of Treaties* (see footnote 446 above), p. 173; Hafner, "Subsequent agreements and practice …" (see footnote 655 above), pp. 110-113; Gautier, "Les accords informels et la Convention de Vienne …" (see footnote 807 above), p. 434.

[812] For example, "… pattern implying the agreement of the parties regarding its interpretation …" (WTO Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted 1 November 1996, section E, p. 13); or "… pattern … must imply *agreement* on the interpretation of the relevant provision" (WTO Panel Report, *European Communities and its member States — Tariff Treatment of Certain Information Technology Products*, WT/DS375/R, WT/DS376/R and WT/DS377/R, adopted 21 September 2010, para. 7.558); or "… practice [that] reflects an agreement as to the interpretation …" (Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (see footnote 537 above), p. 77, at p. 119, para. 116); or that "… State practice" was "… indicative of a lack of any apprehension on the part of the Contracting States …" (*Banković et al. v. Belgium and 16 other contracting States* (dec.) [GC], no. 52207/99, ECHR 2001-XII, para. 62).

[813] *United States-United Kingdom Arbitration concerning Heathrow Airport* (see footnote 811 above), at p. 131, para. 6.7; see also *Arbitration regarding the Iron Rhine* (see footnote 397 above), at p. 98, para. 157.

inaction by one or more parties. Explaining why it used the expression "the understanding of the parties" in draft article 27, paragraph 3 (b) (which later became "the agreement" in article 31, paragraph 3 (b) (see paragraph (10) above)) and not the expression "the understanding of *all* the parties", the Commission stated that:

> "It considered that the phrase 'the understanding of the parties' necessarily means 'the parties as a whole'. It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice."[814]

(15) The International Court of Justice has also recognized the possibility of expressing agreement regarding interpretation by silence or inaction by stating, in the case concerning the *Temple of Preah Vihear*, that "where it is clear that the circumstances were such as called for some reaction, within a reasonable period", the State confronted with a certain subsequent conduct by another party "must be held to have acquiesced".[815] This general proposition of the Court regarding the role of silence for the purpose of establishing agreement regarding the interpretation of a treaty by subsequent practice has been confirmed by later decisions,[816] and supported generally by writers.[817] The "circumstances" that will "call for some reaction" include the particular setting in which the States parties interact with each other in respect of the treaty.[818]

(16) The Court of Arbitration in the *Beagle Channel* case[819] dealt with the contention by Argentina that acts of jurisdiction by Chile over certain islands could not be counted as relevant subsequent conduct, since Argentina had not reacted to these acts. The Court, however, held:

> "The terms of the Vienna Convention do not specify the ways in which 'agreement' may be manifested. In the context of the present case the acts of jurisdiction were

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[814] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 222, para. (15).

[815] *Case concerning the Temple of Preah Vihear* (see footnote 488 above), at p. 23.

[816] See also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, p. 815, para. 30; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 410, para. 39; *Prosecutor v. Anto Furundžija* (see footnote 740 above), paras. 165 *et seq*., at para. 179; *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010, ECHR 2010 (extracts), para. 285; cautiously: WTO Appellate Body Report, *EC — Chicken Cuts* WT/DS269/AB/R and Corr.1, WT/DS286/AB/R and Corr.1, adopted 27 September 2005, para. 272; see, also, for a limited holding, Iran-United States Claims Tribunal, Award No. 30-16-3, *RayGo Wagner Equipment Company v. Iran Express Terminal Corporation*, *Iran-United States Claims Tribunal Reports*, vol. 2 (1983), p. 141, at p. 144; *The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, 16 May 1980, UNRIAA, vol. XIX, pp. 67-145, pp. 103-104, para. 31.

[817] Kamto, "La volonté de l'État en droit international" (see footnote 533 above), pp. 134-141; Yasseen, "L'interprétation des traités …" (see footnote 393 above), p. 49; Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 267; Villiger, *Commentary ...* (see footnote 414 above), p. 431, para. 22; Dörr, "Article 31 …" (see footnote 439 above), pp. 557 and 559, paras. 83 and 86.

[818] For example, when acting within the framework of an international organization, see *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 644, at pp. 675-676, paras. 99-101; Kamto, "La volonté de l'État en droit international" (see footnote 533 above), p. 136.

[819] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, pp. 53-264.

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> not intended to establish a source of title independent of the terms of the treaty; nor could they be considered as being in contradiction of those terms as understood by Chile. The evidence supports the view that they were public and well-known to Argentina, and that they could only derive from the Treaty. Under these circumstances the silence of Argentina permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves."[820]

In the same case, the Court of Arbitration considered that:

> "The mere publication of a number of maps of (as the Court has already shown) extremely dubious standing and value could not — even if they nevertheless represented the official Argentine view — preclude or foreclose Chile from engaging in acts that would, correspondingly, demonstrate her own view of what were her rights under the 1881 Treaty — nor could such publication of itself absolve Argentina from all further necessity for reaction in respect of those acts, if she considered them contrary to the Treaty."[821]

(17) The significance of silence also depends on the legal situation to which the subsequent practice by the other party relates and on the claim thereby expressed. Thus, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the International Court of Justice held that:

> "Some of these activities — the organization of public health and education, policing, the administration of justice — could normally be considered to be acts *à titre de souverain*. The Court notes, however, that, as there was a pre-existing title held by Cameroon in this area, the pertinent legal test is whether there was thus evidenced acquiescence by Cameroon in the passing of the title from itself to Nigeria."[822]

(18) This judgment suggests that in cases that concern treaties delimiting a boundary the circumstances will only very exceptionally call for a reaction with respect to conduct that runs counter to the delimitation. In such situations, there appears to be a strong presumption that silence or inaction does not constitute acceptance of a practice.[823]

(19) The relevance of silence or inaction for the establishment of an agreement regarding interpretation depends to a large extent on the circumstances of the specific case. Decisions of international courts and tribunals demonstrate that acceptance of a practice by one or more parties by way of silence or inaction is not easily established.

(20) International courts and tribunals, for example, have been reluctant to accept that parliamentary proceedings or domestic court judgments are considered as subsequent practice under article 31, paragraph 3 (b), to which other parties to the treaty would be

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[820] *Ibid*., at p. 187, para. 169 (a).

[821] *Ibid*., para. 171.

[822] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 352, para. 67.

[823] *Ibid*., at p. 351, para. 64: "… The Court notes, however, that now that it has made its findings that the frontier in Lake Chad was delimited …, it … follows that any Nigerian *effectivités* are indeed to be evaluated for their legal consequences as acts *contra legem*"; see also *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 586, para. 63; *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* (see footnote 730 above), at p. 181, para. 70.

expected to react, even if such proceedings or judgments had come to their attention through other channels, including by their own diplomatic service.[824]

(21) Further, even where a party, by its conduct, expresses a certain position towards another party (or parties) regarding the interpretation of a treaty, this does not necessarily call for a reaction by the other party or parties. In the *Kasikili/Sedudu Island* case, the International Court of Justice held that a State that did not react to the findings of a joint commission of experts, which had been entrusted by the parties to determine a particular factual situation with respect to a disputed matter, did not thereby provide a ground for the conclusion that an agreement had been reached with respect to the dispute.[825] The Court found that the parties had considered the work of the experts as being merely a preparatory step for a separate decision subsequently to be taken at the political level. At a more general level, the WTO Appellate Body has held that:

> "… in specific situations, the 'lack of reaction' or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties. Such situations may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it."[826]

The International Tribunal for the Law of the Sea has confirmed this approach. Taking into account the practice of States in interpreting articles 56, 58 and 73 of the United Nations Convention on the Law of the Sea, the Tribunal stated:

> "The Tribunal acknowledges that the national legislation of several States, not only in the West African region, but also in some other regions of the world, regulates bunkering of foreign vessels fishing in their exclusive economic zones in a way comparable to that of Guinea-Bissau. The Tribunal further notes that there is no manifest objection to such legislation and that it is, in general, complied with."[827]

(22) Decisions by domestic courts have also recognized that silence on the part of a party to a treaty can only be taken to mean acceptance "if the circumstances call for some reaction".[828] Such circumstances have sometimes been recognized in certain cooperative contexts, for example under a bilateral treaty that provides for a particularly close form of cooperation.[829] This may be different if the cooperation that is envisaged by the treaty takes place in the context of an international organization whose rules preclude using the practice of the parties, and their silence for the purpose of interpretation.[830]

(23) The possible legal significance of silence or inaction in the face of a subsequent practice of a party to a treaty is not limited to contributing to a possible underlying common

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[824] *Sovereignty over Pulau Ligitan and Pulau Sipadan* (see footnote 395 above), at p. 650, para. 48; WTO Appellate Body Report, *EC — Chicken Cuts*, WT/DS269/AB/R and Corr.1, WT/DS286/AB/R and Corr.1, adopted 27 September 2005, para. 334 ("… mere access to a published judgment cannot be equated with acceptance …").

[825] *Kasikili/Sedudu Island* (see footnote 395 above), at pp. 1089-1091, paras. 65-68.

[826] WTO Appellate Body Report, *EC — Chicken Cuts* (see footnote 824 above), para. 272 (footnote omitted).

[827] *The M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, *ITLOS Reports 2014*, para. 218.

[828] Switzerland, Federal Court, judgment of 17 February 1971, BGE, vol. 97 I, p. 359, at pp. 370-371.

[829] See United States, Supreme Court, *O'Connor et ux. v. United States,* 479 U.S. 27, at pp. 33-35; Germany, Federal Constitutional Court, BVerfGE, vol. 59, p. 63, at pp. 94-95.

[830] See United Kingdom, Supreme Court: on the one hand, *Assange v. The Swedish Prosecution Authority* [2012] UKSC 22, paras. 68-71 (Lord Phillips); and, on the other, *Bucnys v. Ministry of Justice, Lithuania* [2013] UKSC 71, paras. 39-43 (Lord Mance).

agreement, but may also play a role for the operation of non-consent-based rules, such as estoppel, preclusion or prescription.[831]

(24) Once established, an agreement between the parties under article 31, paragraph 3 (a) and (b), can eventually be terminated. The parties may replace it by another agreement with a different scope or content under article 31, paragraph 3. In this case, the new agreement replaces the previous one as an authentic means of interpretation from the date of its existence, at least with effect for the future.[832] Such situations, however, should not be lightly assumed as States usually do not change their interpretation of a treaty according to short-term considerations.

(25) It is also possible for a disagreement to arise between the parties regarding the interpretation of a treaty after they had reached a subsequent agreement regarding such interpretation. Such a disagreement, however, normally will not replace the prior subsequent agreement, since the principle of good faith prevents a party from simply disavowing the legitimate expectations that have been created by a common interpretation.[833] On the other hand, clear expressions of disavowal by one party of a previous understanding arising from common practice "do reduce in a major way the significance of the practice after that date", without, however, diminishing the significance of the previous common practice.[834]

## Part Four
## Specific aspects

### Conclusion 11 [10]
### Decisions adopted within the framework of a Conference of States Parties

1. A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

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831 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151, at p. 182 (Dissenting Opinion of Judge Spender).

832 Hafner, "Subsequent agreements and practice …" (see footnote 655 above), p. 118; this means that the interpretative effect of an agreement under article 31, para. 3, does not necessarily go back to the date of the entry into force of the treaty, as Yasseen maintains, "L'interprétation des traités…" (see footnote 393 above), p. 47.

833 Karl, *Vertrag und spätere Praxis …* (see footnote 454 above), p. 151.

834 *Maritime Dispute (Peru v. Chile), Judgment*, *I.C.J. Reports 2014*, p. 3, at p. 52, para. 142.

**Commentary**

(1) Draft conclusion 11 [10] addresses a particular form of action by States that may result in a subsequent agreement or subsequent practice under article 31, paragraph 3, or subsequent practice under article 32, namely, decisions adopted within the framework of Conferences of States Parties.[835]

*Paragraph 1 — definition of Conferences of States Parties*

(2) States typically use Conferences of States Parties as a form of action for the continuous process of multilateral treaty review and implementation.[836] Such Conferences can be roughly divided into two basic categories. First, some Conferences are actually an organ of an international organization within which States parties act in their capacity as members of that organ (for example, meetings of the States parties of the World Trade Organization, the Organization for the Prohibition of Chemical Weapons or the International Civil Aviation Organization).[837] Such Conferences of States Parties do not fall within the scope of draft conclusion 11 [10], which does not address the subsequent practice of and within international organizations.[838] Second, other Conferences of States Parties are convened pursuant to treaties that do not establish an international organization; rather, the treaty simply provides for more or less periodic meetings of the States parties for their review and implementation. Such review conferences are frameworks for States parties' cooperation and subsequent conduct with respect to the treaty. Either type of Conference of States Parties may also have specific powers concerning amendments and/or the adaptation of treaties. Examples include the review conference process of the 1972 Biological Weapons Convention,[839] the Review Conference under article VIII, paragraph 3, of the 1968 Non-Proliferation Treaty,[840] and Conferences of States Parties established by

[835] Other designations include: Meetings of the Parties or Assemblies of the States Parties.

[836] See V. Röben, "Conference (Meeting) of States Parties", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), p. 605; R.R. Churchill and G. Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law", *American Journal of International Law*, vol. 94, No. 4 (2000), pp. 623-659; J. Brunnée, "COPing with consent: law-making under multilateral environmental agreements", *Leiden Journal of International Law*, vol. 15, No. 1 (2002), pp. 1-52; A. Wiersema, "The new international law-makers? Conference of the Parties to multilateral environmental agreements", *Michigan Journal of International Law*, vol. 31, No. 1 (2009), pp. 231-287; L. Boisson de Chazournes, "Environmental treaties in time", *Environmental Policy and Law*, vol. 39, No. 6 (2009), pp. 293-298.

[837] Marrakesh Agreement establishing the World Trade Organization (1994) (see footnote 445 above); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993) (see footnote 545 above); Convention on International Civil Aviation (Chicago Convention, 1944), United Nations, *Treaty Series*, vol. 15, No. 102, p. 295.

[838] See draft conclusion 12 [11] below.

[839] See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972) (see footnote 545 above), art. XI. According to this mechanism, States parties meeting in a review conference shall "… review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention … are being realised. Such review shall take into account any new scientific and technological developments relevant to the Convention" (art. XII).

[840] Treaty on the Non-Proliferation of Nuclear Weapons (1968), United Nations, *Treaty Series*, vol. 729, No. 10485, p. 161; art. VIII, para. 3, establishes that a review conference shall be held five years after its entry into force, and, if so decided, at intervals of five years thereafter "… in order to review the operation of this Treaty with a view to assuring that the purposes of the preamble and the provisions of the Treaty are being realised". By way of such decisions, States parties review the operation of the

international environmental treaties.[841] The International Whaling Commission under the International Convention for the Regulation of Whaling[842] is a borderline case between the two basic categories of Conferences of States Parties and its subsequent practice was considered in the judgment of the International Court of Justice in the *Whaling in the Antarctic* case.[843]

(3) Since Conferences of States Parties are usually established by treaties they are, in a sense, "treaty bodies". However, they should not be confused with bodies that are comprised of independent experts or bodies with a limited membership. Conferences of States Parties are more or less periodical meetings that are open to all of the parties of a treaty.

(4) In order to acknowledge the wide diversity of Conferences of States Parties and the rules under which they operate, paragraph 1 provides a broad definition of the term "Conference of States Parties" for the purpose of these draft conclusions, which only excludes action of States as members of an organ of an international organization (which will be the subject of a later draft conclusion).

*Paragraph 2, first sentence — legal effect of decisions*

(5) The first sentence of paragraph 2 recognizes that the legal significance of any acts undertaken by Conferences of States Parties depends, in the first instance, on the rules that govern the Conferences of States Parties, notably the constituent treaty and any applicable rules of procedure. Conferences of States Parties perform a variety of acts, including reviewing the implementation of the treaty, reviewing the treaty itself and decisions under amendment procedures.[844]

(6) The powers of a Conference of States Parties can be contained in general clauses or in specific provisions, or both. For example, article 7, paragraph 2, of the United Nations Framework Convention on Climate Change begins with the following general language,

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Treaty on the Non-Proliferation of Nuclear Weapons, article by article, and formulate conclusions and recommendations on follow-on actions.

[841] Examples include the Conference of the Parties of the United Nations Framework Convention on Climate Change (1992) (United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107), the CMP Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol, 1997) (United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 161) and the Conference of the Contracting Parties of the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention, 1971) (United Nations, *Treaty Series*, vol. 996, No. 14583, p. 245).

[842] The Convention is often described as establishing an international organization, but it does not do so clearly, and it provides the International Whaling Commission with features that fit the present definition of a Conference of States Parties.

[843] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 248, para. 46.

[844] Convention on Wetlands of International Importance especially as Waterfowl Habitat: art. 6, para. 1, on review functions and art. 10 *bis*, on amendments; United Nations Framework Convention on Climate Change, art. 7, para. 2, on review powers, and art. 15, on amendments; Kyoto Protocol, art. 13, para. 4, on review powers of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, art. 20 on amendment procedures; Convention on International Trade in Endangered Species of Wild Fauna and Flora (United Nations, *Treaty Series*, vol. 993, No. 14537, p. 243), art. XI on Conference of the Parties, and art. XVII on amendment procedures; Treaty on the Non-Proliferation of Nuclear Weapons; World Health Organization Framework Convention on Tobacco Control (United Nations, *Treaty Series*, vol. 2302, No. 41032, p. 166), art. 23, para. 5 (review powers), art. 28 (amendments) and art. 33 (protocols).

before enumerating 13 specific tasks for the Conference, one of which concerns examining the obligations of the Parties under the treaty:

> "The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention."

(7) Specific provisions contained in various treaties refer to the Conference of the Parties proposing "guidelines" for the implementation of particular treaty provisions[845] or defining "the relevant principles, modalities, rules and guidelines" for a treaty scheme.[846]

(8) Amendment procedures (in a broad sense of the term) include procedures by which the primary text of the treaty may be amended (the result of which mostly requires ratification by States parties according to their constitutional procedures), as well as tacit acceptance and opt-out procedures[847] that commonly apply to annexes, containing lists of substances, species or other elements that need to be updated regularly.[848]

(9) As a point of departure, paragraph 2 provides that the legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty in question and any applicable rules of procedure. The word "primarily" leaves room for subsidiary rules "unless the treaty otherwise provides" (see for example, articles 16, 20, 22, paragraph 1, 24, 70, paragraph 1, and 72, paragraph 1, of the 1969 Vienna Convention). The word "any" clarifies that rules of procedure of Conferences of States Parties, if they exist, will apply, given that there may be situations where such conferences operate with no specifically adopted rules of procedure.[849]

*Paragraph 2, second sentence — decisions as possibly embodying a subsequent agreement or subsequent practice*

(10) The second sentence of paragraph 2 recognizes that decisions of Conferences of States Parties may constitute subsequent agreement or subsequent practice for treaty interpretation under articles 31 and 32 of the 1969 Vienna Convention. Decisions adopted within the framework of Conferences of States Parties can perform an important function for determining the Parties' common understanding of the meaning of the treaty.

(11) Decisions of Conferences of States Parties, *inter alia*, may constitute or reflect subsequent agreements under article 31, paragraph 3 (a), by which the parties interpret the underlying treaty. For example, the Biological Weapons Convention Review Conference has regularly adopted "understandings and additional agreements" regarding the interpretation of the Convention's provisions. These agreements have been adopted by States parties within the framework of the review conferences, by consensus, and they "have evolved across all articles of the treaty to address specific issues as and when they

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[845] Arts. 7 and 9 of the World Health Organization Framework Convention on Tobacco Control.

[846] Art. 17 of the Kyoto Protocol provides an example, see Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements …" (footnote 836 above), p. 639; J. Brunnée, "Reweaving the fabric of international law? Patterns of consent in environmental framework agreements", in *Developments of International Law in Treaty Making*, R. Wolfrum and V. Röben, eds. (Berlin, Springer, 2005), pp. 110-115.

[847] See J. Brunnée, "Treaty amendments", in Hollis, *The Oxford Guide to Treaties* (footnote 798 above), pp. 354-360.

[848] *Ibid*.

[849] This is the case, for example, for the United Nations Framework Convention on Climate Change.

arose".[850] Through these understandings, States parties interpret the provisions of the Convention by defining, specifying or otherwise elaborating on the meaning and scope of the provisions, as well as through the adoption of guidelines on their implementation. The Biological Weapons Convention Implementation and Support Unit[851] defines an "additional agreement" as one which:

> (i) Interprets, defines or elaborates the meaning or scope of a provision of the Convention; or
>
> (ii) Provides instructions, guidelines or recommendations on how a provision should be implemented.[852]

(12) Similarly, the Conference of States Parties under the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention)[853] has adopted resolutions interpreting that Convention. The IMO Sub-Division for Legal Affairs, upon a request from the governing bodies, opined as follows in relation to an "interpretative resolution" of the Conference of States Parties under the London Dumping Convention:

> "According to article 31 (3) (a) of the Vienna Convention on the Law of Treaties … subsequent agreements between the Parties shall be taken into account in the interpretation of a treaty. The article does not provide for a specific form of the subsequent agreement containing such interpretation. This seems to indicate that, provided its intention is clear, the interpretation could take various forms, including a resolution adopted at a meeting of the Parties, or even a decision recorded in the summary records of a meeting of the Parties."[854]

(13) In a similar vein, the World Health Organization (WHO) Legal Counsel has stated in general terms that:

> "Decisions of the Conference of the Parties, as the supreme body comprising all Parties to the FCTC, undoubtedly represent a 'subsequent agreement between the Parties regarding the interpretation of the treaty,' as stated in Article 31 of the Vienna Convention."[855]

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[850] See P. Millett, "The Biological Weapons Convention: securing biology in the twenty-first century", *Journal of Conflict and Security Law*, vol. 15, No. 1 (2010), pp. 25-43, at p. 33.

[851] The "Implementation Support Unit" was created by the Conference of States Parties, in order to provide administrative support to the Conference, and to enhance confidence-building measures among States parties (see Final Document of the Sixth Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC/CONF.VI/6), Part. III (decisions and recommendations), para. 5).

[852] See background information document submitted by the Implementation and Support Unit, prepared for the Seventh Review Conference of the States Parties to the Convention, entitled "Additional understandings and agreements reached by previous Review Conferences relating to each article of the Convention" (BWC/CONF.VII/INF.5) (updated later to include the understandings and agreements reached by that Conference, Geneva, 2012).

[853] United Nations, *Treaty Series*, vol. 1046, No. 15749, p. 120.

[854] Agenda item 4 (Ocean fertilization), submitted by the Secretariat on procedural requirements in relation to a decision on an interpretive resolution: views of the IMO Sub-Division of Legal Affairs, document LC 33/J/6, para. 3.

[855] See Conference of the Parties to the World Health Organization Framework Convention on Tobacco Control, Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products, "Revised Chairperson's text on a protocol on illicit trade in tobacco products, and general debate: legal advice on the scope of the protocol", note by the WHO Legal Counsel on scope of the protocol

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(14) Commentators have also viewed decisions of Conferences of States Parties as being capable of embodying subsequent agreements[856] and have observed that:

> "Such declarations are not legally binding in and of themselves, but they may have juridical significance, especially as a source of authoritative interpretations of the treaty."[857]

(15) The International Court of Justice has held with respect to the role of the International Whaling Commission under the International Convention for the Regulation of Whaling:

> "Article VI of the Convention states that '[t]he Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention'. These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule."[858]

(16) The following examples from the practice of Conferences of States Parties support the proposition that decisions by such Conferences may embody subsequent agreements under article 31, paragraph 3 (a).

(17) Article I, paragraph 1, of the Biological Weapons Convention provides that States parties undertake never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

> "microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes."

(18) At the third Review Conference (1991), States parties specified that the prohibitions established in this provision relate to "microbial or other biological agents or toxins harmful to plants and animals, as well as humans".[859]

(19) Article 4, paragraph 9, of the Montreal Protocol on Substances that Deplete the Ozone Layer[860] has given rise to a debate about the definition of its term "State not party to this Protocol". According to Article 4, paragraph 9:

> "For the purposes of this Article, the term 'State not party to this Protocol' shall include, with respect to a particular controlled substance, a State or regional economic integration organization that has not agreed to be bound by the control measures in effect for that substance."

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on illicit trade in tobacco products (FCTC/COP/INB-IT/3/INF.DOC./6) annex, para. 8; S.F. Halabi, "The World Health Organization's Framework Convention on Tobacco Control: an analysis of guidelines adopted by the Conference of the Parties", *Georgia Journal of International and Comparative Law*, vol. 39 (2010), pp. 121-183.

856 D.H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (Oxford, Oxford University Press, 2011), p. 83 (with respect to the Non-Proliferation Treaty); Aust, *Modern Treaty Law and Practice* (see footnote 525 above), pp. 213-214.

857 B.M. Carnahan, "Treaty review conferences", *American Journal of International Law*, vol. 81, No. 1 (1987), pp. 226-230, at p. 229.

858 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 248, para. 46.

859 Final Declaration of the Third Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Geneva, 9-27 September 1991 (BWC/CONF.III/23, part II).

860 United Nations, *Treaty Series*, vol. 1522, No. 26369, p. 3.

(20) In the case of hydro chlorofluorocarbons, two relevant amendments to the Montreal Protocol[861] impose obligations that raised the question of whether a State, in order to be "not party to this Protocol", has to be a non-party with respect to both amendments. The Meeting of the Parties decided that:

> "The term 'State not party to this Protocol' includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments."[862]

(21) Whereas the acts that are the result of a tacit acceptance procedure[863] are not, as such, subsequent agreements by the parties under article 31, paragraph 3 (a), they can, in addition to their primary effect under the treaty, under certain circumstances imply such a subsequent agreement. One example concerns certain decisions of the Conference of the Parties to the London Dumping Convention. At its sixteenth meeting, held in 1993, the Consultative Meeting of Contracting Parties adopted three amendments to annex I by way of the tacit acceptance procedure provided for in the Convention.[864] As such, these amendments were not subsequent agreements. They did, however, also imply a wide-ranging interpretation of the underlying treaty itself.[865] The amendment refers to and builds on a resolution that was adopted by the Consultative Meeting held three years earlier, which had established the agreement of the parties that: "The London Dumping Convention is the appropriate body to address the issue of low-level radioactive waste disposal into sub-sea-

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[861] Copenhagen Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (1992), United Nations, *Treaty Series*, vol. 1785, No. 26369, p. 517; and Beijing Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (1999), *ibid*., vol. 2173, No. 26369, p. 183.

[862] For details, see decision XV/3 on obligations of parties to the 1999 Beijing Amendment under art. 4 of the Montreal Protocol with respect to hydrochlorofluorocarbons; the definition itself is formulated as follows: "… (a) The term 'State not party to this Protocol' in article 4, paragraph 9, does not apply to those States operating under article 5, paragraph 1, of the Protocol until January 1, 2016 when, in accordance with the Copenhagen and Beijing Amendments, hydrochlorofluorocarbon production and consumption control measures will be in effect for States that operate under article 5, paragraph 1, of the Protocol; (b) The term 'State not party to this Protocol' includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments; (c) Recognizing, however, the practical difficulties imposed by the timing associated with the adoption of the foregoing interpretation of the term 'State not party to this Protocol,' paragraph 1 (b) shall apply unless such a State has by 31 March 2004: (i) Notified the Secretariat that it intends to ratify, accede or accept the Beijing Amendment as soon as possible; (ii) Certified that it is in full compliance with articles 2, 2A to 2G and article 4 of the Protocol, as amended by the Copenhagen Amendment; (iii) Submitted data on (i) and (ii) above to the Secretariat, to be updated on 31 March 2005, in which case that State shall fall outside the definition of 'State not party to this Protocol' until the conclusion of the Seventeenth Meeting of the Parties" (Report of the 15th meeting of the State Parties to the Montreal Protocol on Substances that deplete the Ozone Layer (UNEP/OzL.Pro.15/9), chap. XVIII. sect. A, decision XV/3, para. 1).

[863] See above para. (8) of the present commentary.

[864] See London Sixteenth Consultative Meeting of the Contracting Parties, and resolutions LC.49 (16), LC.50 (16) and LC.51 (16) (United Nations, *Treaties Series*, vol. 1775, No. 15749, p. 395). First, the meeting decided to amend the phasing-out of the dumping of industrial waste by 31 December 1995. Second, it banned the incineration at sea of industrial waste and sewage sludge. And, finally, it decided to replace para. 6 of annex I, banning the dumping of radioactive waste or other radioactive matter (see also "Dumping at sea: the evolution of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (LC), 1972", *Focus on IMO* (July 1997), p. 11).

[865] It has even been asserted that these amendments to annex I of the London Dumping Convention "constitute major changes in the Convention" (see Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements …" (footnote 836 above), p. 638).

bed repositories accessed from the sea."[866] The resolution has been described as "effectively expand[ing] the definition of 'dumping' under the Convention by deciding that this term covers the disposal of waste into or under the seabed from the sea but not from land by tunnelling".[867] Thus, the amendment confirmed that the interpretative resolution contained a subsequent agreement regarding the interpretation of the treaty.

(22) The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal[868] provides in Article 17, paragraph 5, that: "Amendments … shall enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, formal confirmation or acceptance by at least three-fourths of the Parties who accepted [them] …". Led by an Indonesian-Swiss initiative, the Conference of the Parties decided to clarify the requirement of the acceptance by three fourths of the Parties, by agreeing:

> "… without prejudice to any other multilateral environmental agreement, that the meaning of paragraph 5 of Article 17 of the Basel Convention should be interpreted to mean that the acceptance of three-fourths of those parties that were parties at the time of the adoption of the amendment is required for the entry into force of such amendment, noting that such an interpretation of paragraph 5 of Article 17 does not compel any party to ratify the Ban Amendment."[869]

The parties adopted this decision on the interpretation of article 17, paragraph 5, by consensus, with many States Parties underlining that the Conferences of States Parties to any convention are "the ultimate authority as to its interpretation".[870] While this suggests that the decision embodies a subsequent agreement of the parties under article 31, paragraph 3 (a), the decision was taken after a debate about whether a formal amendment of the Convention was necessary to achieve this result.[871] It should also be noted that the delegation of Japan, requesting that this position be reflected in the Conference's Report, stated that it "supported the current-time approach to the interpretation of the provision of the Convention regarding entry into force of amendments, as described in a legal advice provided by the United Nations Office of Legal Affairs as the Depositary,[872] and had

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[866] IMO, Report of the Thirteenth Consultative Meeting of Contracting Parties to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, LDC 13/15, annex 7, resolution LDC.41 (13), para. 1.

[867] Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements …" (see footnote 836 above), p. 641.

[868] United Nations, *Treaty Series*, vol. 1673, No. 28911, p. 57.

[869] See Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on its tenth meeting (Cartagena, Colombia, 17-21 October 2011), UNEP/CHW.10/28, annex 1, Decision BC-10/3 (Indonesian-Swiss country-led initiative to improve the effectiveness of the Basel Convention), para. 2.

[870] *Ibid*., chap. III. A, para. 65.

[871] See Günther Handl, "International 'lawmaking' by conferences of the parties and other politically mandated bodies", in Wolfrum and Röben, *Developments of International Law in Treaty Making* (footnote 846 above), pp. 127-143, at p. 132.

[872] The "current-time approach" favoured by the Legal Counsel of the United Nations stipulates that: "Where the treaty is silent or ambiguous on the matter, the practice of the Secretary-General is to calculate the number of acceptances on the basis of the number of parties to the treaty at the time of deposit of each instrument of acceptance of an amendment." See extracts from the memorandum of 8 March 2004 received from the Office of Legal Affairs of the United Nations, available at www.basel.int/TheConvention/Overview/Amendments/Background/tabid/2760/Default.aspx.

accepted the fixed-time approach enunciated in the decision on the Indonesian-Swiss country-led initiative *only in this particular instance*."[873]

(23) The preceding examples demonstrate that decisions of Conferences of States Parties may embody under certain circumstances subsequent agreements under article 31, paragraph 3 (a), and give rise to subsequent practice under articles 31, paragraph 3 (b), or to other subsequent practice under article 32 if they do not reflect agreement of the parties. The respective character of a decision of a Conference of States Parties, however, must always be carefully identified. For this purpose, the specificity and the clarity of the terms chosen in the light of the text of the Conference of States Parties' decision as a whole, its object and purpose, and the way in which it is applied, need to be taken into account. The parties often do not intend that such a decision has any particular legal significance.

*Paragraph 2, third sentence — decisions as possibly providing a range of practical options*

(24) The last sentence of paragraph 2 of draft conclusion 11 [10] reminds the interpreter that decisions of Conferences of States Parties often provide a range of practical options for implementing the treaty. Those decisions may not necessarily embody a subsequent agreement and subsequent practice for the purpose of treaty interpretation, even if the decision is by consensus. Indeed, Conferences of States Parties often do not explicitly seek to resolve or address questions of interpretation of a treaty.

(25) A decision by the Conference of States Parties to the WHO Framework Convention on Tobacco Control provides an example. Articles 9 and 10 of the Convention deal, respectively, with the regulation of the contents of tobacco products, and with the regulation of the disclosure of information regarding the contents of such products. Acknowledging that such measures require the allocation of significant financial resources, the States Parties agreed, under the title of "practical considerations" for the implementation of articles 9 and 10, on "some options that Parties could consider using", such as:

> "(a) designated tobacco taxes;
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> (b) tobacco manufacturing and/or importing licensing fees;
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> (c) tobacco product registration fees;
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> (d) licensing of tobacco distributors and/or retailers;
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> (e) non-compliance fees levied on the tobacco industry and retailers; and
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> (f) annual tobacco surveillance fees (tobacco industry and retailers)."[874]

This decision provides a non-exhaustive range of practical options for implementing articles 9 and 10 of the Convention. The parties have thereby, however, implicitly agreed that the stated "options" would, as such, be compatible with the Convention.

[873] Report of the Conference of the Parties to the Basel Convention … (see footnote 869 above), para. 68 (emphasis added).

[874] Partial guidelines for implementation of articles 9 and 10 of the WHO Framework Convention on Tobacco Control (*Regulation of the contents of tobacco products and Regulation of tobacco product disclosures*), FCTC/COP4(10), Annex, adopted at the fourth session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control (Punta del Este, Uruguay, 15-20 November 2010), in FCTC/COP/4/DIV/6, p. 39.

*Paragraph 2 as a whole*

(26) It follows that decisions of Conferences of States Parties may have different legal effects. Such decisions are often not intended to embody a subsequent agreement under article 31, paragraph 3 (a), by themselves because they are not meant to be a statement regarding the interpretation of the treaty. In other cases, the parties have made it sufficiently clear that the Conference of State Parties decision embodies their agreement regarding the interpretation of the treaty. They may also produce an effect in combination with a legal duty to cooperate under the treaty, "and the parties thus should give due regard" to such a decision.[875] In any case, it cannot simply be said that because the treaty does not accord the Conference of States Parties a competence to take legally binding decisions, their decisions are necessarily legally irrelevant and constitute only political commitments.[876]

(27) Ultimately, the effect of a decision of a Conference of States Parties depends on the circumstances of each particular case and such decisions need to be properly interpreted. A relevant consideration may be whether States parties uniformly or without challenge apply the treaty as interpreted by the Conference of States Parties' decision. Discordant practice following a decision of the Conference of States Parties may be an indication that States did not assume that the decision would be a subsequent agreement under article 31, paragraph 3 (a).[877] Conference of States Parties' decisions that do not qualify as subsequent agreements under article 31, paragraph 3 (a), or as subsequent practice under article 31, paragraph 3 (b), may nevertheless be a subsidiary means of interpretation under article 32.[878]

*Paragraph 3 — an agreement regarding the interpretation of the treaty*

(28) Paragraph 3 sets forth the principle that agreements regarding the interpretation of a treaty under article 31, paragraph 3, must relate to the content of the treaty. Thus, what is important is the substance of the agreement embodied in the decision of the Conference of States Parties and not the form or procedure by which that decision is reached. Acts that originate from Conferences of States Parties may have different forms and designations and they may be the result of different procedures. Conferences of States Parties may even operate without formally adopted rules of procedure.[879] If the decision of the Conference of States Parties is based on a unanimous vote in which all parties participate, it may clearly

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[875] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 257, para. 83.

[876] *Ibid*., p. 248, para. 46.

[877] See above commentary to draft conclusion 10 [9], paras. (23)-(24).

[878] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226 (Separate Opinion of Judge *ad hoc* Charlesworth, at p. 454, para. 4: "I note that resolutions adopted by a vote of the [International Whaling Commission] have some consequence although they do not come within the terms of [a]rticle 31.3 of the Vienna Convention").

[879] The Conference of States Parties to the United Nations Framework Convention on Climate Change provisionally applies the draft rules of procedure of the Conference of the Parties and its subsidiaries bodies (FCCC/CP/1996/2), with the exception of draft rule 42 in the chapter on "Voting", since no agreement has been reached so far on one of the two voting alternatives contained therein, see Report of the Conference of the Parties on its first session (28 March to 7 April 1995) (FCCC/CP/1995/7), p. 8, para. 10; Report of the Conference of the Parties on its nineteenth session (11 to 23 November 2013) (FCCC/CP/2013/10), p. 6, para. 4; similarly, the Conference of States Parties to the Convention on Biological Diversity (1992, United Nations, *Treaties Series*, vol. 1760, No. 30619, p. 79) did not adopt Rule 40, paragraph 1 (Voting), of the rules of procedure "because of the lack of consensus among the Parties concerning the majority required for decision-making on matters of substance", see Report of the Eleventh Meeting of the Conference of the Parties to the Convention on Biological Diversity (8-19 October 2012) (UNEP/CBD/COP/11/35), para. 65.

embody a "subsequent agreement" under article 31, paragraph 3 (a), provided that it is "regarding the interpretation of the treaty".

(29) Conference of States Parties' decisions regarding review and implementation functions, however, are normally adopted by consensus. This practice derives from rules of procedure that usually require States parties to make every effort to achieve consensus on substantive matters. An early example can be found in the Provisional Rules of Procedure for the Review Conference of the Parties to the Biological Weapons Convention. According to rule 28, paragraph 2:

> "The task of the Review Conference being to review the operation of the Convention with a view to assuring that the purposes of the preamble and the provisions of the Convention are being realized, and thus to strengthen its effectiveness, every effort should be made to reach agreement on substantive matters by means of consensus. There should be no voting on such matters until all efforts to achieve consensus have been exhausted."[880]

This formula, with only minor variations, has become the standard with regard to substantive decision-making procedures at Conferences of States Parties.

(30) In order to address concerns relating to decisions adopted by consensus, the phrase "including by consensus" was introduced at the end of paragraph 3 in order to dispel the notion that a decision by consensus would necessarily be equated with agreement in substance. Indeed, consensus is not a concept that necessarily indicates any particular degree of agreement on substance. According to the *Comments on Some Procedural Questions* issued by the Office of Legal Affairs of the United Nations Secretariat in accordance with General Assembly resolution 60/286 of 8 September 2006:[881]

> "Consensus is generally understood as a decision-taking process consisting in arriving at a decision without formal objections and vote. It may however not necessarily reflect 'unanimity' of opinion on the substantive matter. It is used to describe the practice under which every effort is made to achieve general agreement and no delegation objects explicitly to a consensus being recorded."[882]

(31) It follows that adoption by consensus is not a sufficient condition for an agreement under article 31, paragraph 3 (b). The rules of procedure of Conferences of States Parties do not usually give an indication of the possible legal effect of a resolution as a subsequent agreement under article 31, paragraph 3 (a), or a subsequent practice under article 31, paragraph 3 (b). Such rules of procedure only determine how the Conference of States Parties shall adopt its decisions, not their possible legal effect as a subsequent agreement under article 31, paragraph 3. Although subsequent agreements under article 31, paragraph 3 (a), need not be binding as such, the 1969 Vienna Convention attributes them a legal effect under article 31 only if there exists agreement in substance among the parties

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[880] See rule 28, paragraph 2, of the provisional rules of procedure for the Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, held in Geneva, from 3 to 21 March 1980 (BWC/CONF.I/2).

[881] See General Assembly resolution 60/286 of 8 September 2006 on revitalization of the General Assembly, requesting the Office of Legal Affairs of the Secretariat "to make precedents and past practice available in the public domain with respect to rules and practices of the intergovernmental bodies of the Organization" (annex, para. 24).

[882] See "Consensus in UN practice: General", paper prepared by the Secretariat, available from http://legal.un.org/ola/media/GA_RoP/GA_RoP_EN.pdf; see also R. Wolfrum and J. Pichon, "Consensus", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), paras. 3-4 and 24.

concerning the interpretation of a treaty. The International Court of Justice has confirmed that the distinction between the form of a collective decision and the agreement in substance is pertinent in such a context.[883]

(32) That certain decisions, despite having been declared as being adopted by consensus, cannot represent a subsequent agreement under article 31, paragraph 3 (a), is especially true when there exists an objection by one or more States parties to that consensus.

(33) For example, at its Sixth Meeting in 2002, the Conference of States Parties to the Convention on Biological Diversity worked on formulating guiding principles for the prevention, introduction and mitigation of impacts of alien species that threaten ecosystems, habitats or species.[884] After several efforts to reach an agreement had failed, the President of the Conference of States Parties proposed that the decision be adopted and the reservations that Australia had raised be recorded in the final report of the meeting. The representative of Australia, however, reiterated that the guiding principles could not be accepted and that "his formal objection therefore stood".[885] The President declared the debate closed and, "following established practice", declared the decision adopted without a vote, clarifying that the objections of the dissenting States would be reflected in the final report of the meeting. Following the adoption, Australia reiterated its view that consensus is adoption without formal objection and expressed concerns about the legality of the adoption of the draft decision. As a result, a footnote to decision VI/23 indicates that "one representative entered a formal objection during the process leading to the adoption of this decision and underlined that he did not believe that the Conference of the Parties could legitimately adopt a motion or a text with a formal objection in place".[886]

(34) In this situation, the Executive Secretary of the Convention on Biological Diversity requested a legal opinion from the United Nations Legal Counsel.[887] The opinion by the Legal Counsel[888] expressed the view that a party could "disassociate itself from the substance or text … of the document [,] indicate that its joining in the consensus does not constitute acceptance of the substance or text of parts of the document[,] and/or present any other restrictions on its Government's position on substance or text of … the document".[889] Thus, it is clear that a decision by consensus can occur in the face of rejection of the substance of the decision by one or more of the States parties.

(35) The decision under the Convention on Biological Diversity, as well as a similar decision reached in Cancún in 2010 by the Meeting of the Parties to the Kyoto Protocol to the Climate Change Convention (Bolivia's objection notwithstanding),[890] raise the

[883] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 257, para. 83.

[884] See report of the sixth meeting of the Conference of the Parties to the Convention on Biological Diversity (UNEP/CBD/COP/6/20), annex I, decision VI/23.

[885] *Ibid*., para. 313.

[886] *Ibid*., para. 318; for the discussion see paras. 294-324.

[887] Available from the secretariat of the Convention on Biological Diversity, document SCBD/SEL/DBO/30219 (6 June 2002).

[888] Letter dated 17 June 2002, transmitted by facsimile.

[889] *Ibid*.

[890] See report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its sixth session, held in Cancún from 29 November to 10 December 2010 (FCCC/KP/CMP/2010/12 and Add.1), decision 1/CMP.6 (The Cancún Agreements: outcome of the work of the Ad hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session) and decision 2/CMP.6 (The Cancún Agreements: land use, land-use change and forestry); as well as the proceedings of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol, para. 29.

important question of what "consensus" means.[891] However, this question, which does not fall within the scope of the present topic, must be distinguished from the question of whether all the parties to a treaty have arrived at an agreement in substance on matters of interpretation of that treaty under article 31, paragraph 3 (a) and (b). Decisions by Conferences of States Parties that do not reflect agreement in substance among all the parties do not qualify as agreements under article 31, paragraph 3, although they may be a form of "other subsequent practice" under article 32 (see draft conclusion 4, paragraph 3).

(36) A different issue concerns the legal effect of a decision of a Conference of States Parties once it qualifies as an agreement under article 31, paragraph (3). In 2011, the IMO Sub-Division for Legal Affairs was asked to "advise the governing bodies […] about the procedural requirements in relation to a decision on an interpretative resolution and, in particular, whether or not consensus would be needed for such a decision".[892] In its response, while confirming that a resolution by the Conference of States Parties can constitute, in principle, a subsequent agreement under article 31, paragraph 3 (a), the IMO Sub-Division for Legal Affairs advised the governing bodies that even if the Conference were to adopt a decision based on consensus, that would not mean that the decision would be binding on all the parties.[893]

(37) Although the opinion of the IMO Sub-Division for Legal Affairs proceeded from the erroneous assumption that a "subsequent agreement" under article 31, paragraph 3 (a), would only be binding "as a treaty, or an amendment thereto",[894] it came to the correct conclusion that even if the consensus decision by a Conference of States Parties embodies an agreement regarding interpretation in substance it is not (necessarily) binding upon the parties.[895] Rather, as the Commission has indicated, a subsequent agreement under article 31, paragraph 3 (a), is only one of different means of interpretation to be taken into account in the process of interpretation.[896]

(38) Thus, interpretative resolutions by Conferences of States Parties that are adopted by consensus, even if they are not binding as such, can nevertheless be subsequent agreements under article 31, paragraph 3 (a), or subsequent practice under article 31, paragraph 3 (b), if there are sufficient indications that that was the intention of the parties at the time of the adoption of the decision or if the subsequent practice of the parties establishes an agreement on the interpretation of the treaty.[897] The interpreter must give appropriate weight to such an interpretative resolution under article 31, paragraph 3 (a), but not necessarily treat it as legally binding.[898]

**Conclusion 12 [11]**
**Constituent instruments of international organizations**

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent

[891] See Nolte, "Subsequent agreements and subsequent practice of States …" (footnote 440 above), pp. 372-377.

[892] IMO, report of the 3rd meeting of the Intersessional Working Group on Ocean Fertilization (LC 33/4), para. 4.15.2.

[893] IMO, document LC 33/J/6, para. 3 (see footnote 854 above).

[894] *Ibid*., para. 8.

[895] See above commentary to draft conclusion 10 [9], paras. (9)-(11).

[896] Commentary to draft conclusion 3 [2], para. (4), above.

[897] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014,* p. 226, Separate Opinion of Judge Greenwood, at pp. 407-408, para. 6, and Separate Opinion of Judge *ad hoc* Charlesworth, at pp. 453-454, para. 4.

[898] See above commentary to draft conclusion 3 [2], para. 4.

practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

**Commentary**

*General aspects*

(1) Draft conclusion 12 [11] refers to a particular type of treaty, namely constituent instruments of international organizations, and the way in which subsequent agreements or subsequent practice shall or may be taken into account in their interpretation under articles 31 and 32 of the 1969 Vienna Convention.

(2) Constituent instruments of international organizations are specifically addressed in article 5 of the 1969 Vienna Convention, which provides:

> "The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization."[899]

(3) A constituent instrument of an international organization under article 5, like any treaty, is an international agreement "whether embodied in a single instrument or in two or more related instruments" (article 2, paragraph 1 (a)). The provisions that are contained in such a treaty are part of the constituent instrument.[900]

(4) As a general matter, article 5, by stating that the 1969 Vienna Convention applies to constituent instruments of international organizations without prejudice to any relevant rules of the organization,[901] follows the general approach of the Convention according to which treaties between States are subject to the rules set forth in the Convention "unless the treaty otherwise provides."[902]

(5) Draft conclusion 12 [11] only refers to the interpretation of constituent instruments of international organizations. It therefore does not address every aspect of the role of

[899] See also the parallel provision of article 5 of the 1986 Vienna Convention (A/CONF.129/15).

[900] Art. 20, para. 3, of the 1969 Vienna Convention requires the acceptance, by the competent organ of the organization, of reservations relating to its constituent instrument. Twelfth report on reservations to treaties, *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/584, paras. 75-77; S. Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge, Cambridge University Press, 1989), p. 204.

[901] See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 191 (draft article 4); K. Schmalenbach, "Art. 5", in Dörr and Schmalenbach, *Vienna Convention on the Law of Treaties ...* (see footnote 439 above), p. 89, para. 1.

[902] See, for example, articles 16; 19 (a) and (b); 20, paras. 1 and 3-5; 22; 24, para. 3; 25, para. 2; 44, para. 1; 55; 58, para. 2; 70, para. 1; 72, para. 1; 77, para. 1, of the 1969 Vienna Convention.

subsequent agreements and subsequent practice in relation to the interpretation of treaties involving international organizations. In particular, it does not apply to the interpretation of treaties adopted within an international organization or to treaties concluded by international organizations that are not themselves constituent instruments of international organizations.[903] In addition, draft conclusion 12 [11] does not apply to the interpretation of decisions by organs of international organizations as such,[904] including to the interpretation of decisions by international courts[905] or to the effect of a "clear and constant jurisprudence"[906] ("*jurisprudence constante*") of courts or tribunals.[907] Finally, the conclusion does not specifically address questions relating to pronouncements by a treaty monitoring body consisting of independent experts, as well as to the weight of particular forms of practice more generally, matters which may be dealt with at a later stage.

*Paragraph 1 — applicability of articles 31 and 32*

(6) The first sentence of paragraph 1 of draft conclusion 12 [11] recognizes the applicability of articles 31 and 32 of the 1969 Vienna Convention to treaties that are constituent instruments of international organizations.[908] The International Court of Justice has confirmed this point in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*:

> "From a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply."[909]

(7) The Court has held with respect to the Charter of the United Nations:

> "On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the

[903] The latter category is addressed by the 1986 Vienna Convention (A/CONF.129/15).

[904] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion*, *I.C.J. Reports 2010*, p. 403, at p. 442, para. 94 ("… While the rules on treaty interpretation embodied in [a]rticles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account"); see also H. Thirlway, "The law and procedure of the International Court of Justice 1960-1989, part eight", *British Yearbook of International Law 1996*, vol. 67, p. 1, at p. 29; M.C. Wood, "The interpretation of Security Council resolutions", *Max Planck Yearbook of United Nations Law*, vol. 2 (1998), p. 73, at p. 85; Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 128.

[905] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear* (*Cambodia v. Thailand*), *Judgment*, *I.C.J. Reports 2013*, p. 281, at p. 307, para. 75 ("A judgment of the Court cannot be equated to a treaty, an instrument which derives its binding force and content from the consent of the contracting States and the interpretation of which may be affected by the subsequent conduct of those States, as provided by the principle stated in article 31, paragraph 3 (*b*), of the 1969 Vienna Convention on the Law of Treaties").

[906] See *Regina v. Secretary of State for the Environment, Transport and the Regions ex parte Alconbury Developments Limited and others* [2001] UKHL 23; *Regina v. Special Adjudicator (respondent) ex parte Ullah (FC) (appellant) Do (FC) (appellant) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 26 [20] (Lord Bingham of Cornhill); *Regina (On the Application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport* [2008] UKHL 15.

[907] Such jurisprudence may be a means for the determination of rules of law as indicated, in particular, by article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

[908] Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 281-282.

[909] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *Advisory Opinion*, *I.C.J. Reports 1996*, p. 66, at p. 74, para. 19.

> interpretation of treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics."[910]

(8) At the same time, article 5 suggests, and decisions by international courts confirm, that constituent instruments of international organizations are also treaties of a particular type that may need to be interpreted in a specific way. Accordingly, the International Court of Justice has stated:

> "But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties."[911]

(9) The second sentence of paragraph 1 of draft conclusion 12 [11] more specifically refers to elements of articles 31 and 32 that deal with subsequent agreements and subsequent practice as a means of interpretation and confirms that subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for constituent instruments of international organizations.

(10) The International Court of Justice has recognized that article 31, paragraph 3 (b), is applicable to constituent instruments of international organizations. In its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, after describing constituent instruments of international organizations as being treaties of a particular type, the Court introduced its interpretation of the Constitution of WHO by stating:

> "According to the customary rule of interpretation as expressed in Article 31 of the 1969 Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted 'in their context and in the light of its object and purpose' and there shall be 'taken into account, together with the context:
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> …
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> "'(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'."[912]

Referring to different precedents from its own case law in which it had, *inter alia*, employed subsequent practice under article 31, paragraph 3 (b), as a means of interpretation, the Court announced that it would apply article 31, paragraph 3 (b):

> "… in this case for the purpose of determining whether, according to the WHO Constitution, the question to which it has been asked to reply arises 'within the scope of [the] activities' of that Organization."[913]

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[910] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 157.

[911] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 75, para. 19.

[912] *Ibid*.

[913] *Ibid*.

(11) The *Land and Maritime Boundary between Cameroon and Nigeria* case is another decision in which the Court has emphasized, in a case involving the interpretation of a constituent instrument of an international organization,[914] the subsequent practice of the parties. Proceeding from the observation that "Member States have also entrusted to the Commission certain tasks that had not originally been provided for in the treaty texts",[915] the Court concluded that:

> "From the treaty texts and the practice [of the parties] analysed at paragraphs 64 and 65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not however have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter."[916]

(12) Article 31, paragraph 3 (a), is also applicable to constituent treaties of international organizations.[917] Self-standing subsequent agreements between the member States regarding the interpretation of constituent instruments of international organizations, however, are not common. When questions of interpretation arise with respect to such an instrument, the parties mostly act as members within the framework of the plenary organ of the organization. If there is a need to modify, to amend, or to supplement the treaty, the member States either use the amendment procedure that is provided for in the treaty or they conclude a further treaty, usually a protocol.[918] It is, however, also possible that the parties act as such when they meet within a plenary organ of the respective organization. In 1995:

> "The Governments of the 15 Member States have achieved the common agreement that this decision is the agreed and definitive interpretation of the relevant Treaty provisions".[919]

That is to say that:

> "… the name given to the European currency shall be Euro. … The specific name Euro will be used instead of the generic term 'ecu' used by the Treaty to refer to the European currency unit."[920]

This decision of the "Member States meeting within" the European Union has been regarded, in the literature, as a subsequent agreement under article 31, paragraph 3 (a).[921]

(13) It is sometimes difficult to determine whether "Member States meeting within" a plenary organ of an international organization intend to act in their capacity as members of that organ, as they usually do, or whether they intend to act in their independent capacity as

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914 See Art. 17 of the Convention and Statute relating to the Development of the Chad Basin (Treaty of Fort-Lamy von 1964), *Heidelberg Journal of International Law*, vol. 34 (1974), at p. 80; generally: P.H. Sand, "Development of International Water Law in the Lake Chad Basin", *ibid*., pp. 52-76.

915 *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections*, *Judgment, I.C.J. Reports 1998*, p. 275, at p. 305, para. 65.

916 *Ibid*., at pp. 306-307, para. 67.

917 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226; see also below footnote 944 and accompanying text.

918 See articles 39-41 of the 1969 Vienna Convention.

919 See Madrid European Council, Conclusions of the Presidency, *European Union Bulletin*, No. 12 (1995), p. 9, at p. 10, sect. I.A.I.

920 *Ibid*.

921 See Aust, *Modern Treaty Law and Practice* (footnote 525 above), p. 215; Hafner, "Subsequent agreements and practice …" (see footnote 655 above), at pp. 109-110.

States parties to the constituent instrument of the organization.[922] The Court of Justice of the European Union, when confronted with this question, initially proceeded from the wording of the act in question:

> "It is clear from the wording of that provision that acts adopted by representatives of the Member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the Court."[923]

Later, however, the Court accorded decisive importance to the "content and all the circumstances in which [the decision] was adopted" in order to determine whether the decision was that of the organ or of the member States themselves as parties to the treaty:

> "Consequently, it is not enough that an act should be described as a 'decision of the Member States' for it to be excluded from review under Article 173 of the Treaty. In order for such an act to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council."[924]

(14) Apart from subsequent agreements or subsequent practice that establish the agreement of all the parties under article 31, paragraph 3 (a) and (b), other subsequent practice by one or more parties in the application of the constituent instrument of an international organization may also be relevant for the interpretation of that treaty.[925] Constituent instruments of international organizations, like other multilateral treaties, are, for example, sometimes implemented by subsequent bilateral or regional agreements or practice.[926] Such bilateral treaties are not, as such, subsequent agreements under article 31, paragraph 3 (a), if only because they are concluded between a limited number of the parties to the multilateral constituent instrument. They may, however, imply assertions concerning the interpretation of the constituent instrument itself and may serve as supplementary means of interpretation under article 32.

*Paragraph 2 — subsequent agreements and subsequent practice as "arising from" or "being expressed in" the reaction of member States*

(15) Paragraph 2 of draft conclusion 12 [11] highlights a particular way in which subsequent agreements and subsequent practice under articles 31, paragraph 3, and 32 may arise or be expressed. Subsequent agreements and subsequent practice of States parties may "arise from" their reactions to the practice of an international organization in the application of a constituent instrument. Alternatively, subsequent agreements and subsequent practice of States parties to a constituent agreement may be "expressed in" the practice of an

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[922] P.C.G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities*, 3rd edition, L.W. Gormley, ed. (London, Kluwer Law International, 1998), pp. 340-343.

[923] Case C-181/91 and C-248/91, *Parliament v. Council and Commission* [1993], *European Court Reports I-3713*, para. 12.

[924] *Ibid*., para. 14.

[925] See above draft conclusions 2 [1], para. 4, and 4, para. 3, and commentary thereto, respectively, para. (10) and paras. (23)-(37).

[926] This is true, for example, for the Convention on International Civil Aviation (see footnote 837above); P.P.C. Haanappel, "Bilateral air transport agreements — 1913-1980", *International Trade Law Journal*, vol. 5, No. 2 (1980), pp. 241-267; L. Tomas, "Air transport agreements, regulation of liability", in *Max Planck Encyclopedia of Public International Law* (see footnote 425 above); B.F. Havel, *Beyond Open Skies, A New Regime for International Aviation* (Alphen aan den Rijn, Kluwer Law International, 2009), p. 10.

international organization in the application of a constituent instrument. "Arise from" is intended to encompass the generation and development of subsequent agreements and subsequent practice, while "expressed in" is used in the sense of reflecting and articulating such agreements and practice. Either variant of the practice in an international organization may reflect subsequent agreements or subsequent practice by the States parties to the constituent instrument of the organization (see draft conclusion 4).[927]

(16) In its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the International Court of Justice recognized the possibility that the practice of an organization may reflect an agreement or the practice of the Member States as parties to the treaty themselves, but found that the practice in that case did not "express or amount to" a subsequent practice under article 31, paragraph 3 (b):

> "Resolution WHA46.40 itself, adopted, not without opposition, as soon as the question of the legality of the use of nuclear weapons was raised at the WHO, could not be taken to express or to amount on its own to a practice establishing an agreement between the members of the Organization to interpret its Constitution as empowering it to address the question of the legality of the use of nuclear weapons."[928]

(17) In this case, when considering the relevance of a resolution of an international organization for the interpretation of its constituent instrument the Court considered, in the first place, whether the resolution expressed or amounted to "a practice establishing agreement between the members of the Organization" under article 31, paragraph 3 (b).[929]

(18) In a similar way, the WTO Appellate Body has stated in general terms:

> "Based on the text of Article 31 (3) (a) of the *Vienna Convention*, we consider that a decision adopted by Members may qualify as a 'subsequent agreement between the parties' regarding the interpretation of a covered agreement or the application of its provisions if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an *agreement* between Members on the *interpretation* or *application* of a provision of WTO law."[930]

(19) Regarding the conditions under which a decision of a plenary organ may be considered to be a subsequent agreement under article 31, paragraph 3 (a), the WTO Appellate Body held:

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[927] R. Higgins, "The Development of international law by the political organs of the United Nations", *Proceedings of the American Society of International Law at its 59th Annual Meeting* (Washington, D.C., April 22-24, 1965), pp. 116-124, at p. 119; the practice of an international organization, in addition to arising from, or being expressed in, an agreement or the practice of the parties themselves under paragraph 2, may also be a means of interpretation in itself under paragraph 3 (see below at paras. (25)-(35)).

[928] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 81, para. 27.

[929] The Permanent Court of International Justice had adopted this approach in its Advisory Opinion on *Competence of the International Labour Organization to regulate, incidentally, the personal work of the employer*, 23 July 1926, *P.C.I.J. Series B. No. 13*, at pp. 19-20; see S. Engel, "'Living' international constitutions and the world court (the subsequent practice of international organs under their constituent instruments)", *International and Comparative Law Quarterly*, vol. 16 (1967), pp. 865-910, at p. 871.

[930] WTO Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, para. 262 (original emphasis).

> "263. With regard to the first element, we note that the Doha Ministerial Decision was adopted by consensus on 14 November 2001 on the occasion of the Fourth Ministerial Conference of the WTO. … With regard to the second element, the key question to be answered is whether paragraph 5.2 of the Doha Ministerial Decision expresses an *agreement* between Members on the *interpretation* or *application* of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*.
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> "264. We recall that paragraph 5.2 of the Doha Ministerial Decision provides:
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> > Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.
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> "265. In addressing the question of whether paragraph 5.2 of the Doha Ministerial Decision expresses an agreement between Members on the interpretation or application of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*, we find useful guidance in the Appellate Body reports in *EC — Bananas III (Article 21.5 — Ecuador II)/EC — Bananas III (Article 21.5 — US)*. The Appellate Body observed that the International Law Commission (the 'ILC') describes a subsequent agreement within the meaning of Article 31 (3) (a) of the *Vienna Convention* as 'a further *authentic element of interpretation* to be taken into account together with the context'. According to the Appellate Body, 'by referring to "authentic interpretation", the ILC reads Article 31 (3) (a) as referring to *agreements bearing specifically upon the interpretation of the treaty*.' Thus, we will consider whether paragraph 5.2 bears specifically upon the interpretation of Article 2.12 of the *TBT Agreement*.
>
> …
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> "268. For the foregoing reasons, we *uphold* the Panel's finding … that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31 (3) (a) of the *Vienna Convention*, on the interpretation of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*."[931]

(20) The International Court of Justice, although it did not expressly mention article 31, paragraph 3 (a), when relying on the General Assembly Declaration on Friendly Relations between States for the interpretation of Article 2, paragraph 4, of the Charter, emphasized the "attitude of the Parties and the attitude of States towards certain General Assembly resolutions" and their consent thereto.[932] In this context, a number of writers have

[931] *Ibid*. (footnotes omitted); although the Doha Ministerial Decision does not concern a provision of the WTO Agreement itself, it concerns an annex to that Agreement (the "TBT Agreement"), which is an "integral part" of the Agreement establishing the WTO (art. 2, para. 2, WTO Agreement).

[932] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 100, para. 188: "… The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves". This statement, whose primary purpose is to explain the possible role of General Assembly resolutions for the formation of customary law, also recognizes the treaty-related point that such resolutions may serve to express the agreement, or the positions, of the parties regarding a certain interpretation of the Charter of the United Nations as a treaty ("elucidation"); similarly: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J.*

concluded that subsequent agreements within the meaning of article 31, paragraph 3 (a), may, under certain circumstances, arise from or be expressed in acts of plenary organs of international organizations,[933] such as the General Assembly of the United Nations.[934] Indeed, as the WTO Appellate Body has indicated with reference to the Commission,[935] the characterization of a collective decision as an "authentic element of interpretation" under article 31, paragraph 3 (a), is only justified if the parties of the constituent instrument of an international organization acted as such and not, as they usually do, institutionally as members of the respective plenary organ.[936]

(21) Paragraph 2 refers to the practice of an international organization, rather than to the practice of an organ of an international organization. Although the practice of an international organization can arise from the conduct of an organ, it can also be generated by the conduct of two or more organs.

(22) Subsequent agreements and subsequent practice of the parties, which may "arise from, or be expressed in" the practice of an international organization, may sometimes be very closely interrelated with the practice of the organization as such. For example, in its *Namibia* Advisory Opinion, the International Court of Justice arrived at its interpretation of

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*Reports 2010*, p. 403, at p. 437, para. 80; in this sense, for example, L.B. Sohn, "The UN system as authoritative interpreter of its law", in *United Nations Legal Order*, vol. 1, O. Schachter and C.C. Joyner, eds. (Cambridge, American Society of International Law/Cambridge University Press, 1995), pp. 169-229, at p. 177 (noting in regard to the *Nicaragua* case that "[t]he Court accepted the Friendly Relations Declaration as an authentic interpretation of the Charter").

933 H.G. Schermers and N.M. Blokker, *International Institutional Law*, 5th revised edition (Leiden/Boston, Martinus Nijhoff, 2011), p. 854 (referring to interpretations by the Assembly of the Oil Pollution Compensation Fund regarding the constituent instruments of the Fund); M. Cogen, "Membership, associate membership and pre-accession arrangements of CERN, ESO, ESA, and EUMETSAT", *International Organizations Law Review*, vol. 9 (2012), pp. 145-179, at pp. 157-158 (referring to a unanimously adopted decision of the CERN Council of 17 June 2010 interpreting the admission criteria established in the CERN Convention as a subsequent agreement under article 31, para. 3 (a), of the 1969 Vienna Convention).

934 See E. Jiménez de Aréchega, "International law in the past third of a century", *Recueil des Cours … 1978*, vol. 159, pp. 1-334, at p. 32 (stating in relation to the Friendly Relations Declaration that "[t]his Resolution … constitutes an authoritative expression of the views held by the totality of the parties to the Charter as to these basic principles and certain corollaries resulting from them. In the light of these circumstances, it seems difficult to deny the legal weight and authority of the Declaration both as a resolution recognizing what the Members themselves believe constitute existing rules of customary law and as an interpretation of the Charter by the subsequent agreement and the subsequent practice of all its members"); O. Schachter, "General course in public international law", *Recueil des Cours … 1982*, vol. 178, pp. 9-396, at p. 113 ("… [t]he law-declaring resolutions that construed and 'concretized' the principles of the Charter — whether as general rules or in regard to particular cases — may be regarded as authentic interpretation by the parties of their existing treaty obligations. To that extent they were interpretation, and agreed by all Member States, they fitted comfortably into an established source of law."); P. Kunig, "United Nations Charter, interpretation of", in *Max Planck Encyclopedia of Public International Law*, vol. X (www.mpepil.com), p. 273 *et seq*., at p. 275 (stating that, "[i]f passed by *consensus*, they [that is, General Assembly resolutions] are able to play a major role in the … interpretation of the UN Charter"); Aust, *Modern Treaty Law and Practice* (see footnote 525 above), p. 213 (mentioning that General Assembly resolution 51/210 on measures to eliminate international terrorism of 17 December 1996 "can be seen as a subsequent agreement about the interpretation of the UN Charter"). All resolutions to which the writers are referring to have been adopted by consensus.

935 WTO Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, para. 265.

936 Y. Bonzon, *Public Participation and Legitimacy in the WTO* (Cambridge, Cambridge University Press, 2014), pp. 114-115.

the term "concurring votes" in Article 27, paragraph 3, of the Charter of the United Nations as including abstentions primarily by relying on the practice of the competent organ of the organization in combination with the fact that this practice was then "generally accepted" by Member States:

> "… the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization."[937]

In this case, the Court emphasized both the practice of one or more organs of the international organization and the "general acceptance" of that practice by the Member States and characterized the combination of those two elements as being a "general practice of the organization".[938] The Court followed this approach in its Advisory Opinion regarding *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* by stating that:

> "The Court considers that the *accepted* practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter."[939]

By speaking of the "accepted practice of the General Assembly",[940] the Court implicitly affirmed that acquiescence on behalf of the Member States regarding the practice followed by the organization in the application of the treaty permits to establish the agreement regarding the interpretation of the relevant treaty provision.[941]

(23) On this basis it is reasonable to consider "that relevant practice will usually be that of those on whom the obligation of performance falls",[942] in the sense that "where [S]tates by treaty entrust the performance of activities to an organization, how those activities are conducted can constitute practice under the treaty; but whether such practice establishes

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[937] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 22.

[938] H. Thirlway, "The law and procedure of the International Court of Justice 1960-1989, Part Two", *British Yearbook of International Law 1990*, vol. 61, pp. 1-133, at pp. 76 (mentioning that "[t]he Court's reference to the practice as being 'of' the Organization is presumably intended to refer, not to a practice followed by the Organization as an entity in its relations with other subjects of international law, but rather a practice followed, approved or respected throughout the Organization. Seen in this light, the practice is … rather a recognition by the other members of the Security Council at the relevant moment, and indeed by all member States by tacit acceptance, of the validity of such resolutions").

[939] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 150 (emphasis added).

[940] *Ibid*.

[941] See above commentary to draft conclusion 10 [9], para. 2, second sentence, paras. (13)-(25); Villiger, *Commentary …* (see footnote 414 above), pp. 431-432, para. 22; J. Arato, "Treaty interpretation and constitutional transformation", *Yale Journal of International Law*, vol. 38, No. 2 (2013), pp. 289-357, at p. 322.

[942] Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 281.

agreement of the parties regarding the treaty's interpretation may require account to be taken of further factors".[943]

(24) Accordingly, in the *Whaling in the Antarctic* case, the International Court of Justice referred to (non-binding) recommendations of the International Whaling Commission (which is both the name of an international organization established by the Convention for the Regulation of Whaling[944] and that of an organ thereof), and clarified that when such recommendations are "adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule".[945] At the same time, however, the Court also expressed a cautionary note according to which:

> "… Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties."[946]

(25) This cautionary note does not, however, exclude that a resolution that has been adopted without the support of all member States may give rise to, or express, the position or the practice of individual member States in the application of the treaty that may be taken into account under article 32.[947]

*The practice of an international organization itself*

(26) Paragraph 3 of draft conclusion 12 [11] refers to another form of practice that may be relevant for the interpretation of a constituent instrument of an international organization: the practice of the organization *as such*, meaning its "own practice", as distinguished from the practice of the member States. The International Court of Justice has in some cases taken the practice of an international organization into account in its interpretation of constituent instruments without referring to the practice or acceptance of the member States of the organization. In particular, the Court has stated that the international organization's "own practice … may deserve special attention" in the process of interpretation.[948]

(27) For example, in its Advisory Opinion on the *Competence of the General Assembly regarding Admission to the United Nations*, the Court stated that:

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[943] *Ibid*.

[944] S. Schiele, *Evolution of International Environmental Regimes: The Case of Climate Change* (Cambridge, Cambridge University Press, 2014), pp. 37-38; A. Gillespie, *Whaling Diplomacy: Defining Issues in International Environmental Law* (Cheltenham, Edward Elgar, 2005), p. 411.

[945] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226.

[946] *Ibid*., p. 257, para. 83.

[947] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 149 (referring to General Assembly resolution 1600 (XV) of 15 April 1961 (adopted with 60 votes to 16, with 23 abstentions, including the Soviet Union and other States of Eastern Europe) and resolution 1913 (XVIII) of 13 December 1963 (adopted by 91 votes to 2 (Spain and Portugal)).

[948] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 74; See also D. Simon, *L'interprétation judiciaire des traités d'organisations internationales* (Paris, Pedone, 1981), pp. 379-384.

> "The organs to which Article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text in the sense that the General Assembly can decide to admit only on the basis of the recommendation of the Security Council."[949]

(28) Similarly, in *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court referred to acts of organs of the organization when it referred to the practice of "the United Nations":

> "In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions — increasingly varied in nature — to persons not having the status of United Nations officials. … In all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the members of these committees and commissions, have been regarded as experts on missions within the meaning of Section 22."[950]

(29) In its *Inter-Governmental Maritime Consultative Organization* Advisory Opinion, the International Court of Justice referred to "the practice followed by the Organization itself in carrying out the Convention" as a means of interpretation.[951]

(30) In its advisory opinion on *Certain Expenses of the United Nations*, the Court explained why the practice of an international organization, as such, including that of a particular organ, may be relevant for the interpretation of its constituent instrument:

> "Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute 'expenses of the Organization'."[952]

(31) Many international organizations share the same characteristic of not providing for an "ultimate authority to interpret" their constituent instrument. The conclusion that the Court has drawn from this circumstance is therefore now generally accepted as being applicable to international organizations.[953] The identification of a presumption, in the *Certain Expenses* advisory opinion, which arises from the practice of an international

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[949] *Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 9.

[950] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177, at p. 194, para. 48.

[951] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 150, at p. 169.

[952] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 168.

[953] See J. Klabbers, *An Introduction to Institutional Law*, 2nd edition (Cambridge, Cambridge University Press, 2009), p. 90; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edition (Cambridge, Cambridge University Press, 2005), p. 25; J.E. Alvarez, *International Organizations as Law-Makers* (Oxford, Oxford University Press, 2006), p. 80; Rosenne, *Developments in the Law of Treaties …* (see footnote 900 above), pp. 224-225.

organization, including by one or more of its organs, is a way of recognizing such practice as a means of interpretation.[954]

(32) Whereas it is generally agreed that the interpretation of the constituent instruments of international organizations by the practice of their organs constitutes a relevant means of interpretation,[955] certain differences exist among writers about how to explain the relevance, for the purpose of interpretation, of an international organization's "own practice" in terms of the Vienna rules of interpretation.[956] Such practice can, at a minimum, be conceived as a supplementary means of interpretation under article 32.[957] The Court, by referring to acts of international organizations that were adopted against the opposition of certain member states,[958] has recognized that such acts may constitute practice for the purposes of interpretation, but generally not a (more weighty) practice that establishes agreement between the parties regarding the interpretation and that would fall under article 31, paragraph 3. Writers largely agree, however, that the practice of an international organization, as such, will often also be relevant for clarifying the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.[959]

(33) The Commission has confirmed, in its commentary to draft conclusion 2 [1], that given instances of subsequent practice and subsequent agreements contribute, or not, to the determination of the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty.[960] These considerations are also relevant with regard to the practice of an international organization itself.

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[954] See Lauterpacht, "The development of the law of international organization …" (footnote 779 above), at p. 460; N.M. Blokker, "Beyond 'Dili': on the powers and practice of international organizations", in *State, Sovereignty, and International Governance*, G. Kreijen, ed. (Oxford, Oxford University Press, 2002), pp. 299-322, at pp. 312-318.

[955] C. Brölmann, "Specialized rules of treaty interpretation: international organizations", in Hollis, *The Oxford Guide to Treaties* (see footnote 797 above), pp. 507-534, at pp. 520-521; S. Kadelbach, "The interpretation of the Charter", in *The Charter of the United Nations: A Commentary*, 3rd edition, B. Simma and others, eds. (Oxford, Oxford University Press, 2012), p. 71, at p. 80; Gardiner, *Treaty Interpretation* (see footnote 392 above), pp. 127 and 281.

[956] Gardiner, *Treaty Interpretation* (see footnote 392 above), p. 282; Schermers and Blokker, *International Institutional Law* (see footnote 933 above), p. 844; J. Crawford, *Brownlie's Principles of Public International Law*, 8th edition (Oxford, Oxford University Press, 2012), p. 187; Klabbers, *An Introduction to Institutional Law* (see footnote 953 above), pp. 89-90; see also *Partial Award on the Lawfulness of the Recall of the Privately Held Shares on 8 January 2001 and the Applicable Standards for Valuation of those Shares*, 22 November 2002, UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), pp. 183-251, at p. 224, para. 145.

[957] The Commission may on second reading revisit the definition of "other subsequent practice" in draft conclusions 2 [1], para. 4, and 4, para. 3, in order to clarify whether the practice of an international organization as such should be classified within this category which, so far, is limited to the practice of parties; see Report of the International Law Commission on its sixty-fifth session, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), chap. IV, pp. 11-12.

[958] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 149 (referring to General Assembly resolution 1600 (XV) of 15 April 1961 (adopted by 60 votes to 16, with 23 abstentions, including the Soviet Union and other States of Eastern Europe) and resolution 1913 (XVIII) of 13 December 1963 (adopted by 91 votes with 2 against (Spain and Portugal)).

[959] The International Court of Justice used the expression "… purposes and functions as specified or implied in its constituent documents and developed in practice", *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion*, *I.C.J. Reports 1949*, p. 174, at p. 180.

[960] See para. (15) of the commentary to draft conclusion 1 and footnote 429 above; see also, in particular, *Land and Maritime Boundary between Cameroon and Nigeria*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at pp. 306-307, para. 67.

(34) The possible relevance of an international organization's "own practice" can thus be derived from articles 31, paragraph 1, and 32 of the 1969 Vienna Convention. Those rules permit, in particular, taking into account practice of an organization itself, including by one or more of its organs, as being relevant for the determination of the object and purpose of the treaty, including the function of the international organization concerned, under article 31, paragraph 1.[961]

(35) Thus, article 5 of the 1969 Vienna Convention allows for the application of the rules of interpretation in articles 31 and 32 in a way that takes account of the practice of an international organization, in the interpretation of its constituent instrument, including taking into account its institutional character.[962] Such elements may thereby also contribute to identifying whether, and if so how, the meaning of a provision of a constituent instrument of an international organization is capable of evolving over time.[963]

(36) Paragraph 3, like paragraph 2, refers to the practice of an international organization as a whole, rather than to the practice of an organ of an international organization. The practice of an international organization in question can arise from the conduct of an organ, but can also be generated by the conduct of two or more organs.[964] It is understood that the practice of an international organization can only be relevant for the interpretation of its constituent instrument if that organization is competent, since it is a general requirement that international organizations do not act *ultra vires*.[965]

(37) Paragraph 3 of draft conclusion 12 [11] builds on draft conclusion 5, which addresses "subsequent practice" by parties to a treaty in the application of that treaty, as defined in draft conclusion 4. Draft conclusion 5 does not imply that the practice of an

[961] See *South-West Africa—Voting Procedure, Advisory Opinion of June 7th, 1955, I.C.J. Reports 1955*, p. 67, Separate Opinion of Judge Lauterpacht, at p. 106 ("… [a] proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of the revealed tendencies in the life of the Organization").

[962] Commentators are debating whether the specific institutional character of certain international organizations, in combination with the principles and values that are enshrined in their constituent instruments could also yield a "constitutional" interpretation of such instruments that receives inspiration from national constitutional law, see, for example, J.E. Alvarez, "Constitutional interpretation in international organizations", in *The Legitimacy of International Organizations* J.-M. Coicaud and V. Heiskanen, eds. (Tokyo, United Nations University Press, 2001), pp. 104-154;. A. Peters, "L'acte constitutif de l'organisation internationale", in E. Lagrange and J.-M. Sorel, eds., *Droit des organisations internationales* (Paris, LGDJ, 2013), pp. 216-218; M. Wood, "'Constitutionalization' of International Law: A Sceptical Voice", in *International Law and Power: Perspectives on Legal Order and Justice. Essays in Honour of Colin Warbrick,* K.H. Kaikobad and M. Bohlinder, eds. (Leiden/Boston, Brill/Nijhoff, 2009), pp. 85-97.

[963] *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 31-32, para. 53; see also draft conclusion 8 [3] and commentary thereto, paras. (24)-(30); Dörr, "Article 31 …" (see footnote 439 above), p. 537, para. 31; Schmalenbach, "Art. 5" (footnote 901 above), p. 92, para. 7.

[964] See Dörr (footnote 439 above), para. 21.

[965] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 168 ("[b]ut when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vire*s the Organization").

international organization, as such, in the application of its constituent instrument cannot be relevant practice under articles 31 and 32.[966]

*Paragraph 4 — without prejudice to the "rules of the organization"*

(38) Paragraph 4 of draft conclusion 12 [11] reflects article 5 of the Vienna Convention and its formulation borrows from that article. The paragraph applies to the situations covered under paragraphs 1 to 3 and ensures that the rules referred to therein are applicable, interpreted and applied "without prejudice to any relevant rules of the organization". The term "rules of the organization" is to be understood in the same way as in article 2, paragraph 1 (j), of the 1986 Vienna Convention, as well as in article 2 (b) of the articles on responsibility of international organizations of 2011.

(39) The Commission has stated in its general commentary to the 2011 draft articles on the responsibility of international organizations:

> "There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound."[967]

(40) Paragraph 4 implies, *inter alia*, that more specific "relevant rules" of interpretation that may be contained in a constituent instrument of an international organization may take precedence over the general rules of interpretation under the 1969 Vienna Convention.[968] If, for example, the constituent instrument contains a clause according to which the interpretation of the instrument is subject to a special procedure, it is to be presumed that the parties, by reaching an agreement after the conclusion of the treaty, do not wish to circumvent such a procedure by reaching a subsequent agreement under article 31, paragraph 3 (a). The special procedure under the treaty and a subsequent agreement under article 31, paragraph 3 (a), may, however, be compatible if they "serve different functions and have different legal effects".[969] Few constituent instruments contain explicit procedural or substantive rules regarding their interpretation.[970] Specific "relevant rules" of interpretation need not be formulated explicitly in the constituent instrument; they may also be implied therein, or derive from the "established practice of the organization".[971] The

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[966] See above commentary to draft conclusion 5, para. (14). The Commission may, however, eventually revisit the formulation of draft conclusion 5 in the light of draft conclusion 12 [11] in order to clarify their relationship. See also footnote 957 above.

[967] Draft articles on the responsibility of international organizations, general commentary, para. (7) (report of the International Law Commission on its sixty-third session, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. V, p. 70, para. 88).

[968] See, for example, Klabbers, *An Introduction to Institutional Law* (footnote 953 above), p. 88; Schmalenbach, "Art. 5" (footnote 901 above), p. 89, para. 1, and p. 96, para. 15; Brölmann, "Specialized rules of treaty interpretation …" (footnote 955 above), p. 522; Dörr, "Article 31 …" (see footnote 439 above), p. 538, para. 32.

[969] WTO Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, paras. 252-257.

[970] Most so-called interpretation clauses determine which organ is competent authoritatively to interpret the treaty, or certain of its provisions, but do not formulate specific rules "on" interpretation itself, see C. Fernández de Casadevante y Romani, *Sovereignty and Interpretation of International Norms* (Berlin/Heidelberg, Springer, 2007), pp. 26-27; Dörr, "Article 31 …" (see footnote 439 above), p. 537, para. 32.

[971] See 1986 Vienna Convention, art. 2 (j); and the International Law Commission's draft articles on the responsibility of international organizations, art. 2 (b), report of the International Law Commission on its sixty-third session, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No.*

"established practice of the organisation" is a term that is narrower in scope than the term "practice of the organization" as such.

(41) The Commission has noted in its commentary to article 2 (j) of the 1986 Vienna Convention that the significance of a particular practice of an organization may depend on the specific rules and characteristics of the respective organization, as expressed in its constituent instrument:

> "It is true that most international organizations have, after a number of years, a body of practice which forms an integral part of their rules. However, the reference in question is in no way intended to suggest that practice has the same standing in all organizations; on the contrary, each organization has its own characteristics in that respect."[972]

(42) In this sense, the "established practice of the organization" may also be a means for the interpretation of constituent instruments of international organizations. Article 2, paragraph 1 (j), of the 1986 Vienna Convention and article 2 (b) of the draft articles on the responsibility of international organizations[973] recognize the "established practice of the organization" as a "rule of the organization". Such practice may produce different legal effects in different organizations and it is not always clear whether those effects should be explained primarily in terms of traditional sources of international law (treaty or custom) or of institutional law.[974] But even if it is difficult to make general statements, the "established practice of the organization" usually encompasses a specific form of practice,[975] one which has generally been accepted by the members of the organization, albeit sometimes tacitly.[976]

**Conclusion 13 [12]**
**Pronouncements of expert treaty bodies**

1. For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.

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*10* (A/66/10), chap. V, sect. E, para. 87; C. Peters, "Subsequent practice and established practice of international organizations", *Göttingen Journal of International Law*, vol. 3 (2011), pp. 617-642.

[972] *Yearbook ... 1982*, vol. II (Part Two), chap. II, p. 21, commentary to draft article 2, para. 1 (j), para. (25).

[973] Report of the International Law Commission on its sixty-third session, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. V, p. 52.

[974] See Higgins, "The Development of international law …" (footnote 927 above), at p. 121 ("… aspects of treaty interpretation and customary practice in this field merge very closely"); Peters, "Subsequent practice …" (footnote 971 above), at pp. 630-631 ("… should be considered a kind of customary international law of the organization"); it is not persuasive to limit the "established practice of the organization" to so-called internal rules since, according to the Commission, "there would have been problems in referring to the 'internal' law of an organization, for while it has an internal aspect, this law also has in other respects an international aspect", *Yearbook ... 1982*, vol. II (Part Two), chap. II, p. 21, commentary to draft article 2, para. 1 (j), para. (25); Schermers and Blokker, *International Institutional Law* (see footnote 933 above), at p. 766; but see C. Ahlborn, "The rules of international organizations and the law of international responsibility", *International Organizations Law Review*, vol. 8 (2011), pp. 397-482, at pp. 424-428.

[975] Blokker, "Beyond 'Dili' …" (see footnote 954 above), p. 312.

[976] Lauterpacht, "The development of the law of international organization …" (footnote 779 above), p. 464 ("… consent of the general body of membership"); Higgins, "The Development of international law …" (footnote 927 above), p. 121 ("[t]he degree of length and acquiescence need here perhaps to be less marked than elsewhere, because the U.N. organs undoubtedly have initial authority to make such decisions [regarding their own jurisdiction and competence]"); Peters, "Subsequent practice and established practice …" (footnote 971 above), pp. 633-641.

2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.

3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or other subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.

4. This draft conclusion is without prejudice to the contribution that a pronouncement of an expert treaty body may otherwise make to the interpretation of a treaty.

**Commentary**

*Paragraph 1 — definition of the term "expert treaty body"*

(1) Some treaties establish bodies, consisting of experts who serve in their personal capacity, which have the task of monitoring or contributing in other ways to the application of those treaties. Examples of such expert treaty bodies are the committees established under various human rights treaties at the universal level,[977] for example, the Committee on the Elimination of Racial Discrimination,[978] the Human Rights Committee,[979] the Committee on the Elimination of All Forms of Discrimination against Women,[980] Committee on the Rights of Persons with Disabilities,[981] the Committee on the Rights of the Child[982] and the Committee against Torture.[983] Other expert treaty bodies include the Commission on the Limits of the Continental Shelf under the United Nations Convention on the Law of the Sea,[984] the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention),[985] and the International Narcotics Control Board under the Single Convention on Narcotic Drugs.[986]

[977] See Nigel Rodley, "The role and impact of treaty bodies", in *The Oxford Handbook of International Human Rights Law*, D. Shelton, ed. (Oxford, Oxford University Press, 2013), pp. 621-641, at pp. 622-623.

[978] Arts. 8-14 of the International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966), United Nations, *Treaty Series*, vol. 660, No. 9464, p. 195.

[979] Arts. 28-45 of the International Covenant on Civil and Political Rights (New York, 19 December 1966), *ibid*., vol. 999, No. 14668, p. 171.

[980] Arts. 17-22 of the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), *ibid*., vol. 1249, No. 20378, p. 13.

[981] Arts. 34-39 of the Convention on the Rights of Persons with Disabilities (New York, 13 December 2006), *ibid*., vol. 2515, No. 44910, p. 3.

[982] Arts. 43-45 of the Convention on the Rights of the Child (New York, 20 November 1989), *ibid*., vol. 1577, No. 27531, p. 3.

[983] Arts. 17-24 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), *ibid*., vol. 1465, No. 24841, p. 85.

[984] The Commission on the Limits of the Continental Shelf was established under art. 76, para. 8, of the United Nations Convention on the Law of the Sea and annex II to the Convention (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

[985] The Compliance Committee under the Aarhus Convention was established under art. 15 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, Denmark, 25 June 1998), *ibid*., vol. 2161, No. 37770,

(2) Paragraph 1 defines the term "expert treaty body" only "for the purposes of these draft conclusions". The draft conclusion does not claim otherwise to pronounce on the status of such bodies and the possible legal effect of their acts for other purposes.

(3) The term "serving in their personal capacity" means that the members of an expert treaty body are free from governmental instructions when they act in that capacity.[987] Draft conclusion 13 [12] is not concerned with bodies that consist of State representatives. The output of a body that is composed of State representatives, and that is not an organ of an international organization, is a form of practice by those States that thereby act collectively within its framework.[988]

(4) Draft conclusion 13 [12] also does not apply in similar terms to bodies that are organs of an international organization.[989] The output of a body that is an organ of an international organization is, in the first place, attributed to the organization.[990] The exclusion of bodies that are organs of international organizations from the scope of draft conclusion 13 [12] has been made for formal reasons, since the present draft conclusions are not focused on the relevance of the rules of interpretation of the Vienna Convention. This does not exclude that the substance of the present draft conclusion may apply, *mutatis mutandis*, to pronouncements of independent expert bodies that are organs of international organizations.

(5) The expression "established under a treaty" means that the establishment or a competence of a particular expert body is provided under a treaty. In most cases it is clear whether these conditions are satisfied, but there may also be borderline cases. The Committee on Economic, Social and Cultural Rights, for example, is a body that was established by a resolution of an international organization,[991] but which was later given the competence to "consider" certain "communications" by the Optional Protocol to the

p. 447, and decision I/7 on review of compliance, adopted at the first meeting of the parties in 2002 (ECE/MP.PP/2/Add.8).

[986] The International Narcotics Control Board was established under art. 5 of the Single Convention on Narcotic Drugs (New York, 30 March 1961), United Nations, *Treaty Series*, vol. 520, No. 7515, p. 151.

[987] See, e.g., art. 28, para. 3, of the International Covenant on Civil and Political Rights; see also Christian Tomuschat, *Human Rights: Between Idealism and Realism*, 3rd edition (Oxford, Oxford University Press, 2014), p. 219.

[988] This is true, in particular, for decisions of Conferences of States Parties, see draft conclusion 12 [11].

[989] The Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization (ILO) is an important example of an expert body that is an organ of an international organization. It was established in 1926 to examine government reports on ratified conventions. It is composed of 20 eminent jurists from different geographic regions, legal systems and cultures, who are appointed by the governing body of ILO for three-year terms, see www.ilo.org and information provided by ILO to the Commission, which is available on the International Law Commission website at http://legal.un.org/ilc/guide/1_11.shtml.

[990] Art. 6, para. 1, of the articles on responsibility of international organizations, General Assembly resolution 66/100, annex, of 9 December 2011 (for the commentary thereto, see *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), chap. V, sect. E); the Working Group on Arbitrary Detention is an example of a body of experts serving in their personal capacity that is mandated by the Human Rights Council under its resolution 24/7 of 26 September 2013, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 53* (A/68/53/Add.1). Being a subsidiary organ of the Council, it is not an expert treaty body under draft conclusion 13 [12], see www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx.

[991] Economic and Social Council, resolution 1987/5 of 26 May 1987 (E/C.12/1989/4), para. 9.

International Covenant on Economic, Social and Cultural Rights.[992] Such a body is an expert treaty body within the meaning of draft conclusion 13 [12] as a treaty provides for the exercise of certain competences by the Committee. Another borderline case is the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change, the establishment of which — by a decision of the Conference of the Parties — is implicitly envisaged in article 18 of the Protocol.[993]

*Paragraph 2 — primacy of the rules of the treaty*

(6) Treaties use various terms for designating the forms of action of expert treaty bodies, for example, "views",[994] "recommendations",[995] "comments",[996] "measures"[997] and "consequences".[998] Draft conclusion 13 [12] employs, for the purpose of the present draft conclusion, the general term "pronouncements".[999] This term covers all relevant forms of action by expert treaty bodies. Other general terms that are in use for certain bodies include "jurisprudence"[1000] and "output".[1001]

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[992] Arts. 1-15 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, annexed to General Assembly resolution 63/117 of 10 December 2008.

[993] The Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997) (United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 162) was established under art. 18 of the Protocol and decision 24/CP.7 on procedures and mechanisms relating to compliance under the Kyoto Protocol, adopted by the Conference of the Parties at its seventh session (FCCC/CP/2001/13/Add.3).

[994] See International Covenant on Civil and Political Rights, art. 42, para. 7 (c); Optional Protocol to the International Covenant on Civil and Political Rights, art. 5, para. 4; and Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, art. 9, para. 1.

[995] See International Convention on the Elimination of All Forms of Racial Discrimination, art. 9, para. 2; Convention on the Elimination of All Forms of Discrimination against Women, art. 21, para. 1; Convention on the Rights of the Child (New York, 29 November 1989) (United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3), art. 45 (d); International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006) (*ibid.*, vol. 2716, No. 48088, p. 3), art. 33, para. 5; United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) (*ibid*., vol. 1833, No. 31363, p. 3), art. 76, para. 8.

[996] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19, para. 3; International Covenant on Civil and Political Rights, art. 40, para. 4; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990) (United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3), art. 74.

[997] Decision I/7 on review of compliance (see footnote 985 above), sect. XI, para. 36, and sect. XII, para. 37; Single Convention on Narcotic Drugs, art. 14.

[998] Decision 24/CP.7 on procedures and mechanisms relating to compliance under the Kyoto Protocol (see footnote 993 above), annex, sect. XV.

[999] See *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), chap. III, para. 26 (b); see also the "Final report on the impact of findings of the United Nations human rights treaty bodies", International Law Association, *Report of the Seventy-first Conference* (see footnote 540 above) p. 5, para. 15; European Commission for Democracy through Law (Venice Commission), "Report on the implementation of international human rights treaties in domestic law and the role of courts" (CDL-AD(2014)036), adopted by the Venice Commission at its 100th plenary session (Rome, 10-11 October 2014), p. 31, para. 78.

[1000] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at pp. 663-664, para. 66; Rodley, "The role and impact of treaty bodies" (footnote 977 above), p. 640; *Case Law of the Aarhus Convention Compliance Committee (2004-2011)*, 2nd edition, A. Andrusevych, T. Alge and C. Konrad, eds. (Lviv, Resource and Analysis Center "Society and Environment", 2011); "Compilation of findings of the Aarhus Convention Compliance Committee adopted 18 February 2005 to date", available from

(7) Paragraph 2 serves to emphasize that any possible legal effect of a pronouncement by an expert treaty body depends, first and foremost, on the specific rules of the applicable treaty itself. Such possible legal effects may therefore be very different. They must be determined by way of applying the rules on treaty interpretation set forth in the Vienna Convention. The ordinary meaning of the term by which a treaty designates a particular form of pronouncement, or its context, usually gives a clear indication that such pronouncements are not legally binding.[1002] This is true, for example, for the terms "views" (article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights), "suggestions and recommendations" (article 14, paragraph 8, of the International Convention on the Elimination of All Forms of Racial Discrimination) and "recommendations" (article 76, paragraph 8, of the United Nations Convention on the Law of the Sea).

(8) It is not necessary, for present purposes, to describe the competences of different expert treaty bodies in detail. Pronouncements of expert treaty bodies under human rights treaties, for example, are usually either adopted in reaction to State reports (for example, "concluding observations"), or in response to individual communications (for example, "views"), or regarding the implementation or interpretation of the respective treaties generally (for example, "general comments").[1003] Whereas such pronouncements are governed by different specific provisions of the treaty that primarily determine their legal effect, they often, explicitly or implicitly, interpret the treaty in a way that raises some general issues that draft conclusion 13 [12] seeks to address.[1004]

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www.unece.org/fileadmin/DAM/env/pp/compliance/Compilation_of_CC_findings.pdf (accessed 8 July 2016).

[1001] R. Van Alebeek and A. Nollkaemper, "The legal status of decisions by human rights treaty bodies in national law", in *UN Human Rights Treaty Bodies: Law and Legitimacy*, H. Keller and L. Grover, eds. (Cambridge, United Kingdom, Cambridge University Press, 2012), pp. 356-413, at p. 402; Rodley, "The role and impact of treaty bodies" (see footnote 977 above), p. 639; K. Mechlem, "Treaty bodies and the interpretation of human rights", *Vanderbilt Journal of Transnational Law*, vol. 42 (2009), pp. 905-947, at p. 908.

[1002] This is generally accepted in the literature, see International Law Association, *Report of the Seventy-first Conference* (footnote 540 above), p. 5, para. 18; Rodley, "The role and impact of treaty bodies" (see footnote 977 above), p. 639; Tomuschat, *Human Rights* ... (footnote 987 above), pp. 233 and 267; D. Shelton, "The legal status of normative pronouncements of human rights treaty bodies" in *Coexistence, Cooperation and Solidarity, Liber Amicorum Rüdiger Wolfrum*, vol. I, H.P. Hestermeyer and others, eds. (Leiden; Boston, Martinus Nijhoff Publishers, 2012), pp. 553-575, at p. 559; H. Keller and L. Grover, "General comments of the Human Rights Committee and their legitimacy", in Keller and Grover, *UN Human Rights Treaty Bodies* ... (see footnote 1001 above), pp. 116-198, at p. 129; Venice Commission, "Report on the implementation of international human rights treaties … (footnote 999 above), p. 30, para. 76; for the term "determine" in art. 18 of the Kyoto Protocol and decision 24/CP.7, see G. Ulfstein and J. Werksmann, "The Kyoto compliance system: towards hard enforcement", in *Implementing the Climate Regime: International Compliance*, O.S. Stokke, J. Hovi and G. Ulfstein, eds. (London, Fridtjof Nansen Institut, 2005), pp. 39-62, at pp. 55-56.

[1003] W. Kälin, "Examination of state reports", in Keller and Grover, *UN Human Rights Treaty Bodies* ... (see footnote 1001 above), pp. 16-72; G. Ulfstein, "Individual complaints", *ibid*., pp. 73-115; Mechlem, "Treaty bodies … (see footnote 1001 above), pp. 922-930; the legal basis for general comments under the International Covenant on Civil and Political Rights is art. 40, para. 4, but this practice has been generally accepted also with regard to other expert bodies under human rights treaties, see Keller and Grover, "General comments …" (footnote 1002 above), pp. 127-128.

[1004] For example, Rodley, "The role and impact of treaty bodies" (see footnote 977 above), p. 639; Shelton, "The legal status of normative pronouncements …" (see footnote 1002 above), pp. 574-

*Paragraph 3, first sentence — "may give rise to, or refer to, a subsequent agreement or a subsequent practice"*

(9) A pronouncement of an expert treaty body cannot as such constitute subsequent practice under article 31, paragraph 3 (b), since this provision requires a subsequent practice of the parties that establishes their agreement regarding the interpretation of the treaty. This has been confirmed, for example, by the reaction to a draft proposition of the Human Rights Committee according to which its own "general body of jurisprudence", or the acquiescence by States to that jurisprudence, would constitute subsequent practice under article 31, paragraph 3 (b). The proposition of the Human Rights Committee was:

> "In relation to the general body of jurisprudence generated by the Committee, it may be considered that it constitutes 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' within the sense of article 31(3)(b) of the Vienna Convention on the Law of Treaties, or, alternatively, the acquiescence of States parties in those determinations constitutes such practice."[1005]

(10) When this proposition was criticized by some States,[1006] the Committee did not pursue its proposal and adopted its general comment No. 33 without a reference to article 31, paragraph 3 (b).[1007] This confirms that pronouncements of expert treaty bodies cannot as such constitute subsequent practice under article 31, paragraph 3 (b).

(11) Pronouncements of expert treaty bodies may, however, give rise to, or refer to, a subsequent agreement or a subsequent practice by the parties which establish their agreement regarding the interpretation of the treaty under article 31, paragraph 3 (a) or (b). This possibility has been recognized by States,[1008] by the Commission[1009] and also by the International Law Association[1010] and by a significant number of authors.[1011] There is indeed no reason why a subsequent agreement between the parties or subsequent practice

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575; A. Boyle and C. Chinkin, *The Making of International Law* (Oxford, Oxford University Press, 2007), p. 155.

[1005] Draft general comment No. 33 (The obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights) (Second revised version as of 18 August 2008) (CCPR/C/GC/33/CRP.3), 25 August 2008, at para. 17; this position has also been put forward by several authors, see Keller and Grover, "General comments …" (footnote 1002 above), pp. 130-132 with further references.

[1006] See, for example, the "Comments of the United States of America on the Human Rights Committee's 'Draft general comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant Civil and Political Rights'", 17 October 2008, para. 17. Available from www.state.gov/documents/organization/138851.pdf (accessed 8 July 2016).

[1007] Report of the Human Rights Committee, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 40* (A/64/40), vol. I, annex V.

[1008] See, for example, *Official Records of the General Assembly, Seventieth Session, Sixth Committee*, Summary Record of the 22nd meeting (A/C.6/70/SR.22), 6 November 2015, para. 46 (United States: "… States Parties' reactions to the pronouncements or activities of a treaty body might, in some circumstances, constitute subsequent practice (of those States) for the purposes of art. 31, paragraph 3").

[1009] See para. (11) of the commentary to draft conclusion 3 [2].

[1010] See International Law Association, *Report of the Seventy-first Conference* (footnote 540 above), p. 6, para. 21.

[1011] See, for example, Mechlem, "Treaty bodies … (footnote 1001 above), pp. 920-921; B. Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", in Keller and Grover, *UN Human Rights Treaty Bodies* ... (footnote 1001 above), pp. 289-290; Ulfstein and Werksmann, "The Kyoto compliance system …" (footnote 1002 above), p. 96.

that establishes the agreement of the parties themselves regarding the interpretation of a treaty could not arise from, or be referred to by, a pronouncement of an expert treaty body.

(12) Whereas a pronouncement of an expert treaty body can, in principle, give rise to a subsequent agreement or a subsequent practice by the parties themselves under article 31, paragraph 3 (a) and (b), this result is not easily achieved in practice. Most treaties that establish expert treaty bodies at the universal level have many parties. It will often be difficult to establish that all parties have accepted, explicitly or implicitly, that a particular pronouncement of an expert treaty body expresses a particular interpretation of the treaty.

(13) One possible way of identifying an agreement of the parties regarding the interpretation of a treaty that is reflected in a pronouncement of an expert treaty body is to look at resolutions of organs of international organizations as well as of Conferences of States Parties. General Assembly resolutions may, in particular, explicitly or implicitly refer to pronouncements of expert treaty bodies. This is true, for example, for two resolutions of the General Assembly on the "protection of human rights and fundamental freedoms while countering terrorism",[1012] which expressly refer to general comment No. 29 (2001) of the Human Rights Committee on derogations from provisions of the Covenant during a state of emergency.[1013] Both resolutions reaffirm the obligation of States to respect certain rights under the International Covenant on Civil and Political Rights as non-derogable in any circumstances and underline the "exceptional and temporary nature" of derogations by way of using the terms used in general comment No. 29 when interpreting and thereby specifying the obligation of States under article 4 of the Covenant.[1014] These resolutions were adopted without a vote by the General Assembly, and hence would reflect a subsequent agreement under article 31, paragraph 3 (a) or (b), if the consensus constituted the acceptance by all the parties of the interpretation that is contained in the pronouncement.[1015]

(14) The pronouncement of the Committee on Economic, Social and Cultural Rights, in its general comment No. 15 (2002), according to which articles 11 and 12 of that Covenant imply a human right to water,[1016] offers another illustration of the way in which an agreement of the parties may come about. After a debate over a number of years, the General Assembly on 17 December 2015 adopted a resolution, without a vote, that defines the human right to safe drinking water by using the language that the Committee employed in its general comment No. 15 in order to interpret the right.[1017] That resolution may refer to an agreement under article 31, paragraph 3 (a) or (b), depending on whether the consensus

[1012] General Assembly resolutions 65/221 of 21 December 2010, para. 5, footnote 8, and 68/178 of 18 December 2013, para. 5, footnote 8.

[1013] Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40* (A/56/40), vol. I, Annex VI.

[1014] *Ibid*., para. 2.

[1015] See draft conclusion 11 [10], para. 3, and the commentary thereto.

[1016] Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002), *Official Records of the Economic and Social Council 2003, Supplement No. 2* (E/2003/22-E/C.12/2002/13), annex IV, para. 2. ("The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses").

[1017] General Assembly resolution 70/169 of 17 December 2015 recalls general comment No. 15 of the Committee on Economic, Social and Cultural Rights on the right to water (see footnote 1016 above) and uses the same language: "Recognizes that the human right to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use" (para. 2).

constituted the acceptance by all parties of the interpretation that is contained in the pronouncement.[1018]

(15) Other General Assembly resolutions explicitly refer to pronouncements of expert treaty bodies[1019] or call upon States to take into account the recommendations, observations and general comments of relevant treaty bodies to the topic on the implementation of the related treaties.[1020] Resolutions of Conferences of States Parties may do the same, as with regard to recommendations of the Compliance Committee under the Aarhus Convention.[1021] Such resolutions should, however, be approached with caution before reaching any conclusion as to whether they imply a subsequent agreement or subsequent practice of the parties under article 31, paragraph 3 (a) or (b).

(16) Even if a pronouncement of an expert treaty body does not give rise to, or refer to, a subsequent agreement or a subsequent practice that establishes the agreement of all parties to a treaty, it may be relevant for the identification of other subsequent practice under article 32 that does not establish such agreement. There are, for example, resolutions of the Human Rights Council that refer to general comments of the Human Rights Committee or of the Committee on Economic, Social, and Cultural Rights.[1022] Even if the membership of the Council is limited, such resolutions may be relevant for the interpretation of a treaty as expressing other subsequent practice under article 32. Another example concerns the International Narcotics Control Board.[1023] A number of States have engaged in subsequent practice under article 32 by disagreeing with the proposals of the Board regarding the establishment of so-called safe injection rooms and other harm reduction measures,[1024]

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[1018] See draft conclusion 11 [10], para. 3, and the commentary thereto, paras. (31)-(38); in the case of resolution 70/169 on the right to water (see footnote 1017 above) "… the United States dissociated itself from the consensus on paragraph 2 on the grounds that the language used to define the right to water and sanitation was based on the views of the Committee on Economic, Social and Cultural Rights and the Special Rapporteur only and did not appear in any international agreement or reflect any international consensus" (see *Official Records of the General Assembly, Seventieth Session, Third Committee, 55th meeting* (A/C.3/70/SR.55), 24 November 2015, para. 144). It is not entirely clear whether the United States thereby wished to merely restate its position that the resolution did not recognize a particular effect of the pronouncement of the Committee, as such, or whether it disagreed with the definition in substance.

[1019] See General Assembly resolution 69/166 of 18 December 2014, adopted without a vote, recalling general comment No. 16 of the Human Rights Committee on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation (*Official Records of the General Assembly, Forty-third Session, Supplement No. 40* (A/43/40), annex VI).

[1020] See General Assembly resolution 69/157 of 18 December 2014, adopted without a vote; and resolution 68/147 of 18 December 2013, adopted without a vote.

[1021] Decision I/7 on review of compliance (see footnote 985 above), annex, sects. III and XII, para. 37; V. Koester, "The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)", in *Making Treaties Work, Human Rights, Environment and Arms Control*, G. Ulfstein and others, eds. (Cambridge, United Kingdom, Cambridge University Press, 2007), pp. 179-217, at p. 203.

[1022] See Human Rights Council resolutions 28/16 of 26 March 2015 and 28/19 of 27 March 2015, adopted without a vote (report of the Human Rights Council, *Official Records of the General Assembly, Seventieth Session, Supplement No. 53* (A/70/53)).

[1023] See footnote 986 above.

[1024] See *Report of the International Narcotics Control Board for 2009* (E/INCB/2009/1, United Nations Publication, Sales No. E.10.XI.1), para. 278; see also J. Csete and D. Wolfe, "Closed to reason: the International Narcotics Control Board and HIV/AIDS" (Canadian HIV/AIDS Legal Network/International Harm Reduction Development of the Open Society Institute, 2007), pp. 12-18.

criticizing the Board for following too rigid an interpretation of the drug conventions and as acting beyond its mandate.[1025]

(17) Paragraph 3, first sentence, circumscribes the ways in which a pronouncement by an expert treaty body may be relevant for subsequent agreements and subsequent practice of parties to a treaty by using the terms "may give rise to" and "or refer to". The expression "may give rise to" addresses situations in which a pronouncement comes first and the practice and the possible agreement of the parties occur thereafter. In this situation, the pronouncement may serve as a catalyst for the subsequent practice of States parties. The term "refer to", on the other hand, covers situations in which the subsequent practice and a possible agreement of the parties have developed before the pronouncement, and where the pronouncement is only an indication of such an agreement or practice. Paragraph 3 uses the term "refer to" rather than "reflect" in order to make clear that any subsequent practice or agreement of the parties is not comprised in the pronouncement itself. This term does not, however, require that the pronouncement refer to such subsequent practice or agreement explicitly.[1026]

*Paragraph 3, second sentence — presumption against silence as constituting acceptance*

(18) An agreement of all the parties to a treaty, or even only a large part of them, regarding the interpretation that is articulated in a pronouncement is often only conceivable if the absence of objections could be taken as agreement by State parties that have remained silent. Draft conclusion 10 [9], paragraph 2, provides, as a general rule: "Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction."[1027] Paragraph 3, second sentence, does not purport to recognize an exception to this general rule, but rather intends to specify and apply this rule to the typical cases of pronouncements of expert bodies.

(19) This means, in particular, that it cannot usually be expected that States parties take a position with respect to every pronouncement by an expert treaty body, be it addressed to another State or to all States generally.[1028] On the other hand, State parties may have an obligation, under a duty to cooperate under certain treaties, to take into account and to react

[1025] D. Barrett, *Unique in International Relations? A Comparison of the International Narcotics Control Board and the UN Human Rights Treaty Bodies* (London, International Harm Reduction Association, 2008), p. 8.

[1026] Expert treaty bodies under human rights treaties have rarely attempted to specifically identify the practice of the parties for the purpose of interpreting a particular treaty provision, see examples in G. Nolte, "Jurisprudence under special regimes relating to subsequent agreements and subsequent practice: second report for the ILC Study Group on treaties over time", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), pp. 210-278; Schlütter, "Aspects of human rights interpretation …" (see footnote 1011 above), p. 318.

[1027] See draft conclusion 10 [9], para. 2.

[1028] See Ulfstein and Werksmann, "The Kyoto compliance system …" (footnote 1002 above), p. 97; Van Alebeek and Nollkaemper, "The legal status of decisions by human rights treaty bodies …" (footnote 1001 above), p. 410.

to a pronouncement of an expert treaty body that is specifically addressed to them,[1029] or to individual communications regarding their own conduct.[1030]

*Paragraph 4 — without prejudice to other contribution*

(20) Apart from possibly giving rise to, or referring to, subsequent agreements or subsequent practice of the parties themselves under articles 31, paragraph 3 (a) and (b), and 32, pronouncements by expert treaty bodies may also otherwise contribute to, and thus be relevant for, the interpretation of a treaty. Paragraph 4 addresses this possibility by way of a without prejudice clause. The term "otherwise" is, however, not used because the Commission attaches less importance to contributions by expert treaty bodies to the interpretation of a treaty other than those that are described in paragraph 3.

(21) The International Court of Justice has confirmed, in particular in the *Ahmadou Sadio Diallo* case, that pronouncements of the Human Rights Committee are relevant for the purpose of the interpreting of the International Covenant on Civil and Political Rights, irrespective of whether such pronouncements give rise to, or refer to, an agreement of the parties under article 31, paragraph 3:

> "Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of 'General Comments'.
>
> "Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty."[1031]

(22) Regional human rights courts have also used pronouncements of expert treaty bodies as an aid for the interpretation of treaties that they are called on to apply.[1032] Many domestic

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[1029] Such as a pronouncement regarding the permissibility of a reservation that it has formulated, see guideline 3.2.3 of the guide to practice on reservations to treaties, and para. (3) of the commentary thereto, adopted by the Commission in 2011, report of the International Law Commission, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10/Add.1).

[1030] C. Tomuschat, "Human Rights Committee", in *The Max Planck Encyclopedia of Public International Law* (www.mpepil.com), at para. 14 ("States parties cannot simply ignore them [individual communications], but have to consider them in good faith (*bona fide*) … not to react at all … would appear to amount to a violation …").

[1031] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at pp. 663-664, para. 66; see also *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, *Advisory Opinion, I.C.J. Reports 2012*, p. 10, at p. 27, para. 39; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, *I.C.J. Reports 2004*, p. 136, at pp. 179-181, paras. 109-110 and 112, and at pp. 192-193, para. 136, in which the Court referred to various pronouncements of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights; see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 457, para. 101, referring to pronouncements of the Committee against Torture when determining the temporal scope of the Convention against Torture.

[1032] The Inter-American Court of Human Rights, *Case of the Constitutional Tribunal (Camba Campos and Others) v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 28 August 2013, Series C No. 268, paras. 189 and 191; African Commission on

courts consider that pronouncements of expert treaty bodies under human rights treaties, while not being legally binding on them as such,[1033] nevertheless "deserve to be given considerable weight in determining the meaning of a relevant right and the determination of a violation".[1034]

(23) The Commission itself, in its commentary to the Guide to Practice on Reservations to Treaties,[1035] addressed the question of the relevance of pronouncements of expert treaty bodies under human rights treaties with respect to reservations.[1036]

(24) Court decisions have not always fully explained the relevance of pronouncements by expert treaty bodies for the purpose of the interpretation of a treaty, be it in terms of the rules of interpretation under the Vienna Convention or otherwise.[1037] The Commission has considered the following alternatives (paragraphs (25) and (26) below).

(25) Some members consider that pronouncements of expert treaty bodies are a form of practice that may contribute to the interpretation of a treaty, relying, *inter alia*, on the

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Human and Peoples' Rights, *Civil Liberties Organisation and others v. Nigeria*, Communication No. 218/98, Decisions on communications brought before the African Commission, twenty-ninth ordinary session, Tripoli, May 2001 at para. 24 ("In interpreting and applying the Charter, the Commission … is also enjoined by the Charter and by international human rights standards, which include decisions and general comments by UN treaty bodies"); African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Decisions on communications brought before the African Commission, thirtieth ordinary session, Banjul, October 2001 at para. 63 ("draws inspiration from the definition of the term 'forced evictions' by the Committee on Economic Social and Cultural Rights in its General Comment No. 7"); *Marguš v. Croatia* [GC], No. 4455/10, ECHR 2014 (extracts), paras. 48-50; *Baka v. Hungary*, No. 20261/12, 27 May 2014, para. 58; *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, ECHR 2012 (extracts), paras. 107-108, 147-151, 155 and 158; *Gäfgen v. Germany* [GC], No. 22978/05, ECHR 2010, paras. 68 and 70-72; see also International Law Association, *Report of the Seventy-first Conference* (footnote 540 above), pp. 29-38, paras. 116-155.

[1033] See the decisions quoted in Venice Commission, "Report on the implementation of international human rights treaties …" (footnote 999 above), at para. 76, footnotes 172 and 173 (Ireland, Supreme Court, *Kavanagh (Joseph) v. the Governor of Mountjoy Prison and the Attorney General* [2002] IESC 13 (1 March 2002), para. 36; France, Council of State, *Hauchemaille v. France*, case No. 238849, 11 October 2001, ILDC 767 (FR 2001), para. 22).

[1034] International Law Association, *Report of the Seventy-first Conference* (footnote 540 above), p. 43, para. 175; Germany, Federal Administrative Court, BVerwGE, vol. 134, p. 1, at p. 22, para. 48.

[1035] Report of the International Law Commission (2011), *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10/Add.1).

[1036] "Of course, if such bodies have been vested with decision-making power the parties must respect their decisions, but this is currently not the case in practice except for some regional human rights courts. In contrast, the other monitoring bodies lack any juridical decision-making power, either in the area of reservations or in other areas in which they possess declaratory powers. Consequently, their conclusions are not legally binding, and States parties are obliged only to 'take account' of their assessments in good faith"(*ibid*., para. (3) of the commentary to guideline 3.2.3).

[1037] International Law Association, *Report of the Seventy-first Conference* (see footnote 540 above), p. 5, para. 17; Van Alebeek and Nollkaemper, "The legal status of decisions by human rights treaty bodies …" (footnote 1001 above), p. 401; one of the few judgments in which this was the case is High Court of Osaka, Judgment of 28 October 1994, 1513 *Hanrei Jiho* 71, 87, 38 (as quoted in the *Report of the Seventy-first Conference* of the International Law Association (see footnote 540 above), at para. 20, footnote 22), also available in *Japanese Annual of International Law*, vol. 38 (1995), pp. 109-150, at pp. 118-133; and Germany, Federal Administrative Court (see footnote 1034 above).

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Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where the International Court of Justice referred to the "constant practice of the Human Rights Committee" in order to support its own interpretation of a provision of the International Covenant on Civil and Political Rights.[1038] Those members consider that international and domestic courts mostly use pronouncements of expert treaty bodies in the discretionary way in which article 32 describes supplementary means of interpretation.[1039] In addition, pronouncements of expert treaty bodies could, as practice under the treaty, also "contribute to the determination of the ordinary meaning of the terms in their context and in light of the object and purpose of the treaty".[1040] These members consider also that draft conclusion 12 [11], paragraph 3, could help to resolve the question,[1041] as the practice of both an international organization in the application of its own instrument and a pronouncement of an expert treaty body have in common that, while they are both not practice of a party to the treaty, they are nevertheless conduct mandated by the treaty the purpose of which is to contribute to the treaty's proper application.

(26) Other members consider that pronouncements of expert treaty bodies are not, as such, a form of practice in the sense of the present topic. It was pointed out that draft conclusion 4, paragraph 3, provides that "other subsequent practice consists of conduct by

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[1038] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 179, para. 109.

[1039] The High Court of Osaka has explicitly stated: "One may consider that the 'general comments' and 'views'… should be relied upon as supplementary means of interpretation of the ICCPR." Osaka High Court, Judgment of 28 October 1994 (footnote 1037 above), as quoted in the *Report of the Seventy-first Conference* of the International Law Association (see footnote 540 above), at para. 85, footnote 178, also available in *Japanese Annual of International Law*, vol. 38 (1995), at pp. 129-130; see also, for example, Netherlands, Central Appeals Tribunal, *Appellante v. de Raad van Bestuur van de Sociale Verzekeringsbank* (available from http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:CRVB:2006:AY5560, accessed 11 July 2016); United Kingdom, on the one hand, House of Lords, *Jones v. Saudi Arabia,* 14 June 2006 [2006] UKHL 26 ("no value") and, on the other hand, House of Lords, *A. v. Secretary of State for the Home Department* [2005] UKHL 71, paras. 34-36(relying on treaty body pronouncements to establish an exclusionary rule of evidence that prevents the use of information obtained by means of torture) and Court of Appeal, *R. (on the application of Al-Skeini) v. Secretary of State for Defence, application for judicial review* (2005) EWCA Civ 1609 (2006) HRLR 7, at para. 101 (citing general comment No. 31 of the Human Rights Committee to establish the extraterritorial application of the Human Rights Act 1998); South Africa, on the one hand, High Court Witwatersrand, *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*, 2002 (6) BCLR, p. 625, at p. 629 ("general comments have an authoritative status under international law"), as quoted at para. 11 the *Report of the Seventy-first Conference* of the International Law Association (footnote 540 above) and, on the other hand, Constitutional Court, *Minister of Health and Others v. Treatment Action Campaign and Others (No 2)* (CCT 8/02) [2002] ZACC 15, paras. 26 and 37 (rejecting [application of] the "minimum-core standard" set out by the Committee on Economic, Social and Cultural Rights in general comment No. 3 (*Official Records of the Economic and Social Council, 1991, Supplement No. 3* (E/1991/23-E/C.12/1990/8 and Corr.1), annex III, p. 83); Japan, Tokyo District Court, Judgment of 15 March 2001, 1784 *Hanrei Jiho* 67, at 74 ("the General Comment neither represents authoritative interpretation of the ICCPR nor binds the interpretation of the treaty in Japan"), as quoted at para. 87 of the *Report of the Seventy-first Conference* of the International Law Association (footnote 540 above).

[1040] See para. (15) of the commentary to draft conclusion 2 [1], footnote 429; see also draft conclusion 12 [11], para. 3.

[1041] See draft conclusion 12 [11], para. 3.

one or more parties in the application of the treaty, after its conclusion",[1042] and that the topic was therefore restricted to practice by the parties themselves. It was also suggested that pronouncements of expert treaty bodies could not simultaneously be a form of application of the treaty and perform a monitoring function. According to those members, the *Diallo* judgment of the International Court of Justice suggested that the mandate and the function of expert treaty bodies, like that of courts, was to supervise the application of the treaty, not to serve themselves as a means of interpretation.[1043]

(27) Ultimately, the Commission decided to limit itself, for the time being, to formulating, in paragraph 4 of draft conclusion 13 [12], a without prejudice clause. The matter may be taken up again on second reading, in light of the views expressed by States.[1044]

[1042] Pronouncements of expert bodies are indeed "in the application of the treaty" since such "application", according to the Commission, "includes not only official acts at the international or at the internal level which serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, *inter alia*, official statements regarding its interpretation" (see para. (18) of the commentary to draft conclusion 4).

[1043] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at pp. 663-664, para. 66.

[1044] In its commentary to draft conclusion 12 [11], paragraph 3, the Commission noted: "The Commission may … revisit the definition of 'other subsequent practice' in draft conclusions 2 [1], para. 4, and 4, para. 3, in order to clarify whether the practice of an international organization as such should be classified within this category which, so far, is limited to the practice of parties" (see footnote 957 above).

# No. 18232

## MULTILATERAL

## Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969

*Authentic texts: English, French, Chinese, Russian and Spanish.*
*Registered* ex officio *on 27 January 1980.*

## MULTILATÉRAL

## Convention de Vienne sur le droit des traités (avec annexe). Conclue à Vienne le 23 mai 1969

*Textes authentiques : anglais, français, chinois, russe et espagnol.*
*Enregistrée d'office le 27 janvier 1980.*

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# VIENNA CONVENTION[1] 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,

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[1] Came into force on 27 January 1980, i.e., on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession with the Secretary-General of the United Nations, in accordance with article 84 (1):

| State | Date of deposit of the instrument of ratification or accession (a) | State | Date of deposit of the instrument of ratification or accession (a) |
|---|---|---|---|
| Argentina* | 5 December 1972 | Morocco* | 26 September 1972 |
| Australia | 13 June 1974 *a* | Nauru | 5 May 1978 *a* |
| Austria | 30 April 1979 *a* | New Zealand | 4 August 1971 |
| Barbados | 24 June 1971 | Niger | 27 October 1971 *a* |
| Canada* | 14 October 1970 *a* | Nigeria | 31 July 1969 |
| Central African Republic | 10 December 1971 *a* | Paraguay | 3 February 1972 *a* |
| Cyprus | 28 December 1976 *a* | Philippines | 15 November 1972 |
| Denmark* | 1 June 1976 | Republic of Korea | 27 April 1977 |
| Finland* | 19 August 1977 | Spain | 16 May 1972 *a* |
| Greece | 30 October 1974 *a* | Sweden | 4 February 1975 |
| Holy See | 25 February 1977 | Syrian Arab Republic* | 2 October 1970 *a* |
| Honduras | 20 September 1979 | Togo | 28 December 1979 *a* |
| Italy | 25 July 1974 | Tunisia* | 23 June 1971 *a* |
| Jamaica | 28 July 1970 | United Kingdom of Great Britain and Northern Ireland* | 25 June 1971 |
| Kuwait* | 11 November 1975 *a* | United Republic of Tanzania* | 12 April 1976 *a* |
| Lesotho | 3 March 1972 *a* | Yugoslavia | 27 August 1970 |
| Mauritius | 18 January 1973 *a* | Zaire | 25 July 1977 *a* |
| Mexico | 25 September 1974 | | |

Subsequently, the Convention came into force for the following State on the thirtieth day following the date of deposit of its instrument of ratification or accession with the Secretary-General of the United Nations, in accordance with article 84 (2):

| State | Date of deposit of the instrument of accession (a) |
|---|---|
| Rwanda | 3 January 1980 *a* |

(With effect from 2 February 1980.)

* For the texts of the reservations and declarations made upon ratification or accession, see p. 501 of this volume.

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

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

Have agreed as follows:

## PART I. INTRODUCTION

### *Article 1.* SCOPE OF THE PRESENT CONVENTION

The present Convention applies to treaties between States.

### *Article 2.* USE OF TERMS

1. For the purposes of the present Convention:

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

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

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

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

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

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

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

(*h*) "Third State" means a State not a party to the treaty;

(*i*) "International organization" means an intergovernmental organization.

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

### *Article 3.* INTERNATIONAL AGREEMENTS NOT WITHIN THE SCOPE OF THE PRESENT CONVENTION

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

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(*a*) The legal force of such agreements;

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

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

*Article 4.* NON-RETROACTIVITY OF THE PRESENT CONVENTION

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

*Article 5.* TREATIES CONSTITUTING INTERNATIONAL ORGANIZATIONS AND TREATIES ADOPTED WITHIN AN INTERNATIONAL ORGANIZATION

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

## PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

### SECTION 1. CONCLUSION OF TREATIES

*Article 6.* CAPACITY OF STATES TO CONCLUDE TREATIES

Every State possesses capacity to conclude treaties.

*Article 7.* FULL POWERS

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

(*a*) He produces appropriate full powers; or

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

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

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

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

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

*Article 8.* SUBSEQUENT CONFIRMATION OF AN ACT PERFORMED WITHOUT AUTHORIZATION

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

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*Article 9.* ADOPTION OF THE TEXT

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

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

*Article 10.* AUTHENTICATION OF THE TEXT

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

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

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

*Article 11.* MEANS OF EXPRESSING CONSENT TO BE BOUND BY A TREATY

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

*Article 12.* CONSENT TO BE BOUND BY A TREATY EXPRESSED BY SIGNATURE

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

(*a*) The treaty provides that signature shall have that effect;

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

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

2. For the purposes of paragraph 1:

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

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

*Article 13.* CONSENT TO BE BOUND BY A TREATY EXPRESSED BY AN EXCHANGE OF INSTRUMENTS CONSTITUTING A TREATY

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

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

(*b*) It is otherwise established that those States were agreed that the exchange of instruments shall have that effect.

*Article 14.* CONSENT TO BE BOUND BY A TREATY EXPRESSED BY RATIFICATION, ACCEPTANCE OR APPROVAL

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

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

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

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

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

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

*Article 15.* CONSENT TO BE BOUND BY A TREATY EXPRESSED BY ACCESSION

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

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

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

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

*Article 16.* EXCHANGE OR DEPOSIT OF INSTRUMENTS OF RATIFICATION, ACCEPTANCE, APPROVAL OR ACCESSION

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

(*a*) Their exchange between the contracting States;

(*b*) Their deposit with the depositary; or

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

*Article 17.* CONSENT TO BE BOUND BY PART OF A TREATY AND CHOICE OF DIFFERING PROVISIONS

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

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

*Article 18.* OBLIGATION NOT TO DEFEAT THE OBJECT AND PURPOSE OF A TREATY PRIOR TO ITS ENTRY INTO FORCE

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

(*a*) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

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

SECTION 2. RESERVATIONS

*Article 19.* FORMULATION OF RESERVATIONS

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

(*a*) The reservation is prohibited by the treaty;

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

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

*Article 20.* ACCEPTANCE OF AND OBJECTION TO RESERVATIONS

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

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

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

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

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

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

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

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

*Article 21.* LEGAL EFFECTS OF RESERVATIONS AND OF OBJECTIONS TO RESERVATIONS

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

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

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

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

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

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*Article 22.* WITHDRAWAL OF RESERVATIONS AND OF OBJECTIONS TO RESERVATIONS

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

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

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

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

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

*Article 23.* PROCEDURE REGARDING RESERVATIONS

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

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

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

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

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

*Article 24.* ENTRY INTO FORCE

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

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

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

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

*Article 25.* PROVISIONAL APPLICATION

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

(*a*) The treaty itself so provides; or

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

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

## PART III. OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

### SECTION 1. OBSERVANCE OF TREATIES

#### *Article 26.* "PACTA SUNT SERVANDA"

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

#### *Article 27.* INTERNAL LAW AND OBSERVANCE OF TREATIES

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

### SECTION 2. APPLICATION OF TREATIES

#### *Article 28.* NON-RETROACTIVITY OF TREATIES

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

#### *Article 29.* TERRITORIAL SCOPE OF TREATIES

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

#### *Article 30.* APPLICATION OF SUCCESSIVE TREATIES RELATING TO THE SAME SUBJECT-MATTER

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

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(*a*) As between States parties to both treaties the same rule applies as in paragraph 3;

(*b*) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any ques-

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tion of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3. INTERPRETATION OF TREATIES

*Article 31.* GENERAL RULE OF INTERPRETATION

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

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

(*a*) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

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

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

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

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

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

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

*Article 32.* SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable.

*Article 33.* INTERPRETATION OF TREATIES AUTHENTICATED IN TWO OR MORE LANGUAGES

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

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SECTION 4. TREATIES AND THIRD STATES

*Article 34.* GENERAL RULE REGARDING THIRD STATES

A treaty does not create either obligations or rights for a third State without its consent.

*Article 35.* TREATIES PROVIDING FOR OBLIGATIONS FOR THIRD STATES

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

*Article 36.* TREATIES PROVIDING FOR RIGHTS FOR THIRD STATES

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

*Article 37.* REVOCATION OR MODIFICATION OF OBLIGATIONS OR RIGHTS OF THIRD STATES

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

*Article 38.* RULES IN A TREATY BECOMING BINDING ON THIRD STATES THROUGH INTERNATIONAL CUSTOM

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

## PART IV. AMENDMENT AND MODIFICATION OF TREATIES

*Article 39.* GENERAL RULE REGARDING THE AMENDMENT OF TREATIES

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

*Article 40.* AMENDMENT OF MULTILATERAL TREATIES

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

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(*a*) The decision as to the action to be taken in regard to such proposal;

(*b*) The negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(*b*), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(*a*) be considered as a party to the treaty as amended; and

(*b*) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

### *Article 41.* AGREEMENTS TO MODIFY MULTILATERAL TREATIES BETWEEN CERTAIN OF THE PARTIES ONLY

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) The possibility of such a modification is provided for by the treaty; or

(*b*) The modification in question is not prohibited by the treaty and:

(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1(*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

## PART V. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

### SECTION 1. GENERAL PROVISIONS

### *Article 42.* VALIDITY AND CONTINUANCE IN FORCE OF TREATIES

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

### *Article 43.* OBLIGATIONS IMPOSED BY INTERNATIONAL LAW INDEPENDENTLY OF A TREATY

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

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*Article 44.* SEPARABILITY OF TREATY PROVISIONS

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(*a*) The said clauses are separable from the remainder of the treaty with regard to their application;

(*b*) It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(*c*) Continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

*Article 45.* LOSS OF A RIGHT TO INVOKE A GROUND FOR INVALIDATING, TERMINATING, WITHDRAWING FROM OR SUSPENDING THE OPERATION OF A TREATY

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(*a*) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(*b*) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

SECTION 2. INVALIDITY OF TREATIES

*Article 46.* PROVISIONS OF INTERNAL LAW REGARDING COMPETENCE TO CONCLUDE TREATIES

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

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

*Article 47.* SPECIFIC RESTRICTIONS ON AUTHORITY TO EXPRESS THE CONSENT OF A STATE

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to

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observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

*Article 48.* ERROR

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

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

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

*Article 49.* FRAUD

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

*Article 50.* CORRUPTION OF A REPRESENTATIVE OF A STATE

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

*Article 51.* COERCION OF A REPRESENTATIVE OF A STATE

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

*Article 52.* COERCION OF A STATE BY THE THREAT OR USE OF FORCE

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

*Article 53.* TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ("JUS COGENS")

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

*Article 54.* TERMINATION OF OR WITHDRAWAL FROM A TREATY UNDER ITS PROVISIONS OR BY CONSENT OF THE PARTIES

The termination of a treaty or the withdrawal of a party may take place:

(*a*) In conformity with the provisions of the treaty; or

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(*b*) At any time by consent of all the parties after consultation with the other contracting States.

*Article 55.* REDUCTION OF THE PARTIES TO A MULTILATERAL TREATY BELOW THE NUMBER NECESSARY FOR ITS ENTRY INTO FORCE

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

*Article 56.* DENUNCIATION OF OR WITHDRAWAL FROM A TREATY CONTAINING NO PROVISION REGARDING TERMINATION, DENUNCIATION OR WITHDRAWAL

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(*a*) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(*b*) A right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

*Article 57.* SUSPENSION OF THE OPERATION OF A TREATY UNDER ITS PROVISIONS OR BY CONSENT OF THE PARTIES

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(*a*) In conformity with the provisions of the treaty; or

(*b*) At any time by consent of all the parties after consultation with the other contracting States.

*Article 58.* SUSPENSION OF THE OPERATION OF A MULTILATERAL TREATY BY AGREEMENT BETWEEN CERTAIN OF THE PARTIES ONLY

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(*a*) The possibility of such a suspension is provided for by the treaty; or

(*b*) The suspension in question is not prohibited by the treaty and:

(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) Is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1(*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

*Article 59.* TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY IMPLIED BY CONCLUSION OF A LATER TREATY

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(*a*) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

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(*b*) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

*Article 60.* TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY AS A CONSEQUENCE OF ITS BREACH

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(*a*) The other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) In the relations between themselves and the defaulting State, or

(ii) As between all the parties;

(*b*) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*c*) Any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(*a*) A repudiation of the treaty not sanctioned by the present Convention; or

(*b*) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

*Article 61.* SUPERVENING IMPOSSIBILITY OF PERFORMANCE

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

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*Article 62.* FUNDAMENTAL CHANGE OF CIRCUMSTANCES

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(*a*) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(*b*) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(*a*) If the treaty establishes a boundary; or

(*b*) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

*Article 63.* SEVERANCE OF DIPLOMATIC OR CONSULAR RELATIONS

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

*Article 64.* EMERGENCE OF A NEW PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW (''JUS COGENS'')

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

*Article 65.* PROCEDURE TO BE FOLLOWED WITH RESPECT TO INVALIDITY, TERMINATION, WITHDRAWAL FROM OR SUSPENSION OF THE OPERATION OF A TREATY

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

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4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

*Article 66.* PROCEDURES FOR JUDICIAL SETTLEMENT, ARBITRATION AND CONCILIATION

If, under paragraph 3 of article 65, no solution has been reached within a period of twelve months following the date on which the objection was raised, the following procedures shall be followed:

(*a*) Any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(*b*) Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

*Article 67.* INSTRUMENTS FOR DECLARING INVALID, TERMINATING, WITHDRAWING FROM OR SUSPENDING THE OPERATION OF A TREATY

1. The notification provided for under article 65, paragraph 1 must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

*Article 68.* REVOCATION OF NOTIFICATIONS AND INSTRUMENTS PROVIDED FOR IN ARTICLES 65 AND 67

A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

*Article 69.* CONSEQUENCES OF THE INVALIDITY OF A TREATY

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(*a*) Each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(*b*) Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

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3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

*Article 70.* CONSEQUENCES OF THE TERMINATION OF A TREATY

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(*a*) Releases the parties from any obligation further to perform the treaty;

(*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

*Article 71.* CONSEQUENCES OF THE INVALIDITY OF A TREATY WHICH CONFLICTS WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW

1. In the case of a treaty which is void under article 53 the parties shall:

(*a*) Eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(*b*) Bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(*a*) Releases the parties from any obligation further to perform the treaty;

(*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

*Article 72.* CONSEQUENCES OF THE SUSPENSION OF THE OPERATION OF A TREATY

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(*a*) Releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(*b*) Does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

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## PART VI. MISCELLANEOUS PROVISIONS

### *Article 73.* CASES OF STATE SUCCESSION, STATE RESPONSIBILITY AND OUTBREAK OF HOSTILITIES

The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

### *Article 74.* DIPLOMATIC AND CONSULAR RELATIONS AND THE CONCLUSION OF TREATIES

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

### *Article 75.* CASE OF AN AGGRESSOR STATE

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

## PART VII. DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

### *Article 76.* DEPOSITARIES OF TREATIES

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

### *Article 77.* FUNCTIONS OF DEPOSITARIES

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

(*a*) Keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

(*b*) Preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

(*c*) Receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(*d*) Examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

(*e*) Informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

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(*f*) Informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(*g*) Registering the treaty with the Secretariat of the United Nations;

(*h*) Performing the functions specified in other provisions of the present Convention.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

*Article 78.* NOTIFICATIONS AND COMMUNICATIONS

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

(*a*) If there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

(*b*) Be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(*c*) If transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1(*e*).

*Article 79.* CORRECTION OF ERRORS IN TEXTS OR IN CERTIFIED COPIES OF TREATIES

1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:

(*a*) By having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(*b*) By executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(*c*) By executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(*a*) No objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procès-verbal of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;

(*b*) An objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.

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4. The corrected text replaces the defective text *ab initio*, unless the signatory States and the contracting States otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a procès-verbal specifying the rectification and communicate a copy of it to the signatory States and to the contracting States.

*Article 80.* REGISTRATION AND PUBLICATION OF TREATIES

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

## PART VIII. FINAL PROVISIONS

*Article 81.* SIGNATURE

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention, as follows: until 30 November 1969, at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters, New York.

*Article 82.* RATIFICATION

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

*Article 83.* ACCESSION

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 81. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

*Article 84.* ENTRY INTO FORCE

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

*Article 85.* AUTHENTIC TEXTS

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

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna, this twenty-third day of May, one thousand nine hundred and sixty-nine.

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ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) One conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) One conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

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For Afghanistan:
Pour l'Afghanistan :
阿富汗：
За Афганистан:
Por el Afganistán:

Subject to the declaration attached[1]
ABDUL H. TABIBI[2]

For Albania:
Pour l'Albanie :
阿尔巴尼亚：
За Албанию:
Por Albania:

For Algeria:
Pour l'Algérie :
阿尔及利亚：
За Алжир:
Por Argelia:

For Argentina:
Pour l'Argentine :
阿根廷：
За Аргентину:
Por la Argentina:

E. DE LA GUARDIA

For Australia:
Pour l'Australie :
澳大利亚：
За Австралию:
Por Australia:

[1] Avec une déclaration, dont texte joint en annexe.
[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

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For Austria:
Pour l'Autriche :
奥地利：
За Австрию:
Por Austria:

For Barbados:
Pour la Barbade :
巴巴多斯：
За Барбадос:
Por Barbados:

GEORGE C. R. MOE

For Belgium:
Pour la Belgique :
比利时：
За Бельгию:
Por Bélgica:

For Bolivia:
Pour la Bolivie :
玻利维亚：
За Боливию:
Por Bolivia:

Sujeta a la declaración anexa[1]
J. ROMERO LOZA[2]

For Botswana:
Pour le Botswana :
博茨瓦纳：
За Ботсвану:
Por Botswana:

[1] Subject to the attached declaration — Avec une déclaration, dont texte joint en annexe.
[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

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For Brazil:
Pour le Brésil :
巴西:
За Бразилию:
Por el Brasil:

G. NASCIMENTO E SILVA

For Bulgaria:
Pour la Bulgarie :
保加利亚:
За Болгарию:
Por Bulgaria:

For Burma:
Pour la Birmanie :
缅甸:
За Бирму:
Por Birmania:

For Burundi:
Pour le Burundi :
布隆迪:
За Бурунди:
Por Burundi:

For the Byelorussian Soviet Socialist Republic:
Pour la République socialiste soviétique de Biélorussie :
白俄罗斯苏维埃社会主义共和国:
За Белорусскую Советскую Социалистическую Республику:
Por la República Socialista Soviética de Bielorrusia:

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For Cambodia:
Pour le Cambodge :
柬埔寨：
За Камбоджу:
Por Camboya:

SARIN CHHAK

For Cameroon:
Pour le Cameroun :
喀麥隆：
За Камерун:
Por el Camerún:

For Canada:
Pour le Canada :
加拿大：
За Канаду:
Por el Canadá:

For the Central African Republic:
Pour la République centrafricaine :
中非共和国：
За Центральноафриканскую Республику:
Por la República Centroafricana:

For Ceylon:
Pour le Ceylan :
錫蘭：
За Цейлон:
Por Ceilán:

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For Chad:
Pour le Tchad :
乍得:
За Чад:
Por el Chad:

For Chile:
Pour le Chili :
智利:
За Чили:
Por Chile:

PEDRO J. RODRÍGUEZ
EDMUNDO VARGAS

For China:
Pour la Chine :
中国:
За Китай:
Por China:

LIU CHIEH
April 27, 1970

For Colombia:
Pour la Colombie :
哥伦比亚:
За Колумбию:
Por Colombia:

ANTONIO BAYONA
HUMBERTO RUIZ
J. J. CAICEDO PERDOMO

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For the Congo (Brazzaville):
Pour le Congo (Brazzaville) :
刚果 (布拉薩市):
За Конго (Браззавиль):
Por el Congo (Brazzaville):

Sous réserve de ratification par mon pays[1]
S. BIKOUTHA

For the Congo (Democratic Republic of):
Pour le Congo (République démocratique du) :
刚果 (民主共和國):
За Демократическую Республику Конго:
Por el Congo (República Democrática de):

For Costa Rica:
Pour le Costa Rica :
哥斯达黎加:
За Коста-Рику:
Por Costa Rica:

*Ad referendum* y sujeto a las reservas anexas[2]
J. L. REDONDO GÓMEZ[3]

For Cuba:
Pour Cuba :
古巴:
За Кубу:
Por Cuba:

[1] Subject to ratification by my country.
[2] *Ad referendum* and subject to the attached reservations — *Ad referendum* et soumise aux réserves, dont texte joint en annexe.
[3] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

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For Cyprus:
Pour Chypre :
塞浦路斯：
За Кипр:
Por Chipre:

For Czechoslovakia:
Pour la Tchécoslovaquie :
捷克斯洛伐克：
За Чехословакию:
Por Checoslovaquia:

For Dahomey:
Pour le Dahomey :
达荷美：
За Дагомею:
Por el Dahomey:

For Denmark:
Pour le Danemark :
丹麦：
За Данию:
Por Dinamarca:

OTTO BORCH
April 18, 1970

For the Dominican Republic:
Pour la République Dominicaine :
多米尼加共和国：
За Доминиканскую Республику:
Por la República Dominicana:

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For Ecuador:
Pour l'Equateur :
厄瓜多尔：
За Эквадор:
Por el Ecuador:

Con la declaración que se anexo[1]
GONZALO ESCUDERO MOSCOSO[2]

For El Salvador:
Pour El Salvador :
萨尔瓦多：
За Сальвадор:
Por El Salvador:

R. GALINDO POHL
16 de febrero de 1970

For Equatorial Guinea:
Pour la Guinée équatoriale :
赤道几内亚：
За Экваториальную Гвинею:
Por Guinea Ecuatorial:

For Ethiopia:
Pour l'Ethiopie :
埃塞俄比亚：
За Эфиопию:
Por Etiopía:

KIFLE WODAJO
30 April 1970

[1] With the attached declaration — Avec une déclaration, dont texte joint en annexe.
[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

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For the Federal Republic of Germany:
Pour la République fédérale d'Allemagne :
德意志聯邦共和國：
За Федеративную Республику Германии:
Por la República Federal de Alemania:

ALEXANDER BÖKER
30th April 1970

For Finland:
Pour la Finlande :
芬兰：
За Финляндию:
Por Finlandia:

ERIK CASTRÉN

For France:
Pour la France :
法国：
За Францию:
Por Francia:

For Gabon:
Pour le Gabon :
加蓬：
За Габон:
Por el Gabón:

For Gambia:
Pour la Gambie :
冈比亚：
За Гамбию:
Por Gambia:

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For Ghana:
Pour le Ghana :
加纳：
За Гану:
Por Ghana:

EMMANUEL K. DADZIE
G. O. LAMPTEY

For Greece:
Pour la Grèce :
希腊：
За Грецию:
Por Grecia:

For Guatemala:
Pour le Guatemala :
危地马拉：
За Гватемалу:
Por Guatemala:

*Ad referendum* y sujeto a las reservas que constan en documento anexo[1]
ADOLFO MOLINA ORANTES[2]

For Guinea:
Pour la Guinée :
几内亚：
За Гвинею:
Por Guinea:

[1] *Ad referendum* and subject to the reservations contained in the attached document — *Ad referendum* et soumise aux réserves contenues dans le document ci-joint.

[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

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For Guyana:
Pour la Guyane :
圭亚那：
За Гайану:
Por Guyana:

JOHN CARTER

For Haiti:
Pour Haïti :
海地：
За Гаити:
Por Haití:

For the Holy See:
Pour le Saint-Siège :
教廷：
За Святейший Престол:
Por la Santa Sede:

OPILIO ROSSI
30 September 1969

For Honduras:
Pour le Honduras :
洪都拉斯：
За Гондурас:
Por Honduras:

MARIO CARÍAS ZAPATA

For Hungary:
Pour la Hongrie :
匈牙利：
За Венгрию:
Por Hungría:

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For Iceland:
Pour l'Islande :
冰岛：
За Исландию:
Por Islandia:

For India:
Pour l'Inde :
印度：
За Индию:
Por la India:

For Indonesia:
Pour l'Indonésie :
印度尼西亚：
За Индонезию:
Por Indonesia:

For Iran:
Pour l'Iran :
伊朗：
За Иран:
Por el Irán:

A. MATINE-DAFTARY

For Iraq:
Pour l'Irak :
伊拉克：
За Ирак:
Por el Irak:

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For Ireland:
Pour l'Irlande :
爱尔兰：
За Ирландию:
Por Irlanda:

For Israel:
Pour Israël :
以色列：
За Израиль:
Por Israel:

For Italy:
Pour l'Italie :
意大利：
За Италию:
Por Italia:

PIERO VINCI
22 April 1970

For the Ivory Coast:
Pour la Côte-d'Ivoire :
象牙海岸：
За Берег Слоновой Кости:
Por la Costa de Marfil:

LUCIEN YAPOBI
23 July 1969

For Jamaica:
Pour la Jamaïque :
牙买加：
За Ямайку:
Por Jamaica:

L. B. FRANCIS
K. RATTRAY

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For Japan:
Pour le Japon :
日本：
За Японию:
Por el Japón:

For Jordan:
Pour la Jordanie :
约旦：
За Иорданию:
Por Jordania:

For Kenya:
Pour le Kenya :
肯尼亚：
За Кению:
Por Kenya:

I. S. Bhoi

For Kuwait:
Pour le Koweït :
科威特：
За Кувейт:
Por Kuwait:

For Laos:
Pour le Laos :
老挝：
За Лаос:
Por Laos:

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For Lebanon:
Pour le Liban :
黎巴嫩：
За Ливан:
Por el Líbano:

For Lesotho:
Pour le Lesotho :
莱索托：
За Лесото:
Por Lesotho:

For Liberia:
Pour le Libéria :
利比里亚：
За Либерию:
Por Liberia:

NELSON BRODERICK

For Libya:
Pour la Libye :
利比亞：
За Ливию:
Por Libia:

For Liechtenstein:
Pour le Liechtenstein :
列支敦士登：
За Лихтенштейн:
Por Liechtenstein:

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For Luxembourg:
Pour le Luxembourg :
卢森堡：
За Люксембург:
Por Luxemburgo:

GASTON THORN
4 septembre 1969

For Madagascar:
Pour Madagascar :
马达加斯加：
За Мадагаскар:
Por Madagascar:

*Ad referendum*
B. RAZAFINTSEHENO

For Malawi:
Pour le Malawi :
马拉维：
За Малави:
Por Malawi:

For Malaysia:
Pour la Malaisie :
马来西亚：
За Малайскую Федерацию:
Por Malasia:

For the Maldive Islands:
Pour les îles Maldives :
馬爾代夫羣島：
За Мальдивские острова:
Por las Islas Maldivas:

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For Mali:
Pour le Mali :
马里：
За Мали:
Por Malí:

For Malta:
Pour Malte :
马耳他：
За Мальту:
Por Malta:

For Mauritania:
Pour la Mauritanie :
毛里塔尼亚：
За Мавританию:
Por Mauritania:

For Mauritius:
Pour Maurice :
毛里求斯：
За Маврикий:
Por Mauricio:

For Mexico:
Pour le Mexique :
墨西哥：
За Мексику:
Por México:

EDUARDO SUÁREZ

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For Monaco:
Pour Monaco :
摩纳哥 :
За Монако:
Por Mónaco:

For Mongolia:
Pour la Mongolie :
蒙古 :
За Монголию:
Por Mongolia:

For Morocco:
Pour le Maroc :
摩洛哥 :
За Марокко:
Por Marruecos:

Sous réserve de la déclaration ci-jointe[1]
TAOUFIQ KABBAJ[2]

For Nauru:
Pour Nauru :
瑙鲁 :
За Науру:
Por Nauru:

For Nepal:
Pour le Népal :
尼泊尔 :
За Непал:
Por Nepal:

PRADUMNA LAL RAJBHANDARY

[1] Subject to the attached declaration.
[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

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For the Netherlands:
Pour les Pays-Bas :
荷兰：
За Нидерланды:
Por los Países Bajos:

For New Zealand:
Pour la Nouvelle-Zélande :
新西兰：
За Новую Зеландию:
Por Nueva Zelandia:

JOHN V. SCOTT
29 April 1970

For Nicaragua:
Pour le Nicaragua :
尼加拉瓜：
За Никарагуа:
Por Nicaragua:

For the Niger:
Pour le Niger :
尼日尔：
За Нигер:
Por el Níger:

For Nigeria:
Pour la Nigéria :
尼日利亚：
За Нигерию:
Por Nigeria:

T. O. ELIAS

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For Norway:
Pour la Norvège :
挪威：
За Норвегию:
Por Noruega:

For Pakistan:
Pour le Pakistan :
巴基斯坦：
За Пакистан:
Por el Pakistán:

A. SHAHI
29 April, 1970

For Panama:
Pour le Panama :
巴拿马：
За Панаму:
Por Panamá:

For Paraguay:
Pour le Paraguay :
巴拉圭：
За Парагвай:
Por el Paraguay:

For Peru:
Pour le Pérou :
秘鲁：
За Перу:
Por el Perú:

LUIS ALVARADO GARRIDO
JUAN JOSÉ CALLE

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For the Philippines:
Pour les Philippines :
菲律宾：
За Филиппины:
Por Filipinas:

ROBERTO CONCEPCIÓN

For Poland:
Pour la Pologne :
波兰：
За Польшу:
Por Polonia:

For Portugal:
Pour le Portugal :
葡萄牙：
За Португалию:
Por Portugal:

For the Republic of Korea:
Pour la République de Corée :
大韩民国：
За Корейскую Республику:
Por la República de Corea:

YANG SOO YU
27 November 1969

For the Republic of Viet-Nam:
Pour la République du Viet-Nam :
越南共和国：
За Республику Вьетнам:
Por la República de Viet-Nam:

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For Romania:
Pour la Roumanie :
罗马尼亚：
За Румынию:
Por Rumania:

For Rwanda:
Pour le Rwanda :
卢旺达：
За Руанду:
Por Rwanda:

For San Marino:
Pour Saint-Marin :
圣马力诺：
За Сан-Марино:
Por San Marino:

For Saudi Arabia:
Pour l'Arabie Saoudite :
沙特阿拉伯：
За Саудовскую Аравию:
Por Arabia Saudita:

For Senegal:
Pour le Sénégal :
塞内加尔：
За Сенегал:
Por el Senegal:

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For Sierra Leone:
Pour le Sierra Leone :
塞拉勒窝内:
За Сьерра-Леоне:
Por Sierra Leona:

For Singapore:
Pour Singapour :
新加坡:
За Сингапур:
Por Singapur:

For Somalia:
Pour la Somalie :
索马里:
За Сомали:
Por Somalia:

For South Africa:
Pour l'Afrique du Sud :
南非:
За Южную Африку:
Por Sudáfrica:

For Southern Yemen:
Pour le Yémen du Sud :
南也門:
За Южный Йемен:
Por el Yemen Meridional:

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For Spain:
Pour l'Espagne :
西班牙：
За Испанию:
Por España:

For the Sudan:
Pour le Soudan :
苏丹：
За Судан:
Por el Sudán:

AHMED SALAH BUKHARI

For Swaziland:
Pour le Souaziland :
斯威士兰：
За Свазиленд:
Por Swazilandia:

For Sweden:
Pour la Suède :
瑞典：
За Швецию:
Por Suecia:

TORSTEN ÖRN
23 April 1970

For Switzerland:
Pour la Suisse :
瑞士：
За Швейцарию:
Por Suiza:

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For Syria:
Pour la Syrie :
叙利亚：
За Сирию:
Por Siria:

For Thailand:
Pour la Thaïlande :
泰国：
За Таиланд:
Por Tailandia:

For Togo:
Pour le Togo :
多哥：
За Того:
Por el Togo:

For Trinidad and Tobago:
Pour la Trinité-et-Tobago :
特立尼达和多巴哥：
За Тринидад и Тобаго:
Por Trinidad y Tabago:

T. BADEN-SEMPER

For Tunisia:
Pour la Tunisie :
突尼斯：
За Тунис:
Por Túnez:

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For Turkey:
Pour la Turquie :
土耳其：
За Турцию:
Por Turquía:

For Uganda:
Pour l'Ouganda :
乌干达：
За Уганду:
Por Uganda:

For the Ukrainian Soviet Socialist Republic:
Pour la République socialiste soviétique d'Ukraine :
乌克兰苏维埃社会主义共和国：
За Украинскую Советскую Социалистическую Республику:
Por la República Socialista Soviética de Ucrania:

For the Union of Soviet Socialist Republics:
Pour l'Union des Républiques socialistes soviétiques :
苏维埃社会主义共和国联盟：
За Союз Советских Социалистических Республик:
Por la Unión de Repúblicas Socialistas Soviéticas:

For the United Arab Republic:
Pour la République arabe unie :
阿拉伯聯合共和國：
За Объединенную Арабскую Республику:
Por la República Arabe Unida:

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For the United Kingdom of Great Britain and Northern Ireland:
Pour le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord :
大不列颠及北爱尔兰联合王国:
За Соединенное Королевство Великобритании и Северной Ирландии:
Por el Reino Unido de Gran Bretaña e Irlanda del Norte:

Subject to the declaration, the text of which is attached[1]
CARADON[2]
20 April 1970

For the United Republic of Tanzania:
Pour la République-Unie de Tanzanie :
坦桑尼亚联合共和国:
За Объединенную Республику Танзания:
Por la República Unida de Tanzanía:

For the United States of America:
Pour les Etats-Unis d'Amérique :
美利坚合众国:
За Соединенные Штаты Америки:
Por los Estados Unidos de América:

RICHARD D. KEARNEY
24 April 1970

JOHN R. STEVENSON
24 April 1970

For the Upper Volta:
Pour la Haute-Volta :
上沃尔特:
За Верхнюю Вольту:
Por el Alto Volta:

[1] Avec une déclaration, dont texte joint en annexe.
[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature – Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

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For Uruguay:
Pour l'Uruguay :
乌拉圭：
За Уругвай:
Por el Uruguay:

EDUARDO JIMÉNEZ DE ARÉCHAGA
ALVARO ALVAREZ

For Venezuela:
Pour le Venezuela :
委内瑞拉：
За Венесуэлу:
Por Venezuela:

For Western Samoa:
Pour le Samoa-Occidental :
西萨摩亚：
За Западное Самоа:
Por Samoa Occidental:

For Yemen:
Pour le Yémen :
也门：
За Йемен:
Por el Yemen:

For Yugoslavia:
Pour la Yougoslavie :
南斯拉夫：
За Югославию:
Por Yugoslavia:

ALEKSANDAR JELIĆ

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For Zambia:
Pour la Zambie :
赞比亚:
За Замбию:
Por Zambia:

LISHOMWA MUUKA

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## RESERVATIONS AND DECLARATIONS MADE UPON SIGNATURE

### *AFGHANISTAN*

"Afghanistan's understanding of article 62 (fundamental change of circumstances) is as follows:

"Sub-paragraph 2 (*a*) of this article does not cover unequal and illegal treaties, or any treaties which were contrary to the principle of self-determination. This view was also supported by the Expert Consultant in his statement of 11 May 1968 in the Committee of the Whole and on 14 May 1969 (doc. A/CONF.39/L.40) to the Conference."

### *BOLIVIA*

[SPANISH TEXT — TEXTE ESPAGNOL]

"1. La imperfección de la Convención de Viena sobre el derecho de los tratados posterga la realización de las aspiraciones de la humanidad.

"2. No obstante lo anterior, los preceptos aprobados por la Convención constituyen avances significativos inspirados en principios de justicia internacional que Bolivia ha sostenido tradicionalmente."

[TRANSLATION]

1. The shortcomings of the Vienna Convention on the Law of Treaties are such as to postpone the realization of the aspirations of mankind.

2. Nevertheless, the rules endorsed by the Convention do represent significant advances, based on the principles of international justice which Bolivia has traditionally supported.

## RÉSERVES ET DÉCLARATIONS FAITES LORS DE LA SIGNATURE

### *AFGHANISTAN*

[TRADUCTION — TRANSLATION]

L'Afghanistan interprète l'article 62 (Changement fondamental de circonstances) de la manière suivante :

L'alinéa *a* du paragraphe 2 ne s'applique pas dans le cas de traités inégaux ou illégaux, ni dans le cas de tout autre traité contraire au principe de l'autodétermination. Cette interprétation est celle qui a été soutenue par l'Expert consultant dans sa déclaration du 11 mai 1968 devant la Commission plénière et dans la communication du 14 mai 1969 (A/CONF.39/L.40) qu'il a adressée à la Conférence.

### *BOLIVIE*

[TRADUCTION]

1. L'imperfection de la Convention de Vienne sur le droit des traités retarde la réalisation des aspirations de l'humanité.

2. Néanmoins, les normes que consacre la Convention marquent d'importants progrès fondés sur des principes de justice internationale que la Bolivie a traditionnellement défendus.

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*COSTA RICA* *COSTA RICA*

[SPANISH TEXT — TEXTE ESPAGNOL]

"1. En relación a los artículos 11 y 12 la delegación de Costa Rica hace la reserva de que el sistema jurídico constitucional de ese país no autoriza ninguna forma de consentimiento que no esté sujeto a ratificación de la Asamblea Legislativa.

"2. En cuanto al artículo 25 hace la reserva de que la Constitución Política de dicho país tampoco admite la entrada en vigor provisional de los tratados.

"3. En cuanto al artículo 27 interpreta que se refiere al derecho secundario, no así a las disposiciones de la Constitución Política.

"4. En relación al artículo 38 interpreta que una norma consuetudinaria de derecho internacional general no privará sobre ninguna norma del sistema interamericano del cual considera supletoria la presente Convención."

[TRANSLATION] [TRADUCTION]

1. With regard to articles 11 and 12, the delegation of Costa Rica wishes to make a reservation to the effect that the Costa Rican system of constitutional law does not authorize any form of consent which is not subject to ratification by the Legislative Assembly.

2. With regard to article 25, it wishes to make a reservation to the effect that the Political Constitution of Costa Rica does not permit the provisional application of treaties, either.

3. With regard to article 27, it interprets this article as referring to secondary law and not to the provisions of the Political Constitution.

4. With regard to article 38, its interpretation is that no customary rule of general international law shall take precedence over any rule of the Inter-American System to which, in its view, this Convention is supplementary.

1. En ce qui concerne les articles 11 et 12, la délégation du Costa Rica formule la réserve suivante : en matière constitutionnelle, le système juridique de ce pays n'autorise aucune forme de consentement qui ne soit sujette à ratification par l'Assemblée législative.

2. En ce qui concerne l'article 25, la délégation du Costa Rica formule la réserve suivante : la Constitution politique de ce pays n'admet pas non plus l'entrée en vigueur provisoire des traités.

3. La délégation du Costa Rica interprète l'article 27 comme visant les lois ordinaires mais non les dispositions de la Constitution politique.

4. La délégation du Costa Rica interprète l'article 38 de la manière suivante : une règle coutumière du droit international général ne prévaudra sur aucune règle du système interaméricain, au regard duquel la présente Convention revêt, à son avis, un caractère supplémentaire.

*ECUADOR* *ÉQUATEUR*

[SPANISH TEXT — TEXTE ESPAGNOL]

"El Ecuador, al firmar la presente Convención, no ha creído necesario formular reserva alguna al artículo 4 de este instrumento porque entiende que, entre las normas comprendidas en la primera parte del artículo 4, se encuentra el principio de solución

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pacífica de controversias, establecido en el Artículo 2, párrafo 3, de la Carta de las Naciones Unidas, cuyo carácter de *jus cogens* confiere a esa norma valor imperativo universal.

"El Ecuador considera asimismo que la primera parte del artículo 4, por tanto, es aplicable a los tratados existentes.

"Deja en claro en esta forma que dicho artículo recoge el principio inconcuso de que, cuando la Convención codifica normas *lex lata*, éstas, siendo normas preexistentes, pueden invocarse y aplicarse a tratados suscritos antes de la vigencia de esta Convención, la cual constituye su instrumento codificador."

[TRANSLATION]

In signing this Convention, Ecuador has not considered it necessary to make any reservation in regard to article 4 of the Convention because it understands that the rules referred to in the first part of article 4 include the principle of the peaceful settlement of disputes, which is set forth in Article 2, paragraph 3, of the Charter of the United Nations and which, as *jus cogens*, has universal and mandatory force.

Ecuador also considers that the first part of article 4 is applicable to existing treaties.

It wishes to place on record, in this form, its view that the said article 4 incorporates the indisputable principle that, in cases where the Convention codifies rules of *lex lata*, these rules, as preexisting rules, may be invoked and applied to treaties signed before the entry into force of this Convention, which is the instrument codifying the rules.

[TRADUCTION]

En signant la présente Convention, l'Equateur n'a pas jugé nécessaire de formuler une réserve quelconque au sujet de l'article 4 de cet instrument, car il considère qu'au nombre des règles auxquelles se réfère la première partie de cet article figure le principe du règlement pacifique des différends, énoncé au paragraphe 3 de l'Article 2 de la Charte des Nations Unies, dont le caractère de *jus cogens* lui confère une valeur impérative universelle.

De même, l'Equateur considère également que la première partie de l'article 4 est applicable aux traités existants.

Il tient à préciser à cette occasion que ledit article s'appuie sur le principe incontestable selon lequel, lorsque la Convention codifie des règles relevant de la *lex lata*, ces règles, du fait qu'elles sont préexistantes, peuvent être invoquées et appliquées au regard de traités conclus avant l'entrée en vigueur de ladite Convention, laquelle constitue l'instrument les ayant codifiées.

*GUATEMALA*

*GUATEMALA*

[SPANISH TEXT — TEXTE ESPAGNOL]

"La delegación de Guatemala, al suscribir la Convención de Viena sobre el derecho de los tratados, formula las siguientes reservas:

"I. Guatemala no puede aceptar disposición alguna de la presente Convención que menoscabe sus derechos y su reclamación sobre el Territorio de Belice.

"II. Guatemala no aplicará los artículos 11, 12, 25 y 66 en lo que contravinieren preceptos de la Constitución de la República.

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"III. Guatemala aplicará lo dispuesto en el artículo 38 solamente en aquellos casos en que lo considere conveniente para los intereses del país."

[TRANSLATION]

The delegation of Guatemala, in signing the Vienna Convention on the Law of Treaties, wishes to make the following reservations:

I. Guatemala cannot accept any provision of this Convention which would prejudice its rights and its claim to the Territory of Belize.

II. Guatemala will not apply articles 11, 12, 25 and 66 in so far as they are contrary to the provisions of the Constitution of the Republic.

III. Guatemala will apply the provision contained in article 38 only in cases where it considers that it is in the national interest to do so.

[TRADUCTION]

En signant la Convention de Vienne sur le droit des traités, la délégation du Guatemala formule les réserves suivantes :

I. Le Guatemala ne peut accepter aucune disposition de la présente Convention qui porte atteinte à ses droits et à sa revendication sur le territoire de Belize.

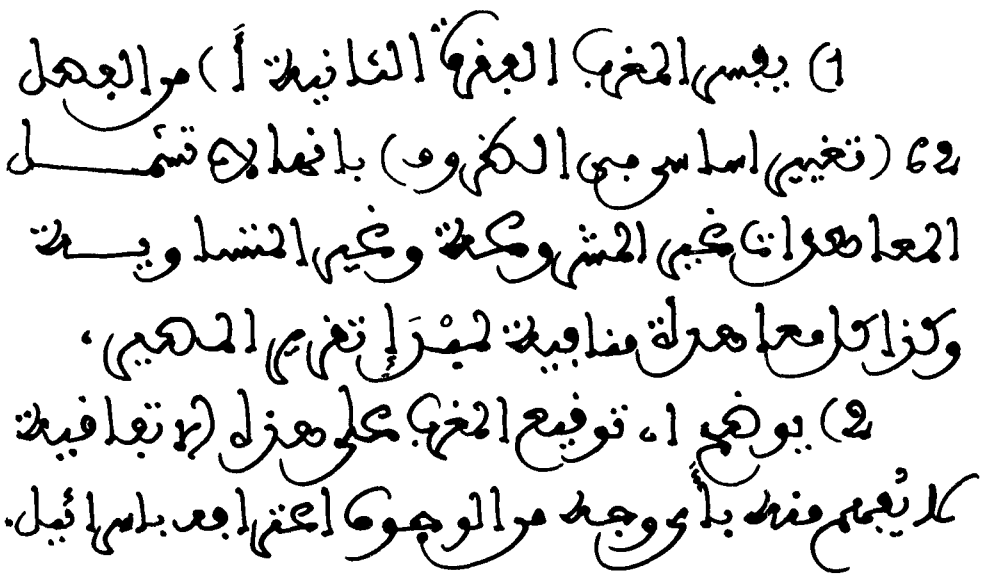
II. Le Guatemala n'appliquera pas les dispositions des articles 11, 12, 25 et 66, dans la mesure où elles contreviendraient aux principes consacrés dans la Constitution de la République.

III. Le Guatemala n'appliquera les dispositions de l'article 38 que dans le cas où il considérera que cela sert les intérêts du pays.

*MOROCCO*

*MAROC*

[ARABIC TEXT — TEXTE ARABE]



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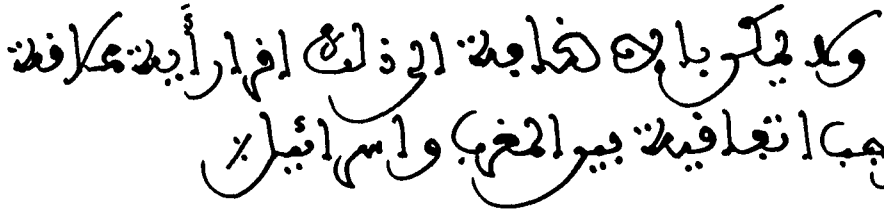

[TRANSLATION — TRADUCTION]

1. Morocco interprets paragraph 2 (*a*) of article 62 (Fundamental change of circumstances) as not applying to unlawful or inequitable treaties, or to any treaty contrary to the principle of self-determination. Morocco's views on paragraph 2 (*a*) were supported by the Expert Consultant in his statements in the Committee of the Whole on 11 May 1968 and before the Conference in plenary on 14 May 1969 (see document A/CONF.39/L.40).

2. It shall be understood that Morocco's signature of this Convention does not in any way imply that it recognized Israel. Furthermore, no treaty relationships will be established between Morocco and Israel.

«1. Le Maroc interprète le paragraphe 2, *a*, de l'article 62 (Changement fondamental de circonstances) comme ne couvrant pas les traités illicites et inégaux ainsi que tout traité contraire au principe de l'autodétermination. Le point de vue du Maroc sur le paragraphe 2, *a*, a été soutenu par l'Expert consultant dans son intervention du 11 mai 1968 en Commission plénière ainsi que le 14 mai 1969 à la Conférence plénière (document A/CONF.39/L.40).

«2. Il est entendu que la signature par le Maroc de la présente Convention ne signifie en aucune façon qu'il reconnaisse Israël. En outre, aucune relation conventionnelle ne sera établie entre le Maroc et Israël.»

*UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND*

"In signing the Vienna Convention on the Law of Treaties, the Government of the United Kingdom of Great Britain and Northern Ireland declare their understanding that nothing in article 66 of the Convention is intended to oust the jurisdiction of the International Court of Justice where such jurisdiction exists under any provisions in force binding the parties with regard to the settlement of disputes. In particular, and in relation to States parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court of Jus-

*ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD*

[TRADUCTION — TRANSLATION]

Le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord déclare considérer qu'aucune disposition de l'article 66 de ladite Convention ne vise à écarter la juridiction de la Cour internationale de Justice lorsque cette juridiction découle de clauses en vigueur entre les parties, concernant le règlement des différends et ayant force obligatoire à leur égard. Le Gouvernement du Royaume-Uni déclare notamment, au regard des Etats parties à la Convention de Vienne qui acceptent comme obligatoire la juridiction de la

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tice, the Government of the United Kingdom declare that they will not regard the provisions of sub-paragraph (*b*) of article 66 of the Vienna Convention as providing 'some other method of peaceful settlement' within the meaning of sub-paragraph (i) (*a*) of the Declaration of the Government of the United Kingdom accepting as compulsory the jurisdiction of the International Court of Justice which was deposited with the Secretary-General of the United Nations on the 1st of January, 1969.[1]

"The Government of the United Kingdom, while reserving their position for the time being with regard to the other declarations and reservations made by various States on signing the Convention, consider it necessary to state that the United Kingdom does not accept that Guatemala has any rights or any valid claim in respect of the territory of British Honduras."

Cour internationale de Justice, qu'il ne considérera pas les dispositions de l'alinéa *b* de l'article 66 de la Convention de Vienne comme fournissant «un autre mode de règlement pacifique», au sens du paragraphe i, *a*, de la Déclaration, déposée auprès du Secrétaire général de l'Organisation des Nations Unies le 1er janvier 1969, par laquelle le Gouvernement du Royaume-Uni a accepté comme obligatoire la juridiction de la Cour internationale de Justice[1].

Le Gouvernement du Royaume-Uni, tout en réservant pour le moment sa position vis-à-vis des autres déclarations et réserves faites par divers Etats lors de la signature de la Convention par ces derniers, juge nécessaire de déclarer que le Royaume-Uni ne reconnaît au Guatemala aucun droit ni titre légitime de réclamation en ce qui concerne le territoire du Honduras britannique.

## RESERVATIONS AND DECLARATIONS MADE UPON RATIFICATION OR ACCESSION (*a*)

### *ARGENTINA*

[SPANISH TEXT — TEXTE ESPAGNOL]

"*a*) La República Argentina no considera aplicable a su respecto la norma contenida en el artículo 45, apartado *b*, por cuanto la misma consagra la renuncia anticipada de derechos".

"*b*) La República Argentina no acepta que un cambio fundamental en las circunstancias ocurrido con respecto a las existentes en el momento de la celebración de un tratado y que no fue previsto por las partes pueda alegarse como causa para dar por terminado el tratado o retirarse de él y, además, objeta las reservas formuladas por Afganistán, Marruecos y Siria al artículo 62, párrafo 2, apartado *a*, y todas las reservas del mismo alcance que la de los Estados mencionados que se presenten en el futuro sobre el artículo 62".

[TRANSLATION]

(*a*) The Argentine Republic does not regard the rule contained in article 45 (*b*) as applicable to it inasmuch as the rule in question provides for the renunciation of rights in advance.

[1] United Nations, *Treaty Series*, vol. 654, p. 335.

## RÉSERVES ET DÉCLARATIONS FAITES LORS DE LA RATIFICATION OU DE L'ADHÉSION (*a*)

### *ARGENTINE*

[TRADUCTION]

*a*) La République argentine ne considère pas que la règle énoncée à l'article 45, *b*, lui est applicable dans la mesure où celle-ci prévoit la renonciation anticipée à certains droits.

[1] Nations Unies, *Recueil des Traités*, vol. 654, p. 335.

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(*b*) The Argentine Republic does not accept the idea that a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may be invoked as a ground for terminating or withdrawing from the treaty; moreover, it objects to the reservations made by Afghanistan, Morocco and Syria with respect to article 62, paragraph 2 (*a*), and to any reservations to the same effect as those of the States referred to which may be made in the future with respect to article 62.

*b*) La République argentine n'admet pas qu'un changement fondamental de circonstances qui s'est produit par rapport à celles qui existaient au moment de la conclusion du traité et qui n'avait pas été prévu par les parties puisse être invoqué comme motif pour mettre fin au traité ou pour s'en retirer; de plus, elle s'élève contre les réserves formulées par l'Afghanistan, le Maroc et la Syrie au sujet du paragraphe 2, *a*, de l'article 62 et contre toutes autres réserves de même effet que celles des Etats susmentionnés qui pourraient être formulées à l'avenir au sujet de l'article 62.

[SPANISH TEXT — TEXTE ESPAGNOL]

"La aplicación de la presente Convención a territorios cuya soberanía fuera discutida entre dos o más Estados que sean parte o no de la misma, no podrá ser interpretada como alteración, renuncia o abandono de la posición que cada uno ha sostenido hasta el presente".

[TRANSLATION]

The application of this Convention to territories whose sovereignty is a subject of dispute between two or more States, whether or not they are parties to it, cannot be deemed to imply a modification, renunciation or abandonment of the position heretofore maintained by each of them.

[TRADUCTION]

L'application de la présente Convention dans des territoires sur lesquels deux ou plusieurs Etats, qu'ils soient ou non parties à ladite Convention, ont des prétentions adverses à exercer la souveraineté, ne pourra être interprétée comme signifiant que chacun d'eux modifie la position qu'il a maintenue jusqu'à présent, y renonce ou l'abandonne.

*CANADA* (a)

"In acceding to the Vienna Convention on the Law of Treaties, the government of Canada declares its understanding that nothing in article 66 of the Convention is intended to exclude the jurisdiction of the International Court of Justice where such jurisdiction exists under the provisions of any treaty in force binding the parties with regard to the settlement of disputes. In relation to states parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court of Jus-

*CANADA* (a)

«En adhérant à la Convention de Vienne sur le droit des traités, le Gouvernement du Canada déclare reconnaître qu'il n'y a rien dans l'article 66 de la Convention qui tende à exclure la compétence de la Cour internationale de Justice lorsque cette compétence est établie en vertu des dispositions d'un traité en vigueur dont les parties sont liées relativement au règlement des différends. En ce qui concerne les Etats parties à la Convention de Vienne qui acceptent que la compétence de la Cour internationale

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tice, the government of Canada declares that it does not regard the provisions of article 66 of the Vienna Convention as providing 'some other method of peaceful settlement' within the meaning of paragraph 2 (*a*) of the declaration of the government of Canada accepting as compulsory the jurisdiction of the International Court of Justice which was deposited with the Secretary-General of the United Nations on April 7, 1970."[1]

de Justice soit obligatoire, le Gouvernement du Canada déclare qu'il ne considère pas que les dispositions de l'article 66 de la Convention de Vienne proposent «un autre moyen de règlement pacifique», selon la teneur de l'alinéa *a* du paragraphe 2 de la déclaration que le Gouvernement du Canada a remise au Secrétaire général de l'Organisation des Nations Unies le 7 avril 1970, par laquelle il acceptait que la compétence de la Cour internationale de Justice soit obligatoire[1].»

*DENMARK*

[TRANSLATION — TRADUCTION]

As between itself and any State which formulates, wholly or in part, a reservation relating to the provisions of article 66 of the Convention concerning the compulsory settlement of certain disputes, Denmark will not consider itself bound by those provisions of part V of the Convention, according to which the procedures for settlement set forth in article 66 are not to apply in the event of reservations formulated by other States.

*DANEMARK*

«Vis-à-vis de pays formulant entièrement ou partiellement des réserves en ce qui concerne les dispositions de l'article 66 de la Convention portant sur le règlement obligatoire de certains différends, le Danemark ne se considère pas lié par les dispositions de la partie V de la Convention, selon lesquelles les procédures de règlement indiquées à l'article 66 ne seront pas appliquées par suite de réserves formulées par d'autres pays.»

*FINLAND*

"Finland declares its understanding that nothing in paragraph 2 of article 7 of the Convention is intended to modify any provisions of internal law in force in any Contracting State concerning competence to conclude treaties. Under the Constitution of Finland the competence to conclude treaties is given to the President of the Republic, who also decides on the issuance of full powers to the Head of Government and the Minister for Foreign Affairs.

*FINLANDE*

[TRADUCTION — TRANSLATION]

La Finlande déclare qu'elle considère qu'aucune des dispositions du paragraphe 2 de l'article 7 de la Convention ne vise à modifier les dispositions de droit interne concernant la compétence pour conclure des traités en vigueur dans un Etat contractant. En vertu de la Constitution finlandaise, c'est le Président de la République qui est habilité à conclure des traités et c'est également lui qui décide de donner pleins pouvoirs au Chef du Gouvernement et au Ministre des affaires étrangères.

[1] United Nations, *Treaty Series*, vol. 724, p. 63.

[1] Nations Unies, *Recueil des Traités*, vol. 724, p. 63.

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"Finland also declares that as to its relation with any State which has made or makes a reservation to the effect that this State will not be bound by some or all of the provisions of article 66, Finland will consider itself bound neither by those procedural provisions nor by the substantive provisions of part V of the Convention to which the procedures provided for in article 66 do not apply as a result of the said reservation."

La Finlande déclare également qu'en ce qui concerne ses relations avec tout Etat qui a fait ou fait une réserve telle que cet Etat n'est pas lié par quelques-unes des dispositions de l'article 66 ou par toutes ces dispositions la Finlande ne se considérera liée ni par ces dispositions de procédure ni par les dispositions de fond de la partie V de la Convention auxquelles les procédures prévues à l'article 66 ne s'appliquent pas par suite de ladite réserve.

*KUWAIT* (a)

*KOWEÏT* (a)

[ARABIC TEXT — TEXTE ARABE]

مع التحفظ الخاص بأن الارتباط بهذه الاتفاقية لا يحوى بأية حال معنى الاعتراف بأسرائيل ولا يؤدى الى الدخول معها فى معاملات مما تنظمة هذه الاتفاقية ، كما تعهد بمراعاتها والامر بمراعاتها دون أنتهاك حرمتها .

[TRANSLATION[1] — TRADUCTION[2]]

"The participation of Kuwait in this Convention does not mean in any way recognition of Israel by the Government of the State of Kuwait and that, furthermore, no treaty relations will arise between the State of Kuwait and Israel."

[TRADUCTION — TRANSLATION]

La participation du Koweït à ladite Convention ne signifie en aucune façon que le Gouvernement de l'Etat du Koweït reconnaisse Israël, et qu'en outre aucune relation conventionnelle ne sera établie entre l'Etat du Koweït et Israël.

*MOROCCO*

*[For the text of the declaration, see p. 499 of this volume.]*

*MAROC*

*[Pour le texte de la déclaration, voir p. 499 du présent volume.]*

*SYRIAN ARAB REPUBLIC* (a)

*RÉPUBLIQUE ARABE SYRIENNE* (a)

[ARABIC TEXT — TEXTE ARABE]

٢ — ان قبول الجمهورية العربية السورية هذه الاتفاقية وابرام حكومتها لها لا يحوى بأية حال معنى الاعتراف باسرائيل ولا يؤدى الى دخولها معها في معاملات مما تنظمه أحكامها .

[1] Translation supplied by the Government of Kuwait.
[2] Traduction fournie par le Gouvernement du Koweït.

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ب — ان الجمهورية العربية السورية تعتبر أن المادة الواحدة والثمانين من هذه الاتفاقية لا تتفق وأهداف الاتفاقية وغايتها اذ أنها لا تمكن جميع الدول بدون تفرقة أو تمييز من أن تصبح اطرافا فيها .

ج — ان حكومة الجمهورية العربية السورية لا تقبل بحال من الاحوال عدم سريان مبدأ التغيير الجوهري للظروف على المعاهدات التي تنشيء حدودا في الفقرة ٢ (أ) من المادة الثانية والستين لان ذلك يعتبر خرقا واضحا لواحدة من القواعد الآمرة في القواعد العامة للقانون الدولي والقاضية بحق الشعوب في تقرير مصيرها .

د — ان حكومة الجمهورية العربية السورية تفهم حكم المادة الثانية والخمسين على النحو التالي :

" ان عبارة التهديد بالقوة واستخدامها الواردة في هذه المادة تنصرف ايضا الى ممارسة الضغوط الاقتصادية والسياسية والعسكرية والنفسية وسائر انواع الضغوط الاخرى التي من شأنها حمل الدولة على الدخول في معاهدة ضد رغبتها أو مصلحتها .

هـ — ان انضمام الجمهورية العربية السورية الى هذه الاتفاقية وابرام حكومتها لها لا يسري على الملحق بهذه الاتفاقية المتعلق بالتوفيق الالزامي .

[TRANSLATION — TRADUCTION]

A. Acceptance of this Convention by the Syrian Arab Republic and ratification of it by its Government shall in no way signify recognition of Israel and cannot have as a result the establishment with the latter of any contact governed by the provisions of this Convention.

B. The Syrian Arab Republic considers that article 81 is not in conformity with the aims and purposes of the Convention in that it does not allow all States, without distinction or discrimination, to become parties to it.

C. The Government of the Syrian Arab Republic does not in any case accept the non-applicability of the principle of a fundamental change of circumstances with regard to treaties establishing boundaries, referred to in article 62, paragraph 2 (*a*), inasmuch as it regards this as a flagrant violation of an obligatory norm which forms part of general in-

[TRADUCTION[1] — TRANSLATION[2]]

«A) L'acceptation de cette Convention par la République arabe syrienne et sa ratification par son Gouvernement ne peuvent comporter en aucune façon le sens d'une reconnaissance d'Israël et ne peuvent aboutir à entretenir avec lui aucun contact réglé par les dispositions de la Convention.

«B) La République arabe syrienne considère que l'article quatre-vingt-un de cette Convention ne s'accorde pas avec ses buts et ses desseins car il ne permet pas à tous les Etats sans discrimination ou distinction d'en devenir parties.

«C) Le Gouvernement de la République arabe syrienne n'accepte en aucun cas la non-application du principe du changement fondamental de circonstances sur les traités établissant des frontières au paragraphe 2, alinéa *a*, de l'article soixante-deux, car cela est considéré comme une violation flagrante de l'une des règles obligatoires parmi les règles

[1] Traduction fournie par le Gouvernement de la République arabe syrienne.

[2] Translation supplied by the Government of the Syrian Arab Republic.

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ternational law and which recognizes the right of peoples to self-determination.

D. The Government of the Syrian Arab Republic interprets the provisions in article 52 as follows:

> The expression "the threat or use of force" used in this article extends also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests.

E. The accession of the Syrian Arab Republic to this Convention and the ratification of it by its Government shall not apply to the Annex to the Convention, which concerns obligatory conciliation.

générales du Code international et qui prévoit le droit des peuples à l'autodétermination.

«D) Le Gouvernement de la République arabe syrienne comprend la disposition de l'article cinquante-deux, comme suit :

> «Le terme de la menace ou l'emploi de la force prévu par cet article s'applique également à l'exercice des contraintes économiques, politiques, militaires et psychologiques ainsi que tous les genres de contraintes qui entraînent l'obligation d'un Etat à conclure un traité contre son désir ou son intérêt.»

«E) L'adhésion de la République arabe syrienne à cette Convention et sa ratification par son Gouvernement ne s'appliquent pas à l'Annexe à la Convention relative à la conciliation obligatoire.»

### *TUNISIA* (a)

[TRANSLATION — TRADUCTION]

The dispute referred to in article 66 (*a*) requires the consent of all parties thereto in order to be submitted to the International Court of Justice for a decision.

### *TUNISIE* (a)

«Le différend prévu au paragraphe *a* de l'article 66 nécessite l'accord de toutes les parties à ce différend pour être soumis à la décision de la Cour internationale de Justice.»

### *UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND*

It is [the United Kingdom's] understanding that nothing in article 66 of the Convention is intended to oust the jurisdiction of the International Court of Justice where such jurisdiction exists under any provisions in force binding the parties with regard to the settlement of disputes. In particular, and in relation to States parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court, the

### *ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD*

[TRADUCTION — TRANSLATION]

Le Royaume-Uni considère qu'aucune disposition de l'article 66 de la Convention ne vise à écarter la juridiction de la Cour internationale de Justice lorsque cette juridiction découle de clauses en vigueur entre les parties, concernant le règlement des différends et ayant force obligatoire à leur égard. Notamment, au regard des Etats parties à la Convention de Vienne qui acceptent comme obligatoire la juridiction de la Cour internatio-

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United Kingdom will not regard the provisions of sub-paragraph (*b*) of article 66 of the Vienna Convention on the Law of Treaties as providing 'some other method of peaceful settlement' within the meaning of sub-paragraph (i) (*a*) of the Declaration of the Government of the United Kingdom which was deposited with the Secretary-General of the United Nations on the 1st of January 1969."

*UNITED REPUBLIC OF TANZANIA* (a)

"Article 66 of the Convention shall not be applied to the United Republic of Tanzania by any State which enters a reservation on any provision of part V or the whole of that part of the Convention."

OBJECTION[1] to the declaration made by the Government of Finland upon ratification[2]

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

*Received on:*
7 December 1977

"The Government of the United Kingdom of Great Britain and Northern Ireland note that the instrument of ratification of the Government of Finland, which was deposited with the Secretary-General on 19 August 1977, contains a declaration relating to paragraph 2 of article 7 of the Convention. The Government of the United Kingdom wish to inform the Secretary-General that they do not regard that declaration as in any way affecting the interpretation or application of article 7."

[1] Unless otherwise indicated, the texts of the objections were received at the time of ratification or accession.
[2] See p. 503 of this volume.

nale de Justice, le Royaume-Uni ne considérera pas les dispositions de l'alinéa *b* de l'article 66 de la Convention de Vienne sur le droit des traités comme fournissant «un autre moyen de règlement pacifique», au sens de l'alinéa i, *a*, de la Déclaration que le Gouvernement du Royaume-Uni a déposée auprès du Secrétaire général de l'Organisation des Nations Unies le 1er janvier 1969.

*RÉPUBLIQUE-UNIE DE TANZANIE* (a)

[TRADUCTION — TRANSLATION]

Aucun Etat formulant des réserves à propos d'une quelconque disposition de la partie V de la Convention, ou de l'ensemble de cette partie, ne pourra invoquer l'article 66 de la Convention vis-à-vis de la République-Unie de Tanzanie.

OBJECTION[1] à la déclaration faite par le Gouvernement finlandais lors de la ratification[2]

ROYAUME-UNI DE GRANDE BRETAGNE ET D'IRLANDE DU NORD

*Reçue le :*
7 décembre 1977

[TRADUCTION — TRANSLATION]

Le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord prend note que l'instrument de ratification du Gouvernement finlandais, déposé auprès du Secrétaire général le 19 août 1977, contient une déclaration relative au paragraphe 2 de l'article 7 de la Convention. Le Gouvernement du Royaume-Uni informe le Secrétaire général qu'il considère que cette déclaration ne modifie aucunement l'interprétation ou l'application de l'article 7.

[1] Sauf indication contraire, la date de réception est celle de la ratification ou de l'adhésion.
[2] Voir p. 503 du présent volume.

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OBJECTION to the reservation made by the Government of Guatemala upon signature[1]

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

"With reference to a reservation in relation to the territory of British Honduras made by Guatemala on signing the Convention, the United Kingdom does not accept that Guatemala has any rights or any valid claim with respect to that territory;

"The United Kingdom fully reserves its position in other respects with regard to the declarations made by various States on signature, to some of which the United Kingdom would object, if they were to be confirmed on ratification."

OBJECTIONS to the declaration made by the Government of the Syrian Arab Republic upon accession[2]

CANADA

*Received on:*
22 October 1971

". . . Canada does not consider itself in treaty relations with the Syrian Arab Republic in respect of those provisions of the Vienna Convention on the Law of Treaties to which the compulsory conciliation procedures set out in the annex to that Convention are applicable."

OBJECTION à la réserve faite par le Gouvernement guatémaltèque lors de la signature[1]

ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD

[TRADUCTION — TRANSLATION]

S'agissant de la réserve relative au territoire du Honduras britannique qui a été formulée par le Guatemala lors de la signature de la Convention, le Royaume-Uni ne reconnaît au Guatemala aucun droit ni titre légitime de réclamation en ce qui concerne ce territoire.

Le Royaume-Uni réserve pleinement sa position sur d'autres points vis-à-vis des déclarations qui ont été faites par divers Etats lors de la signature de la Convention; si certaines d'entre elles venaient à être confirmées lors de la ratification, le Royaume-Uni formulerait des objections à leur encontre.

OBJECTIONS à la réserve faite par le Gouvernement de la République arabe syrienne lors de l'adhésion[2]

CANADA

*Reçue le :*
22 octobre 1971

«Le Canada ne se considère pas comme lié par traité avec la République arabe syrienne à l'égard des dispositions de la Convention de Vienne sur le droit des traités auxquelles s'appliquent les procédures de conciliation obligatoire énoncées à l'annexe de ladite Convention.»

[1] See p. 498 of this volume.
[2] See p. 504 of this volume.

[1] Voir p. 498 du présent volume.
[2] Voir p. 504 du présent volume.

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NEW ZEALAND

*Received on:*
14 October 1971

". . . The New Zealand Government objects to the reservation entered by the Government of Syria to the obligatory conciliation procedures contained in the annex to the Vienna Convention on the Law of Treaties and does not accept the entry into force of the Convention as between New Zealand and Syria."

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

"The United Kingdom does not accept that the interpretation of article 52 put forward by the Government of Syria correctly reflects the conclusions reached at the Conference of Vienna on the subject of coercion; the Conference dealt with this matter by adopting a Declaration on this subject which forms part of the Final Act.

"The United Kingdom objects to the reservation entered by the Government of Syria in respect of the annex to the Convention and does not accept the entry into force of the Convention as between the United Kingdom and Syria".

OBJECTION to the reservations made by the Government of the Syrian Arab Republic and by the Government of Tunisia, respectively, upon accession[1]

SWEDEN

*Received on:*

4 February 1975

"Article 66 of the Convention contains certain provisions regarding procedures

[1] See pp. 504 and 506 of this volume.

NOUVELLE-ZÉLANDE

*Reçue le :*
14 octobre 1971

[TRADUCTION — TRANSLATION]

Le Gouvernement néo-zélandais objecte à la réserve formulée par le Gouvernement syrien relative aux procédures de conciliation obligatoire prévues dans l'annexe à la Convention de Vienne sur le droit des traités et n'accepte pas l'entrée en vigueur de la Convention entre la Nouvelle-Zélande et la Syrie.

ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD

[TRADUCTION — TRANSLATION]

Le Royaume-Uni ne considère pas que l'interprétation de l'article 52 qui a été avancée par le Gouvernement syrien reflète avec exactitude les conclusions auxquelles la Conférence de Vienne est parvenue au sujet de la contrainte; la Conférence a réglé cette question en adoptant à son sujet une déclaration qui fait partie de l'Acte final.

Le Royaume-Uni formule une objection contre la réserve faite par le Gouvernement syrien au sujet de l'annexe à la Convention et ne reconnaît pas l'entrée en vigueur de cette dernière entre le Royaume-Uni et la Syrie.

OBJECTION aux réserves faites par le Gouvernement de la République arabe syrienne et par le Gouvernement de la Tunisie, respectivement, lors de l'adhésion[1]

SUÈDE

*Reçue le :*

4 février 1975

[TRADUCTION — TRANSLATION]

L'article 66 de la Convention contient certaines dispositions concernant les

[1] Voir p. 504 et p. 506 du présent volume.

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for judicial settlement, arbitration and conciliation. According to these provisions a dispute concerning the application or the interpretation of article 53 or 64, which deal with the so-called *jus cogens*, may be submitted to the International Court of Justice. If the dispute concerns the application or the interpretation of any of the other articles in Part V of the Convention, the conciliation procedure specified in the Annex to the Convention may be set in motion.

"The Swedish Government considers that these provisions regarding the settlement of disputes are an important part of the Convention and that they cannot be separated from the substantive rules with which they are connected. Consequently, the Swedish Government considers it necessary to raise objections to any reservation which is made by another State and whose aim is to exclude the application, wholly or in part, of the provisions regarding the settlement of disputes. While not objecting to the entry into force of the Convention between Sweden and such a State, the Swedish Government considers that their treaty relations will not include either the procedural provision in respect of which a reservation has been made or the substantive provisions to which that procedural provision relates.

"For the reasons set out above, the Swedish Government objects to the reservation of the Syrian Arab Republic, according to which its accession to the Convention shall not include the Annex, and to the reservation of Tunisia, according to which the dispute referred to in article 66 (*a*) requires the consent of all parties thereto in order to be submitted to the International Court of Justice for a decision. In view of these reservations, the Swedish Government considers, firstly, that the treaty relations between Sweden and the Syrian Arab Republic will not include those provisions of Part V of the Convention to

procédures du règlement judiciaire, d'arbitrage et de conciliation. Aux termes de ces dispositions, un différend concernant l'application ou l'interprétation des articles 53 ou 64, qui traitent de ce que l'on appelle le *jus cogens*, peut être soumis à la décision de la Cour internationale de Justice. Si le différend concerne l'application ou l'interprétation de l'un quelconque des autres articles de la partie V de la Convention, la procédure de conciliation indiquée à l'annexe à la Convention peut être mise en œuvre.

Le Gouvernement suédois estime que ces dispositions relatives au règlement des différends constituent une partie importante de la Convention et qu'elles ne peuvent être dissociées des règles de fond auxquelles elles sont liées. Par conséquent, le Gouvernement suédois objecte à toutes les réserves qu'un autre Etat pourrait faire dans le but d'éviter, totalement ou partiellement, l'application des dispositions relatives au règlement des différends. Bien qu'il ne s'oppose pas à l'entrée en vigueur de la Convention entre la Suède et un tel Etat, le Gouvernement suédois estime que ni les dispositions de procédure faisant l'objet de réserves ni les dispositions de fond auxquelles ces dispositions de procédure se rapportent ne seront comprises dans leurs relations conventionnelles.

Pour les raisons évoquées ci-dessus, le Gouvernement suédois objecte à la réserve de la République arabe syrienne selon laquelle son adhésion à la Convention n'entraîne pas son adhésion à l'annexe à la Convention, et à la réserve de la Tunisie selon laquelle le différend dont il est question à l'article 66, *a*, ne peut être soumis à la décision de la Cour internationale de Justice qu'avec l'assentiment de toutes les parties à ce différend. Etant donné ces réserves, le Gouvernement suédois estime, premièrement, que les dispositions de la partie V de la Convention auxquelles se rapporte la procédure de conciliation indiquée à

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which the conciliation procedure in the Annex applies and, secondly, that the treaty relations between Sweden and Tunisia will not include articles 53 and 64 of the Convention.

"The Swedish Government has also taken note of the declaration of the Syrian Arab Republic, according to which it interprets the expression 'the threat or use of force' as used in article 52 of the Convention so as to extend also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests. On this point, the Swedish Government observes that since article 52 refers to threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations, it should be interpreted in the light of the practice which has developed or will develop on the basis of the Charter."

l'annexe ne seront pas comprises dans les relations conventionnelles entre la Suède et la République arabe syrienne et, deuxièmement, que les relations conventionnelles entre la Suède et la Tunisie n'engloberont pas les articles 53 et 64 de la Convention.

Le Gouvernement suédois a également pris note de la déclaration faite par la République arabe syrienne selon laquelle celle-ci interprète l'expression «la menace ou l'emploi de la force» utilisée à l'article 52 de la Convention comme s'appliquant également à l'emploi de contraintes économiques, politiques, militaires et psychologiques et les pressions de toute nature exercées en vue de contraindre un Etat à conclure un traité contre son gré ou contre ses intérêts. A ce propos, le Gouvernement suédois fait remarquer qu'étant donné que l'article 52 traite de la menace ou de l'emploi de la force en violation des principes du droit international incorporés dans la Charte des Nations Unies, il conviendrait de l'interpréter en tenant compte de la pratique qui s'est instaurée ou qui s'instaurera en ce qui concerne l'application des dispositions de la Charte.

OBJECTIONS to the reservation made by the Government of Tunisia upon accession[1]

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

*Received on:*

22 June 1972

". . . The United Kingdom objects to the reservation entered by the Government of Tunisia in respect of article 66 (*a*) of the Convention and does not accept the entry into force of the Convention as between the United Kingdom and Tunisia."

[1] See p. 506 of this volume.

OBJECTIONS à la réserve faite par le Gouvernement tunisien lors de l'adhésion[1]

ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD

*Reçue le :*

22 juin 1972

[TRADUCTION — TRANSLATION]

Le Royaume-Uni objecte à la réserve formulée par le Gouvernement tunisien au sujet de l'article 66, *a*, de la Convention et ne reconnaît pas l'entrée en vigueur de cette dernière entre le Royaume-Uni et la Tunisie.

[1] Voir p. 506 du présent volume.

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NEW ZEALAND

*Received on:*

10 August 1972

". . . The New Zealand Government objects to the reservation entered by the Government of Tunisia in respect of article 66 (*a*) of the Convention and does not consider New Zealand to be in treaty relations with Tunisia in respect of those provisions of the Convention to which the dispute settlement procedure provided for in article 66 (*a*) is applicable."

NOUVELLE-ZÉLANDE

*Reçue le :*

10 août 1972

[TRADUCTION — TRANSLATION]

Le Gouvernement néo-zélandais fait objection à la réserve émise par le Gouvernement tunisien à propos de l'article 66, *a*, de la Convention, et il considère que la Nouvelle-Zélande n'est pas liée par traité avec la Tunisie en ce qui concerne les dispositions de la Convention auxquelles la procédure de règlement des différends prévues à l'article 66, *a*, est applicable.

United Nations S/RES/1970 (2011)*

Security Council

Distr.: General
26 February 2011

# Resolution 1970 (2011)

## Adopted by the Security Council at its 6491st meeting, on 26 February 2011

*The Security Council*,

*Expressing* grave concern at the situation in the Libyan Arab Jamahiriya and condemning the violence and use of force against civilians,

*Deploring* the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government,

*Welcoming* the condemnation by the Arab League, the African Union, and the Secretary General of the Organization of the Islamic Conference of the serious violations of human rights and international humanitarian law that are being committed in the Libyan Arab Jamahiriya,

*Taking note* of the letter to the President of the Security Council from the Permanent Representative of the Libyan Arab Jamahiriya dated 26 February 2011,

*Welcoming* the Human Rights Council resolution A/HRC/RES/S-15/1 of 25 February 2011, including the decision to urgently dispatch an independent international commission of inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, to establish the facts and circumstances of such violations and of the crimes perpetrated, and where possible identify those responsible,

*Considering* that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity,

*Expressing concern* at the plight of refugees forced to flee the violence in the Libyan Arab Jamahiriya,

*Expressing concern also* at the reports of shortages of medical supplies to treat the wounded,

* Second reissue for technical reasons (10 March 2011).



Please recycle

*Recalling* the Libyan authorities' responsibility to protect its population,

*Underlining* the need to respect the freedoms of peaceful assembly and of expression, including freedom of the media,

*Stressing* the need to hold to account those responsible for attacks, including by forces under their control, on civilians,

*Recalling* article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

*Expressing concern* for the safety of foreign nationals and their rights in the Libyan Arab Jamahiriya,

*Reaffirming* its strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya.

*Mindful* of its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations,

*Acting* under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41,

1. *Demands* an immediate end to the violence and calls for steps to fulfil the legitimate demands of the population;

2. *Urges* the Libyan authorities to:

(a) Act with the utmost restraint, respect human rights and international humanitarian law, and allow immediate access for international human rights monitors;

(b) Ensure the safety of all foreign nationals and their assets and facilitate the departure of those wishing to leave the country;

(c) Ensure the safe passage of humanitarian and medical supplies, and humanitarian agencies and workers, into the country; and

(d) Immediately lift restrictions on all forms of media;

3. *Requests* all Member States, to the extent possible, to cooperate in the evacuation of those foreign nationals wishing to leave the country;

*ICC referral*

4. *Decides* to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;

5. *Decides* that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor;

6. *Decides* that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the

Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State;

7. *Invites* the Prosecutor to address the Security Council within two months of the adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

8. *Recognizes* that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

*Arms embargo*

9. *Decides* that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel whether or not originating in their territories, and decides further that this measure shall not apply to:

(a) Supplies of non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance or training, as approved in advance by the Committee established pursuant to paragraph 24 below;

(b) Protective clothing, including flak jackets and military helmets, temporarily exported to the Libyan Arab Jamahiriya by United Nations personnel, representatives of the media and humanitarian and development workers and associated personnel, for their personal use only; or

(c) Other sales or supply of arms and related materiel, or provision of assistance or personnel, as approved in advance by the Committee;

10. *Decides* that the Libyan Arab Jamahiriya shall cease the export of all arms and related materiel and that all Member States shall prohibit the procurement of such items from the Libyan Arab Jamahiriya by their nationals, or using their flagged vessels or aircraft, and whether or not originating in the territory of the Libyan Arab Jamahiriya;

11. *Calls upon* all States, in particular States neighbouring the Libyan Arab Jamahiriya, to inspect, in accordance with their national authorities and legislation and consistent with international law, in particular the law of the sea and relevant international civil aviation agreements, all cargo to and from the Libyan Arab Jamahiriya, in their territory, including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, transfer, or export of which is prohibited by paragraphs 9 or 10 of this resolution for the purpose of ensuring strict implementation of those provisions;

12. *Decides* to authorize all Member States to, and that all Member States shall, upon discovery of items prohibited by paragraph 9 or 10 of this resolution,

seize and dispose (such as through destruction, rendering inoperable, storage or transferring to a State other than the originating or destination States for disposal) items the supply, sale, transfer or export of which is prohibited by paragraphs 9 or 10 of this resolution and decides further that all Member States shall cooperate in such efforts;

13. *Requires* any Member State when it undertakes an inspection pursuant to paragraph 11 above, to submit promptly an initial written report to the Committee containing, in particular, explanation of the grounds for the inspections, the results of such inspections, and whether or not cooperation was provided, and, if prohibited items for transfer are found, further requires such Member States to submit to the Committee, at a later stage, a subsequent written report containing relevant details on the inspection, seizure, and disposal, and relevant details of the transfer, including a description of the items, their origin and intended destination, if this information is not in the initial report;

14. *Encourages* Member States to take steps to strongly discourage their nationals from travelling to the Libyan Arab Jamahiriya to participate in activities on behalf of the Libyan authorities that could reasonably contribute to the violation of human rights;

*Travel ban*

15. *Decides* that all Member States shall take the necessary measures to prevent the entry into or transit through their territories of individuals listed in Annex I of this resolution or designated by the Committee established pursuant to paragraph 24 below, provided that nothing in this paragraph shall oblige a State to refuse its own nationals entry into its territory;

16. *Decides* that the measures imposed by paragraph 15 above shall not apply:

(a) Where the Committee determines on a case-by-case basis that such travel is justified on the grounds of humanitarian need, including religious obligation;

(b) Where entry or transit is necessary for the fulfilment of a judicial process;

(c) Where the Committee determines on a case-by-case basis that an exemption would further the objectives of peace and national reconciliation in the Libyan Arab Jamahiriya and stability in the region; or

(d) Where a State determines on a case-by-case basis that such entry or transit is required to advance peace and stability in the Libyan Arab Jamahiriya and the States subsequently notifies the Committee within forty-eight hours after making such a determination;

*Asset freeze*

17. *Decides* that all Member States shall freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities listed in annex II of this resolution or designated by the Committee established pursuant to paragraph 24 below, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, and decides further that all

Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the individuals or entities listed in Annex II of this resolution or individuals designated by the Committee;

18. *Expresses* its intention to ensure that assets frozen pursuant to paragraph 17 shall at a later stage be made available to and for the benefit of the people of the Libyan Arab Jamahiriya;

19. *Decides* that the measures imposed by paragraph 17 above do not apply to funds, other financial assets or economic resources that have been determined by relevant Member States:

(a) To be necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services in accordance with national laws, or fees or service charges, in accordance with national laws, for routine holding or maintenance of frozen funds, other financial assets and economic resources, after notification by the relevant State to the Committee of the intention to authorize, where appropriate, access to such funds, other financial assets or economic resources and in the absence of a negative decision by the Committee within five working days of such notification;

(b) To be necessary for extraordinary expenses, provided that such determination has been notified by the relevant State or Member States to the Committee and has been approved by the Committee; or

(c) To be the subject of a judicial, administrative or arbitral lien or judgment, in which case the funds, other financial assets and economic resources may be used to satisfy that lien or judgment provided that the lien or judgment was entered into prior to the date of the present resolution, is not for the benefit of a person or entity designated pursuant to paragraph 17 above, and has been notified by the relevant State or Member States to the Committee;

20. *Decides* that Member States may permit the addition to the accounts frozen pursuant to the provisions of paragraph 17 above of interests or other earnings due on those accounts or payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of this resolution, provided that any such interest, other earnings and payments continue to be subject to these provisions and are frozen;

21. *Decides* that the measures in paragraph 17 above shall not prevent a designated person or entity from making payment due under a contract entered into prior to the listing of such a person or entity, provided that the relevant States have determined that the payment is not directly or indirectly received by a person or entity designated pursuant to paragraph 17 above, and after notification by the relevant States to the Committee of the intention to make or receive such payments or to authorize, where appropriate, the unfreezing of funds, other financial assets or economic resources for this purpose, 10 working days prior to such authorization;

*Designation criteria*

22. *Decides* that the measures contained in paragraphs 15 and 17 shall apply to the individuals and entities designated by the Committee, pursuant to paragraph 24 (b) and (c), respectively;

(a) Involved in or complicit in ordering, controlling, or otherwise directing, the commission of serious human rights abuses against persons in the Libyan Arab Jamahiriya, including by being involved in or complicit in planning, commanding, ordering or conducting attacks, in violation of international law, including aerial bombardments, on civilian populations and facilities; or

(b) Acting for or on behalf of or at the direction of individuals or entities identified in subparagraph (a).

23. *Strongly encourages* Member States to submit to the Committee names of individuals who meet the criteria set out in paragraph 22 above;

*New Sanctions Committee*

24. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council (herein "the Committee"), to undertake to following tasks:

(a) To monitor implementation of the measures imposed in paragraphs 9, 10, 15, and 17;

(b) To designate those individuals subject to the measures imposed by paragraphs 15 and to consider requests for exemptions in accordance with paragraph 16 above;

(c) To designate those individuals subject to the measures imposed by paragraph 17 above and to consider requests for exemptions in accordance with paragraphs 19 and 20 above;

(d) To establish such guidelines as may be necessary to facilitate the implementation of the measures imposed above;

(e) To report within thirty days to the Security Council on its work for the first report and thereafter to report as deemed necessary by the Committee;

(f) To encourage a dialogue between the Committee and interested Member States, in particular those in the region, including by inviting representatives of such States to meet with the Committee to discuss implementation of the measures;

(g) To seek from all States whatever information it may consider useful regarding the actions taken by them to implement effectively the measures imposed above;

(h) To examine and take appropriate action on information regarding alleged violations or non-compliance with the measures contained in this resolution;

25. *Calls upon* all Member States to report to the Committee within 120 days of the adoption of this resolution on the steps they have taken with a view to implementing effectively paragraphs 9, 10, 15 and 17 above;

*Humanitarian assistance*

26. *Calls upon* all Member States, working together and acting in cooperation with the Secretary General, to facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance in the Libyan Arab Jamahiriya, and requests the States concerned to keep the Security Council regularly informed on the progress of actions undertaken pursuant to this paragraph, and expresses its readiness to consider taking additional appropriate measures, as necessary, to achieve this;

*Commitment to review*

27. *Affirms* that it shall keep the Libyan authorities' actions under continuous review and that it shall be prepared to review the appropriateness of the measures contained in this resolution, including the strengthening, modification, suspension or lifting of the measures, as may be needed at any time in light of the Libyan authorities' compliance with relevant provisions of this resolution;

28. *Decides* to remain actively seized of the matter.

# Annex I

## Travel ban

1. Al-Baghdadi, Dr Abdulqader Mohammed

   Passport number: B010574. Date of birth: 01/07/1950.

   Head of the Liaison Office of the Revolutionary Committees. Revolutionary Committees involved in violence against demonstrators.

2. Dibri, Abdulqader Yusef

   Date of birth: 1946. Place of birth: Houn, Libya.

   Head of Muammar Qadhafi's personal security. Responsibility for regime security. History of directing violence against dissidents.

3. Dorda, Abu Zayd Umar

   Director, External Security Organisation. Regime loyalist. Head of external intelligence agency.

4. Jabir, Major General Abu Bakr Yunis

   Date of birth: 1952. Place of birth: Jalo, Libya.

   Defence Minister. Overall responsibility for actions of armed forces.

5. Matuq, Matuq Mohammed

   Date of birth: 1956. Place of birth: Khoms.

   Secretary for Utilities. Senior member of regime. Involvement with Revolutionary Committees. Past history of involvement in suppression of dissent and violence.

6. Qadhaf Al-dam, Sayyid Mohammed

   Date of birth: 1948. Place of birth: Sirte, Libya.

   Cousin of Muammar Qadhafi. In the 1980s, Sayyid was involved in the dissident assassination campaign and allegedly responsible for several deaths in Europe. He is also thought to have been involved in arms procurement.

7. Qadhafi, Aisha Muammar

   Date of birth: 1978. Place of birth: Tripoli, Libya.

   Daughter of Muammar Qadhafi. Closeness of association with regime.

8. Qadhafi, Hannibal Muammar

   Passport number: B/002210. Date of birth: 20/09/1975. Place of birth: Tripoli, Libya. Son of Muammar Qadhafi. Closeness of association with regime.

9. Qadhafi, Khamis Muammar

   Date of birth: 1978. Place of birth: Tripoli, Libya.

   Son of Muammar Qadhafi. Closeness of association with regime. Command of military units involved in repression of demonstrations.

10. Qadhafi, Mohammed Muammar

    Date of birth: 1970. Place of birth: Tripoli, Libya.

    Son of Muammar Qadhafi. Closeness of association with regime.

11. Qadhafi, Muammar Mohammed Abu Minyar

    Date of birth: 1942. Place of birth: Sirte, Libya.

    Leader of the Revolution, Supreme Commander of Armed Forces. Responsibility for ordering repression of demonstrations, human rights abuses.

12. Qadhafi, Mutassim

    Date of birth: 1976. Place of birth: Tripoli, Libya.

    National Security Adviser. Son of Muammar Qadhafi. Closeness of association with regime.

13. Qadhafi, Saadi

    Passport number: 014797. Date of birth: 25/05/1973. Place of birth: Tripoli, Libya.

    Commander Special Forces. Son of Muammar Qadhafi. Closeness of association with regime. Command of military units involved in repression of demonstrations.

14. Qadhafi, Saif al-Arab

    Date of birth: 1982. Place of birth: Tripoli, Libya.

    Son of Muammar Qadhafi. Closeness of association with regime.

15. Qadhafi, Saif al-Islam

    Passport number: B014995. Date of birth: 25/06/1972. Place of birth: Tripoli, Libya.

    Director, Qadhafi Foundation. Son of Muammar Qadhafi. Closeness of association with regime. Inflammatory public statements encouraging violence against demonstrators.

16. Al-Senussi, Colonel Abdullah

    Date of birth: 1949. Place of birth: Sudan.

    Director Military Intelligence. Military Intelligence involvement in suppression of demonstrations. Past history includes suspicion of involvement in Abu Selim prison massacre. Convicted in absentia for bombing of UTA flight. Brother-in-law of Muammar Qadhafi.

# Annex II

## Asset freeze

1. Qadhafi, Aisha Muammar

   Date of birth: 1978. Place of birth: Tripoli, Libya.

   Daughter of Muammar Qadhafi. Closeness of association with regime.

2. Qadhafi, Hannibal Muammar

   Passport number: B/002210. Date of birth: 20/09/1975. Place of birth: Tripoli, Libya. Son of Muammar Qadhafi. Closeness of association with regime.

3. Qadhafi, Khamis Muammar

   Date of birth: 1978. Place of birth: Tripoli, Libya.

   Son of Muammar Qadhafi. Closeness of association with regime. Command of military units involved in repression of demonstrations.

4. Qadhafi, Muammar Mohammed Abu Minyar

   Date of birth: 1942. Place of birth: Sirte, Libya.

   Leader of the Revolution, Supreme Commander of Armed Forces. Responsibility for ordering repression of demonstrations, human rights abuses.

5. Qadhafi, Mutassim

   Date of birth: 1976. Place of birth: Tripoli, Libya.

   National Security Adviser. Son of Muammar Qadhafi. Closeness of association with regime.

6. Qadhafi, Saif al-Islam

   Passport number: B014995. Date of birth: 25/06/1972. Place of birth: Tripoli, Libya.

   Director, Qadhafi Foundation. Son of Muammar Qadhafi. Closeness of association with regime. Inflammatory public statements encouraging violence against demonstrators.

# CHARTER OF THE UNITED NATIONS

AND

# STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

SAN FRANCISCO · 1945

# CHARTER OF THE UNITED NATIONS

WE THE PEOPLES OF THE UNITED NATIONS
DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

to practice tolerance and live together in peace with one another as good neighbors, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS
TO ACCOMPLISH THESE AIMS.

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

# CHAPTER I

## PURPOSES AND PRINCIPLES

### *Article 1*

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

### *Article 2*

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. 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 or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

# CHAPTER II

## MEMBERSHIP

### *Article 3*

The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.

*Article 4*

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

*Article 5*

A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

*Article 6*

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

## CHAPTER III

## ORGANS

*Article 7*

1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.

2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

*Article 8*

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

## CHAPTER IV

## THE GENERAL ASSEMBLY

*Composition*

*Article 9*

1. The General Assembly shall consist of all the Members of the United Nations.

2. Each Member shall have not more than five representatives in the General Assembly.

*Functions and Powers*

*Article 10*

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

*Article 11*

1. The General Assembly may consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a

Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

*Article 12*

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

*Article 13*

1. The General Assembly shall initiate studies and make recommendations for the purpose of:

a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification;

b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

2. The further responsibilities, functions, and powers of the General Assembly with respect to matters mentioned in paragraph 1(b) above are set forth in Chapters IX and X.

*Article 14*

Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

*Article 15*

1. The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.

2. The General Assembly shall receive and consider reports from the other organs of the United Nations.

*Article 16*

The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapters XII and XIII, including the approval of the trusteeship agreements for areas not designated as strategic.

*Article 17*

1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.

3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

*Voting*

*Article 18*

1. Each member of the General Assembly shall have one vote.

2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1(c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.

3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

*Article 19*

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

*Procedure*

*Article 20*

The General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require. Special sessions shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations.

*Article 21*

The General Assembly shall adopt its own rules of procedure. It shall elect its President for each session.

*Article 22*

The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

## CHAPTER V

## THE SECURITY COUNCIL

*Composition*

*Article 23*

1. The Security Council shall consist of eleven Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect six other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the

United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

2. The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members, however, three shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.

3. Each member of the Security Council shall have one representative.

*Functions and Powers*

*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.

*Article 25*

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

*Article 26*

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

*Voting*

*Article 27*

1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

*Procedure*

*Article 28*

1. The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization.

2. The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.

3. The Security Council may hold meetings at such places other than the seat of the Organization as in its judgment will best facilitate its work.

*Article 29*

The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

*Article 30*

The Security Council shall adopt its own rules of procedure, including the method of selecting its President.

*Article 31*

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

*Article 32*

Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

## CHAPTER VI

## PACIFIC SETTLEMENT OF DISPUTES

*Article 33*

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

*Article 34*

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

*Article 35*

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

*Article 36*

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

*Article 37*

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

*Article 38*

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

## CHAPTER VII

## ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

*Article 39*

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

*Article 40*

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

*Article 41*

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

*Article 42*

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

*Article 43*

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

*Article 44*

When the Security Council has decided to use force it shall, before calling upon a Member not

represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

*Article 45*

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

*Article 46*

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

*Article 47*

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional subcommittees.

*Article 48*

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

*Article 49*

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

*Article 50*

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

*Article 51*

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Mem-

ber of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

## CHAPTER VIII

## REGIONAL ARRANGEMENTS

### *Article 52*

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

4. This Article in no way impairs the application of Articles 34 and 35.

### *Article 53*

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

### *Article 54*

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

## CHAPTER IX

## INTERNATIONAL ECONOMIC AND SOCIAL COOPERATION

### *Article 55*

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and inter-

national cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

*Article 56*

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

*Article 57*

1. The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.

*Article 58*

The Organization shall make recommendations for the coordination of the policies and activities of the specialized agencies.

*Article 59*

The Organization shall, where appropriate, initiate negotiations among the states concerned for the creation of any new specialized agencies required for the accomplishment of the purposes set forth in Article 55.

*Article 60*

Responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

# CHAPTER X

## THE ECONOMIC AND SOCIAL COUNCIL

*Composition*

*Article 61*

1. The Economic and Social Council shall consist of eighteen Members of the United Nations elected by the General Assembly.

2. Subject to the provisions of paragraph 3, six members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.

3. At the first election, eighteen members of the Economic and Social Council shall be chosen. The term of office of six members so chosen shall expire at the end of one year, and of six other members at the end of two years, in accordance with arrangements made by the General Assembly.

4. Each member of the Economic and Social Council shall have one representative.

*Functions and Powers*

*Article 62*

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

*Article 63*

1. The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

2. It may coordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.

*Article 64*

1. The Economic and Social Council may take appropriate steps to obtain regular reports from the specialized agencies. It may make arrangements with the Members of the United Nations and with the specialized agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly.

2. It may communicate its observations on these reports to the General Assembly.

*Article 65*

The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.

*Article 66*

1. The Economic and Social Council shall perform such functions as fall within its competence in connection with the carrying out of the recommendations of the General Assembly.

2. It may, with the approval of the General Assembly, perform services at the request of Members of the United Nations and at the request of specialized agencies.

3. It shall perform such other functions as are specified elsewhere in the present Charter or as may be assigned to it by the General Assembly.

*Voting*

*Article 67*

1. Each member of the Economic and Social Council shall have one vote.

2. Decisions of the Economic and Social Council shall be made by a majority of the members present and voting.

*Procedure*

*Article 68*

The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.

*Article 69*

The Economic and Social Council shall invite any Member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that Member.

*Article 70*

The Economic and Social Council may make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the commissions established by it, and for its representatives to participate in the deliberations of the specialized agencies.

*Article 71*

The Economic and Social Council may make suitable arrangements for consultation with nongovernmental organizations which are concerned with matters within its competence. Such arrange-

ments may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

*Article 72*

1. The Economic and Social Council shall adopt its own rules of procedure, including the method of selecting its President.

2. The Economic and Social Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

## CHAPTER XI

## DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES

*Article 73*

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

c. to further international peace and security;

d. to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

*Article 74*

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighborliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

## CHAPTER XII

## INTERNATIONAL TRUSTEESHIP SYSTEM

*Article 75*

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

*Article 76*

The basic objectives of the trusteeship system,

in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

a. to further international peace and security;

b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

*Article 77*

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

a. territories now held under mandate;

b. territories which may be detached from enemy states as a result of the Second World War; and

c. territories voluntarily placed under the system by states responsible for their administration.

2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

*Article 78*

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

*Article 79*

The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

*Article 80*

1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

*Article 81*

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the

administering authority, may be one or more states or the Organization itself.

*Article 82*

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.

*Article 83*

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.

2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.

3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

*Article 84*

It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defense and the maintenance of law and order within the trust territory.

*Article 85*

1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.

2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

## CHAPTER XIII

## THE TRUSTEESHIP COUNCIL

*Composition*

*Article 86*

1. The Trusteeship Council shall consist of the following Members of the United Nations:

a. those Members administering trust territories;

b. such of those Members mentioned by name in Article 23 as are not administering trust territories; and

c. as many other Members elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations which administer trust territories and those which do not.

2. Each member of the Trusteeship Council shall designate one specially qualified person to represent it therein.

*Functions and Powers*

*Article 87*

The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may:

a. consider reports submitted by the administering authority;

b. accept petitions and examine them in consultation with the administering authority;

c. provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and

d. take these and other actions in conformity with the terms of the trusteeship agreements.

*Article 88*

The Trusteeship Council shall formulate a questionnaire on the political, economic, social, and educational advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire.

*Voting*

*Article 89*

1. Each member of the Trusteeship Council shall have one vote.

2. Decisions of the Trusteeship Council shall be made by a majority of the members present and voting.

*Procedure*

*Article 90*

1. The Trusteeship Council shall adopt its own rules of procedure, including the method of selecting its President.

2. The Trusteeship Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

*Article 91*

The Trusteeship Council shall, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialized agencies in regard to matters with which they are respectively concerned.

# CHAPTER XIV

## THE INTERNATIONAL COURT OF JUSTICE

*Article 92*

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

*Article 93*

1. All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.

2. A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

*Article 94*

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

*Article 95*

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

*Article 96*

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

## CHAPTER XV

## THE SECRETARIAT

*Article 97*

The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

*Article 98*

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

*Article 99*

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

*Article 100*

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

*Article 101*

1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.

3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

## CHAPTER XVI

## MISCELLANEOUS PROVISIONS

*Article 102*

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of

this Article may invoke that treaty or agreement before any organ of the United Nations.

*Article 103*

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

*Article 104*

The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

*Article 105*

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

## CHAPTER XVII

### TRANSITIONAL SECURITY ARRANGEMENTS

*Article 106*

Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, October 30, 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.

*Article 107*

Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

## CHAPTER XVIII

### AMENDMENTS

*Article 108*

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

*Article 109*

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any seven members of the Security Council. Each Member of the United Nations shall have one vote in the conference.

2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.

3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

## CHAPTER XIX

## RATIFICATION AND SIGNATURE

### *Article 110*

1. The present Charter shall be ratified by the signatory states in accordance with their respective constitutional processes.

2. The ratifications shall be deposited with the Government of the United States of America, which shall notify all the signatory states of each deposit as well as the Secretary-General of the Organization when he has been appointed.

3. The present Charter shall come into force upon the deposit of ratifications by the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, and by a majority of the other signatory states. A protocol of the ratifications deposited shall thereupon be drawn up by the Government of the United States of America which shall communicate copies thereof to all the signatory states.

4. The states signatory to the present Charter which ratify it after it has come into force will become original Members of the United Nations on the date of the deposit of their respective ratifications.

### *Article 111*

The present Charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that Government to the Governments of the other signatory states.

IN FAITH WHEREOF the representatives of the Governments of the United Nations have signed the present Charter.

DONE at the city of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five.

# STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

*Article 1*

THE INTERNATIONAL COURT OF JUSTICE established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.

## CHAPTER I

## ORGANIZATION OF THE COURT

*Article 2*

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

*Article 3*

1. The Court shall consist of fifteen members, no two of whom may be nationals of the same state.

2. A person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.

*Article 4*

1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.

2. In the case of Members of the United Nations not represented in the Permanent Court of Arbitration, candidates shall be nominated by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

3. The conditions under which a state which is a party to the present Statute but is not a Member of the United Nations may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the General Assembly upon recommendation of the Security Council.

*Article 5*

1. At least three months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the states which are parties to the present Statute, and to the members of the national groups appointed under Article 4, paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

2. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case may the number of candidates nominated by a group be more than double the number of seats to be filled.

*Article 6*

Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

*Article 7*

1. The Secretary-General shall prepare a list

in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible.

2. The Secretary-General shall submit this list to the General Assembly and to the Security Council.

*Article 8*

The General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court.

*Article 9*

At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

*Article 10*

1. Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected.

2. Any vote of the Security Council, whether for the election of judges or for the appointment of members of the conference envisaged in Article 12, shall be taken without any distinction between permanent and non-permanent members of the Security Council.

3. In the event of more than one national of the same state obtaining an absolute majority of the votes both of the General Assembly and of the Security Council, the eldest of these only shall be considered as elected.

*Article 11*

If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

*Article 12*

1. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed at any time at the request of either the General Assembly or the Security Council, for the purpose of choosing by the vote of an absolute majority one name for each seat still vacant, to submit to the General Assembly and the Security Council for their respective acceptance.

2. If the joint conference is unanimously agreed upon any person who fulfils the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Article 7.

3. If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been elected shall, within a period to be fixed by the Security Council, proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the General Assembly or in the Security Council.

4. In the event of an equality of votes among the judges, the eldest judge shall have a casting vote.

*Article 13*

1. The members of the Court shall be elected for nine years and may be re-elected; provided, however, that of the judges elected at the first election, the terms of five judges shall expire at the end of three years and the terms of five more judges shall expire at the end of six years.

2. The judges whose terms are to expire at the end of the above-mentioned initial periods of three and six years shall be chosen by lot to be drawn by the Secretary-General immediately after the first election has been completed.

3. The members of the Court shall continue to

discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

4. In the case of the resignation of a member of the Court, the resignation shall be addressed to the President of the Court for transmission to the Secretary-General. This last notification makes the place vacant.

*Article 14*

Vacancies shall be filled by the same method as that laid down for the first election, subject to the following provision: the Secretary-General shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Security Council.

*Article 15*

A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

*Article 16*

1. No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.

2. Any doubt on this point shall be settled by the decision of the Court.

*Article 17*

1. No member of the Court may act as agent, counsel, or advocate in any case.

2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

3. Any doubt on this point shall be settled by the decision of the Court.

*Article 18*

1. No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.

2. Formal notification thereof shall be made to the Secretary-General by the Registrar.

3. This notification makes the place vacant.

*Article 19*

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

*Article 20*

Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.

*Article 21*

1. The Court shall elect its President and Vice-President for three years; they may be re-elected.

2. The Court shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

*Article 22*

1. The seat of the Court shall be established at The Hague. This, however, shall not prevent the Court from sitting and exercising its functions elsewhere whenever the Court considers it desirable.

2. The President and the Registrar shall reside at the seat of the Court.

*Article 23*

1. The Court shall remain permanently in session, except during the judicial vacations, the dates and duration of which shall be fixed by the Court.

2. Members of the Court are entitled to peri-

odic leave, the dates and duration of which shall be fixed by the Court, having in mind the distance between The Hague and the home of each judge.

3. Members of the Court shall be bound, unless they are on leave or prevented from attending by illness or other serious reasons duly explained to the President, to hold themselves permanently at the disposal of the Court.

*Article 24*

1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.

3. If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

*Article 25*

1. The full Court shall sit except when it is expressly provided otherwise in the present Statute.

2. Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of the Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting.

3. A quorum of nine judges shall suffice to constitute the Court.

*Article 26*

1. The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labor cases and cases relating to transit and communications.

2. The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.

3. Cases shall be heard and determined by the chambers provided for in this Article if the parties so request.

*Article 27*

A judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court.

*Article 28*

The chambers provided for in Articles 26 and 29 may, with the consent of the parties, sit and exercise their functions elsewhere than at The Hague.

*Article 29*

With a view to the speedy despatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing judges who find it impossible to sit.

*Article 30*

1. The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.

2. The Rules of the Court may provide for assessors to sit with the Court or with any of its chambers, without the right to vote.

*Article 31*

1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.

2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among

those persons who have been nominated as candidates as provided in Articles 4 and 5.

3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.

4. The provisions of this Article shall apply to the case of Articles 26 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially chosen by the parties.

5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.

6. Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfil the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues.

*Article 32*

1. Each member of the Court shall receive an annual salary.

2. The President shall receive a special annual allowance.

3. The Vice-President shall receive a special allowance for every day on which he acts as President.

4. The judges chosen under Article 31, other than members of the Court, shall receive compensation for each day on which they exercise their functions.

5. These salaries, allowances, and compensation shall be fixed by the General Assembly. They may not be decreased during the term of office.

6. The salary of the Registrar shall be fixed by the General Assembly on the proposal of the Court.

7. Regulations made by the General Assembly shall fix the conditions under which retirement pensions may be given to members of the Court and to the Registrar, and the conditions under which members of the Court and the Registrar shall have their traveling expenses refunded.

8. The above salaries, allowances, and compensation shall be free of all taxation.

*Article 33*

The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly.

## CHAPTER II

## COMPETENCE OF THE COURT

*Article 34*

1. Only states may be parties in cases before the Court.

2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

*Article 35*

1. The Court shall be open to the states parties to the present Statute.

2. The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid

down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.

3. When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court.

*Article 36*

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

*Article 37*

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

*Article 38*

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

## CHAPTER III

## PROCEDURE

*Article 39*

1. The official languages of the Court shall be French and English. If the parties agree that the

case shall be conducted in French, the judgment shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment shall be delivered in English.

2. In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court shall be given in French and English. In this case the Court shall at the same time determine which of the two texts shall be considered as authoritative.

3. The Court shall, at the request of any party, authorize a language other than French or English to be used by that party.

*Article 40*

1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

2. The Registrar shall forthwith communicate the application to all concerned.

3. He shall also notify the Members of the United Nations through the Secretary-General, and also any other states entitled to appear before the Court.

*Article 41*

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

*Article 42*

1. The parties shall be represented by agents.

2. They may have the assistance of counsel or advocates before the Court.

3. The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

*Article 43*

1. The procedure shall consist of two parts: written and oral.

2. The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.

3. These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

4. A certified copy of every document produced by one party shall be communicated to the other party.

5. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.

*Article 44*

1. For the service of all notices upon persons other than the agents, counsel, and advocates. the Court shall apply direct to the government of the state upon whose territory the notice has to be served.

2. The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

*Article 45*

The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President; if neither is able to preside, the senior judge present shall preside.

*Article 46*

The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

*Article 47*

1. Minutes shall be made at each hearing and signed by the Registrar and the President.

2. These minutes alone shall be authentic.

*Article 48*

The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

*Article 49*

The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

*Article 50*

The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

*Article 51*

During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

*Article 52*

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

*Article 53*

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

*Article 54*

1. When, subject to the control of the Court, the agents, counsel, and advocates have completed their presentation of the case, the President shall declare the hearing closed.

2. The Court shall withdraw to consider the judgment.

3. The deliberations of the Court shall take place in private and remain secret.

*Article 55*

1. All questions shall be decided by a majority of the judges present.

2. In the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote.

*Article 56*

1. The judgment shall state the reasons on which it is based.

2. It shall contain the names of the judges who have taken part in the decision.

*Article 57*

If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

*Article 58*

The judgment shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the agents.

*Article 59*

The decision of the Court has no binding force except between the parties and in respect of that particular case.

*Article 60*

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

*Article 61*

1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

4. The application for revision must be made at latest within six months of the discovery of the new fact.

5. No application for revision may be made after the lapse of ten years from the date of the judgment.

*Article 62*

1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

2. It shall be for the Court to decide upon this request.

*Article 63*

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

*Article 64*

Unless otherwise decided by the Court, each party shall bear its own costs.

# CHAPTER IV
## ADVISORY OPINIONS

*Article 65*

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

*Article 66*

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.

2. The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

3. Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide.

4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.

*Article 67*

The Court shall deliver its advisory opinions in open court, notice having been given to the Secretary-General and to the representatives of Members of the United Nations, of other states and of international organizations immediately concerned.

*Article 68*

In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

## CHAPTER V

## AMENDMENT

*Article 69*

Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations.

*Article 70*

The Court shall have power to propose such amendments to the present Statute as it may deem necessary, through written communications to the Secretary-General, for consideration in conformity with the provisions of Article 69.

FOR CHINA:
POUR LA CHINE:
中國:
За Китай:
POR LA CHINA:

钧惠时芳蹟勷武霖
维寵道貽　君必
預王魏吳李張董胡

FOR THE UNION OF SOVIET SOCIALIST REPUBLICS:
POUR L'UNION DES RÉPUBLIQUES SOVIÉTIQUES SOCIALISTES:
蘇維埃社會主義共和國聯邦:
За Союз Советских Социалистических Республик:
POR LA UNIÓN DE REPÚBLICAS SOCIALISTAS SOVIÉTICAS:

FOR THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:
POUR LE ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD:
大不列顛及北愛爾蘭聯合王國:
За Соединенное Королевство Великобритании и Северной Ирландии:
POR EL REINO UNIDO DE LA GRAN BRETAÑA E IRLANDA DEL NORTE:

Halifax.
Cranborne.

FOR THE UNITED STATES OF AMERICA:
POUR LES ETATS-UNIS D'AMÉRIQUE:
美利堅合衆國:
За Соединенные Штаты Америки:
POR LOS ESTADOS UNIDOS DE AMÉRICA:

E. Stettinius Jr.
John Winant
Averell Harriman
Sol Bloom
Charles A. Eaton
Harold E. Stassen
Virginia C. Gildersleeve

FOR FRANCE:
POUR LA FRANCE:
法蘭西:
За Францию:
POR FRANCIA:

FOR ARGENTINA:
POUR L'ARGENTINE:
阿根廷:
За Аргентину:
POR LA ARGENTINA:

FOR AUSTRALIA:
POUR L'AUSTRALIE:
澳大利亞:
За Австралию:
POR AUSTRALIA:

FOR THE KINGDOM OF BELGIUM:
POUR LE ROYAUME DE BELGIQUE:
比利時王國:
За Королевство Бельгии:
POR EL REINO DE BÉLGICA:

FOR BOLIVIA:
POUR LA BOLIVIE:
玻利維亞:
За Боливию:
POR BOLIVIA:

FOR BRAZIL:
POUR LE BRÉSIL:
巴西:
За Бразилию:
POR EL BRASIL:

FOR THE BYELORUSSIAN SOVIET SOCIALIST REPUBLIC:
POUR LA RÉPUBLIQUE SOVIÉTIQUE SOCIALISTE DE BÉLORUSSIE:
白俄羅斯蘇維埃社會主義共和國:
За Белорусскую Советскую Социалистическую Республику:
POR LA REPÚBLICA SOCIALISTA SOVIÉTICA BIELORRUSA:

FOR CANADA:
POUR LE CANADA:
加拿大:
За Канаду:
POR EL CANADÁ:

FOR CHILE:
POUR LE CHILI:
智利:
За Чили:
POR CHILE:

FOR COLOMBIA:
POUR LA COLOMBIE:
哥倫比亞:
За Колумбию:
POR COLOMBIA:

FOR COSTA RICA:
POUR COSTA-RICA:
哥斯大黎加:
За Костарику:
POR COSTA RICA:

FOR CUBA:
POUR CUBA:
古巴:
За Кубу:
POR CUBA:

FOR CZECHOSLOVAKIA:
POUR LA TCHÉCOSLOVAQUIE:
捷克斯拉夫:
За Чехословакию:
POR CHECOESLOVAQUIA:

FOR DENMARK:
POUR LE DANEMARK:
丹麥:
За Данию:
POR DINAMARCA:

FOR THE DOMINICAN REPUBLIC:
POUR LA RÉPUBLIQUE DOMINICAINE:
多明尼加共和國:
За Доминиканскую Республику:
POR LA REPÚBLICA DOMINICANA:

FOR ECUADOR:
POUR L'EQUATEUR:
厄瓜多:
За Эквадор:
POR EL ECUADOR:

P2020

FOR EGYPT:
POUR L'EGYPTE:
埃及:
За Египет:
POR EGIPTO:

FOR EL SALVADOR:
POUR LE SALVADOR:
薩爾瓦多:
За Сальвадор:
POR EL SALVADOR:

Héctor Daniel Castro
Carlos Leiva, M.D.

FOR ETHIOPIA:
POUR L'ETHIOPIE:
阿比西尼亞:
За Эфиопию:
POR ETIOPÍA:

Ambassador
Eshetu T. Mekuria

FOR GREECE:
POUR LA GRÈCE:
希臘:
За Грецию:
POR GRECIA:

FOR GUATEMALA:
POUR LE GUATEMALA:
瓜地馬拉:
За Гватемалу:
POR GUATEMALA:

FOR HAITI:
POUR HAÏTI:
海地:
За Гаити:
POR HAITÍ:

'OR HONDURAS:
POUR LE HONDURAS:
洪都拉斯:
За Гондурас:
POR HONDURAS:

Julián Pacheco
Marco Carías Reyes

FOR INDIA:
POUR L'INDE:
印度:
За Индию:
POR LA INDIA:

AR Ramaswami Mudaliar
V. T. Krishnama Chari

FOR IRAN:
POUR L'IRAN:
伊朗:
За Иран:
POR IRÁN:

Mostafa Adl

FOR IRAQ:
POUR L'IRAK:
伊拉克:
За Ирак:
POR IRAK:

Mohd. Fadhel Jamali

FOR LEBANON:
POUR LE LIBAN:
黎巴嫩:
За Ливан:
POR EL LÍBANO:

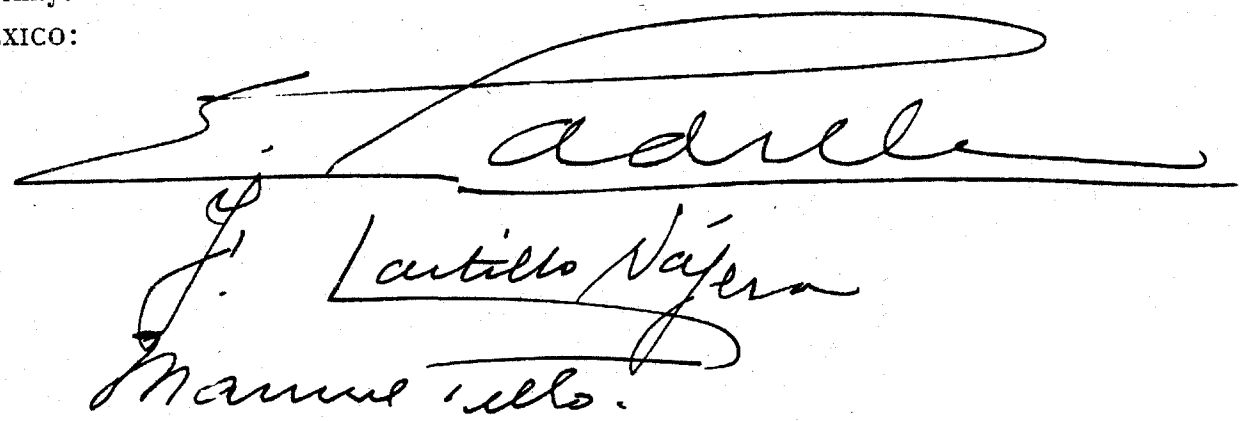
W. Nasser

Charles Malik

FOR LIBERIA:
POUR LE LIBÉRIA:
利比里亞:
За Либерию:
POR LIBERIA:

FOR THE GRAND DUCHY OF LUXEMBOURG:
POUR LE GRAND DUCHÉ DE LUXEMBOURG:
盧森堡大公國:
За Великое Герцогство Люксембург:
POR EL GRAN DUCADO DE LUXEMBURGO:

FOR MEXICO:
POUR LE MEXIQUE:
墨西哥:
За Мексику:
POR MÉXICO:



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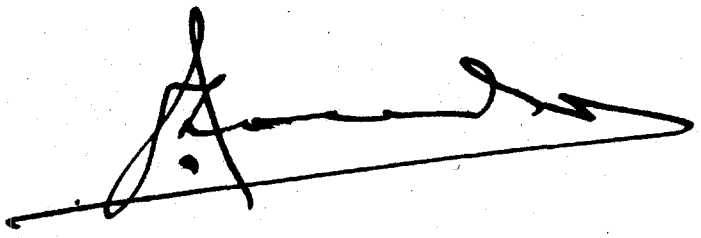
POUR LE ROYAUME DES PAYS-BAS:
荷蘭王國:
За Королевство Нидерландов:
POR EL REINO DE HOLANDA:



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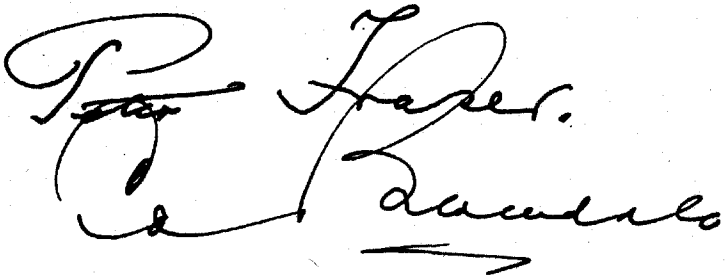
紐西蘭:
За Новую Зеландию:
POR NUEVA ZELANDIA:



FOR NICARAGUA:
POUR LE NICARAGUA:
尼加拉瓜:
За Никарагуа:
POR NICARAGUA:

FOR THE KINGDOM OF NORWAY:
POUR LE ROYAUME DE NORVÈGE:
挪威王國:
За Королевство Норвегии:
POR EL REINO DE NORUEGA:

FOR PANAMA:
POUR LE PANAMA:
巴拿馬:
За Панаму:
POR PANAMÁ:

FOR PARAGUAY:
POUR LE PARAGUAY:
巴拉圭:
За Парагвай:
POR EL PARAGUAY:

FOR PERU:
POUR LE PÉROU:
秘鲁:
За Перу:
POR EL PERÚ:

FOR THE PHILIPPINE COMMONWEALTH:
POUR LE COMMONWEALTH DES PHILIPPINES:
菲律賓共和國:
За Филиппины:
POR LA MANCOMUNIDAD DE FILIPINAS:

FOR POLAND:
POUR LA POLOGNE:
波蘭:
За Польшу:
POR POLONIA:

FOR SAUDI ARABIA:
POUR L'ARABIE SAOUDITE:
蘇地亞拉伯:
За Сауди Аравию:
POR ARABIA SAUDITA:

FOR SYRIA:
POUR LA SYRIE:
叙利亞:
За Сирию:
POR SIRIA:

F. Al-Khomi

Ja Antaki

N. Rondzi

FOR TURKEY:
POUR LA TURQUIE:
土耳其:
За Турцию:
POR TURQUÍA:

Hasan Sakaj

Ahmet Recep Baydur

FOR THE UKRAINIAN SOVIET SOCIALIST REPUBLIC:
POUR LA RÉPUBLIQUE SOVIÉTIQUE SOCIALISTE D'UKRAINE:
烏克蘭蘇維埃社會主義共和國:
За Украинскую Советскую Социалистическую Республику:
POR LA REPÚBLICA SOCIALISTA SOVIÉTICA UCRANIANA:

Дм. Мануїльский

Іван Сенін

Олександр Шлапін

Микола Петровський

FOR THE UNION OF SOUTH AFRICA:
POUR L'UNION SUD-AFRICAINE:
南非聯邦:
За Южноафриканский Союз:
POR LA UNIÓN SUDAFRICANA:

L. S. Jones J.M.

FOR URUGUAY:
POUR L'URUGUAY:
烏拉圭:
За Уругвай:
POR EL URUGUAY:

FOR VENEZUELA:
POUR LE VENEZUELA:
委內瑞拉:
За Венесуэлу:
POR VENEZUELA:

FOR YUGOSLAVIA:
POUR LA YOUGOSLAVIE:
南斯拉夫:
За Югославию:
POR YUGOSLAVIA:

Stanoje Simić

I Certify That the foregoing is a true copy of the Charter of the United Nations, with the Statute of the International Court of Justice annexed thereto, signed in San Francisco, California, on June 26, 1945, in the Chinese, French, Russian, English, and Spanish languages, the signed original of which is deposited in the archives of the Government of the United States of America.

In Testimony Whereof, I, EDWARD R. STETTINIUS, JR., Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by an Assistant Chief, Division of Central Services of the said Department, at the city of Washington, in the District of Columbia, this twenty-~~seventh~~ sixth day of June 1945.

E. R. Stettinius Jr.
*Secretary of State*

By M L Wentworth
*Assistant Chief, Division of Central Services*

United Nations S/RES/1593 (2005)

Security Council

Distr.: General
31 March 2005

# Resolution 1593 (2005)

## Adopted by the Security Council at its 5158th meeting, on 31 March 2005

*The Security Council*,

*Taking note* of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),

*Recalling* article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

*Also recalling* articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims,

*Taking note* of the existence of agreements referred to in Article 98-2 of the Rome Statute,

*Determining* that the situation in Sudan continues to constitute a threat to international peace and security,

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

1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;

2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

3. *Invites* the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;

4. *Also encourages* the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur;

05-29273 (E)

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5. *Also emphasizes* the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary;

6. *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;

7. *Recognizes* that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

8. *Invites* the Prosecutor to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

9. *Decides* to remain seized of the matter.

United Nations S/RES/1593 (2005)

Security Council

Distr.: General
31 March 2005

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3. *Invites* the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;

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05-29273 (E)

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5. *Also emphasizes* the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary;

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9. *Decides* to remain seized of the matter.

# No. 18232

## MULTILATERAL

## Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969

*Authentic texts: English, French, Chinese, Russian and Spanish.*
*Registered* ex officio *on 27 January 1980.*

## MULTILATÉRAL

## Convention de Vienne sur le droit des traités (avec annexe). Conclue à Vienne le 23 mai 1969

*Textes authentiques : anglais, français, chinois, russe et espagnol.*
*Enregistrée d'office le 27 janvier 1980.*

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# VIENNA CONVENTION[1] 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,

---

[1] Came into force on 27 January 1980, i.e., on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession with the Secretary-General of the United Nations, in accordance with article 84 (1):

| State | Date of deposit of the instrument of ratification or accession (a) | State | Date of deposit of the instrument of ratification or accession (a) |
|---|---|---|---|
| Argentina* | 5 December 1972 | Morocco* | 26 September 1972 |
| Australia | 13 June 1974 *a* | Nauru | 5 May 1978 *a* |
| Austria | 30 April 1979 *a* | New Zealand | 4 August 1971 |
| Barbados | 24 June 1971 | Niger | 27 October 1971 *a* |
| Canada* | 14 October 1970 *a* | Nigeria | 31 July 1969 |
| Central African Republic | 10 December 1971 *a* | Paraguay | 3 February 1972 *a* |
| Cyprus | 28 December 1976 *a* | Philippines | 15 November 1972 |
| Denmark* | 1 June 1976 | Republic of Korea | 27 April 1977 |
| Finland* | 19 August 1977 | Spain | 16 May 1972 *a* |
| Greece | 30 October 1974 *a* | Sweden | 4 February 1975 |
| Holy See | 25 February 1977 | Syrian Arab Republic* | 2 October 1970 *a* |
| Honduras | 20 September 1979 | Togo | 28 December 1979 *a* |
| Italy | 25 July 1974 | Tunisia* | 23 June 1971 *a* |
| Jamaica | 28 July 1970 | United Kingdom of Great Britain and Northern Ireland* | 25 June 1971 |
| Kuwait* | 11 November 1975 *a* | United Republic of Tanzania* | 12 April 1976 *a* |
| Lesotho | 3 March 1972 *a* | Yugoslavia | 27 August 1970 |
| Mauritius | 18 January 1973 *a* | Zaire | 25 July 1977 *a* |
| Mexico | 25 September 1974 | | |

Subsequently, the Convention came into force for the following State on the thirtieth day following the date of deposit of its instrument of ratification or accession with the Secretary-General of the United Nations, in accordance with article 84 (2):

| State | Date of deposit of the instrument of accession (a) |
|---|---|
| Rwanda | 3 January 1980 *a* |

(With effect from 2 February 1980.)

* For the texts of the reservations and declarations made upon ratification or accession, see p. 501 of this volume.

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

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

Have agreed as follows:

## PART I. INTRODUCTION

### *Article 1.* SCOPE OF THE PRESENT CONVENTION

The present Convention applies to treaties between States.

### *Article 2.* USE OF TERMS

1. For the purposes of the present Convention:

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

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

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

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

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

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

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

(*h*) "Third State" means a State not a party to the treaty;

(*i*) "International organization" means an intergovernmental organization.

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

### *Article 3.* INTERNATIONAL AGREEMENTS NOT WITHIN THE SCOPE OF THE PRESENT CONVENTION

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

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(*a*) The legal force of such agreements;

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

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

*Article 4.* NON-RETROACTIVITY OF THE PRESENT CONVENTION

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

*Article 5.* TREATIES CONSTITUTING INTERNATIONAL ORGANIZATIONS AND TREATIES ADOPTED WITHIN AN INTERNATIONAL ORGANIZATION

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

## PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

### SECTION 1. CONCLUSION OF TREATIES

*Article 6.* CAPACITY OF STATES TO CONCLUDE TREATIES

Every State possesses capacity to conclude treaties.

*Article 7.* FULL POWERS

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

(*a*) He produces appropriate full powers; or

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

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

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

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

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

*Article 8.* SUBSEQUENT CONFIRMATION OF AN ACT PERFORMED WITHOUT AUTHORIZATION

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

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*Article 9.* ADOPTION OF THE TEXT

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

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

*Article 10.* AUTHENTICATION OF THE TEXT

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

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

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

*Article 11.* MEANS OF EXPRESSING CONSENT TO BE BOUND BY A TREATY

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

*Article 12.* CONSENT TO BE BOUND BY A TREATY EXPRESSED BY SIGNATURE

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

(*a*) The treaty provides that signature shall have that effect;

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

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

2. For the purposes of paragraph 1:

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

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

*Article 13.* CONSENT TO BE BOUND BY A TREATY EXPRESSED BY AN EXCHANGE OF INSTRUMENTS CONSTITUTING A TREATY

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

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

(*b*) It is otherwise established that those States were agreed that the exchange of instruments shall have that effect.

*Article 14.* CONSENT TO BE BOUND BY A TREATY EXPRESSED BY RATIFICATION, ACCEPTANCE OR APPROVAL

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

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

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

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

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

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

*Article 15.* CONSENT TO BE BOUND BY A TREATY EXPRESSED BY ACCESSION

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

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

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

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

*Article 16.* EXCHANGE OR DEPOSIT OF INSTRUMENTS OF RATIFICATION, ACCEPTANCE, APPROVAL OR ACCESSION

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

(*a*) Their exchange between the contracting States;

(*b*) Their deposit with the depositary; or

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

*Article 17.* CONSENT TO BE BOUND BY PART OF A TREATY AND CHOICE OF DIFFERING PROVISIONS

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

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

*Article 18.* OBLIGATION NOT TO DEFEAT THE OBJECT AND PURPOSE OF A TREATY PRIOR TO ITS ENTRY INTO FORCE

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

(*a*) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

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

SECTION 2. RESERVATIONS

*Article 19.* FORMULATION OF RESERVATIONS

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

(*a*) The reservation is prohibited by the treaty;

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

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

*Article 20.* ACCEPTANCE OF AND OBJECTION TO RESERVATIONS

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

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

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

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

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

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

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

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

*Article 21.* LEGAL EFFECTS OF RESERVATIONS AND OF OBJECTIONS TO RESERVATIONS

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

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

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

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

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

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*Article 22.* WITHDRAWAL OF RESERVATIONS AND OF OBJECTIONS TO RESERVATIONS

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

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

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

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

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

*Article 23.* PROCEDURE REGARDING RESERVATIONS

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

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

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

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

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

*Article 24.* ENTRY INTO FORCE

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

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

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

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

*Article 25.* PROVISIONAL APPLICATION

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

(*a*) The treaty itself so provides; or

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

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

## PART III. OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

### SECTION 1. OBSERVANCE OF TREATIES

#### *Article 26.* "PACTA SUNT SERVANDA"

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

#### *Article 27.* INTERNAL LAW AND OBSERVANCE OF TREATIES

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

### SECTION 2. APPLICATION OF TREATIES

#### *Article 28.* NON-RETROACTIVITY OF TREATIES

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

#### *Article 29.* TERRITORIAL SCOPE OF TREATIES

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

#### *Article 30.* APPLICATION OF SUCCESSIVE TREATIES RELATING TO THE SAME SUBJECT-MATTER

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

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(*a*) As between States parties to both treaties the same rule applies as in paragraph 3;

(*b*) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any ques-

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tion of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

### SECTION 3. INTERPRETATION OF TREATIES

#### *Article 31.* GENERAL RULE OF INTERPRETATION

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

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

(*a*) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

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

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

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

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

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

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

#### *Article 32.* SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable.

#### *Article 33.* INTERPRETATION OF TREATIES AUTHENTICATED IN TWO OR MORE LANGUAGES

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

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SECTION 4. TREATIES AND THIRD STATES

*Article 34.* GENERAL RULE REGARDING THIRD STATES

A treaty does not create either obligations or rights for a third State without its consent.

*Article 35.* TREATIES PROVIDING FOR OBLIGATIONS FOR THIRD STATES

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

*Article 36.* TREATIES PROVIDING FOR RIGHTS FOR THIRD STATES

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

*Article 37.* REVOCATION OR MODIFICATION OF OBLIGATIONS OR RIGHTS OF THIRD STATES

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

*Article 38.* RULES IN A TREATY BECOMING BINDING ON THIRD STATES THROUGH INTERNATIONAL CUSTOM

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

PART IV. AMENDMENT AND MODIFICATION OF TREATIES

*Article 39.* GENERAL RULE REGARDING THE AMENDMENT OF TREATIES

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

*Article 40.* AMENDMENT OF MULTILATERAL TREATIES

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

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(*a*) The decision as to the action to be taken in regard to such proposal;

(*b*) The negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(*b*), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(*a*) be considered as a party to the treaty as amended; and

(*b*) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

### *Article 41.* AGREEMENTS TO MODIFY MULTILATERAL TREATIES BETWEEN CERTAIN OF THE PARTIES ONLY

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) The possibility of such a modification is provided for by the treaty; or

(*b*) The modification in question is not prohibited by the treaty and:

(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1(*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

## PART V. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

### SECTION 1. GENERAL PROVISIONS

### *Article 42.* VALIDITY AND CONTINUANCE IN FORCE OF TREATIES

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

### *Article 43.* OBLIGATIONS IMPOSED BY INTERNATIONAL LAW INDEPENDENTLY OF A TREATY

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

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*Article 44.* SEPARABILITY OF TREATY PROVISIONS

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(*a*) The said clauses are separable from the remainder of the treaty with regard to their application;

(*b*) It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(*c*) Continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

*Article 45.* LOSS OF A RIGHT TO INVOKE A GROUND FOR INVALIDATING, TERMINATING, WITHDRAWING FROM OR SUSPENDING THE OPERATION OF A TREATY

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(*a*) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(*b*) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

SECTION 2. INVALIDITY OF TREATIES

*Article 46.* PROVISIONS OF INTERNAL LAW REGARDING COMPETENCE TO CONCLUDE TREATIES

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

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

*Article 47.* SPECIFIC RESTRICTIONS ON AUTHORITY TO EXPRESS THE CONSENT OF A STATE

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to

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observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

*Article 48.* ERROR

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

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

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

*Article 49.* FRAUD

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

*Article 50.* CORRUPTION OF A REPRESENTATIVE OF A STATE

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

*Article 51.* COERCION OF A REPRESENTATIVE OF A STATE

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

*Article 52.* COERCION OF A STATE BY THE THREAT OR USE OF FORCE

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

*Article 53.* TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ("JUS COGENS")

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

*Article 54.* TERMINATION OF OR WITHDRAWAL FROM A TREATY UNDER ITS PROVISIONS OR BY CONSENT OF THE PARTIES

The termination of a treaty or the withdrawal of a party may take place:

(*a*) In conformity with the provisions of the treaty; or

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(*b*) At any time by consent of all the parties after consultation with the other contracting States.

*Article 55.* REDUCTION OF THE PARTIES TO A MULTILATERAL TREATY BELOW THE NUMBER NECESSARY FOR ITS ENTRY INTO FORCE

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

*Article 56.* DENUNCIATION OF OR WITHDRAWAL FROM A TREATY CONTAINING NO PROVISION REGARDING TERMINATION, DENUNCIATION OR WITHDRAWAL

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(*a*) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(*b*) A right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

*Article 57.* SUSPENSION OF THE OPERATION OF A TREATY UNDER ITS PROVISIONS OR BY CONSENT OF THE PARTIES

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(*a*) In conformity with the provisions of the treaty; or

(*b*) At any time by consent of all the parties after consultation with the other contracting States.

*Article 58.* SUSPENSION OF THE OPERATION OF A MULTILATERAL TREATY BY AGREEMENT BETWEEN CERTAIN OF THE PARTIES ONLY

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(*a*) The possibility of such a suspension is provided for by the treaty; or

(*b*) The suspension in question is not prohibited by the treaty and:

(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) Is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1(*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

*Article 59.* TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY IMPLIED BY CONCLUSION OF A LATER TREATY

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(*a*) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

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(*b*) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

*Article 60.* TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY AS A CONSEQUENCE OF ITS BREACH

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(*a*) The other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) In the relations between themselves and the defaulting State, or

(ii) As between all the parties;

(*b*) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*c*) Any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(*a*) A repudiation of the treaty not sanctioned by the present Convention; or

(*b*) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

*Article 61.* SUPERVENING IMPOSSIBILITY OF PERFORMANCE

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

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*Article 62.* FUNDAMENTAL CHANGE OF CIRCUMSTANCES

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(*a*) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(*b*) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(*a*) If the treaty establishes a boundary; or

(*b*) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

*Article 63.* SEVERANCE OF DIPLOMATIC OR CONSULAR RELATIONS

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

*Article 64.* EMERGENCE OF A NEW PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW (''JUS COGENS'')

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

*Article 65.* PROCEDURE TO BE FOLLOWED WITH RESPECT TO INVALIDITY, TERMINATION, WITHDRAWAL FROM OR SUSPENSION OF THE OPERATION OF A TREATY

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

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4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

*Article 66.* PROCEDURES FOR JUDICIAL SETTLEMENT, ARBITRATION AND CONCILIATION

If, under paragraph 3 of article 65, no solution has been reached within a period of twelve months following the date on which the objection was raised, the following procedures shall be followed:

(*a*) Any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(*b*) Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

*Article 67.* INSTRUMENTS FOR DECLARING INVALID, TERMINATING, WITHDRAWING FROM OR SUSPENDING THE OPERATION OF A TREATY

1. The notification provided for under article 65, paragraph 1 must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

*Article 68.* REVOCATION OF NOTIFICATIONS AND INSTRUMENTS PROVIDED FOR IN ARTICLES 65 AND 67

A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

*Article 69.* CONSEQUENCES OF THE INVALIDITY OF A TREATY

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(*a*) Each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(*b*) Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

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3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

*Article 70.* CONSEQUENCES OF THE TERMINATION OF A TREATY

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(*a*) Releases the parties from any obligation further to perform the treaty;

(*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

*Article 71.* CONSEQUENCES OF THE INVALIDITY OF A TREATY WHICH CONFLICTS WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW

1. In the case of a treaty which is void under article 53 the parties shall:

(*a*) Eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(*b*) Bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(*a*) Releases the parties from any obligation further to perform the treaty;

(*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

*Article 72.* CONSEQUENCES OF THE SUSPENSION OF THE OPERATION OF A TREATY

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(*a*) Releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(*b*) Does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

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## PART VI. MISCELLANEOUS PROVISIONS

### *Article 73.* CASES OF STATE SUCCESSION, STATE RESPONSIBILITY AND OUTBREAK OF HOSTILITIES

The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

### *Article 74.* DIPLOMATIC AND CONSULAR RELATIONS AND THE CONCLUSION OF TREATIES

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

### *Article 75.* CASE OF AN AGGRESSOR STATE

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

## PART VII. DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

### *Article 76.* DEPOSITARIES OF TREATIES

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

### *Article 77.* FUNCTIONS OF DEPOSITARIES

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

(*a*) Keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

(*b*) Preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

(*c*) Receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(*d*) Examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

(*e*) Informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

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(*f*) Informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(*g*) Registering the treaty with the Secretariat of the United Nations;

(*h*) Performing the functions specified in other provisions of the present Convention.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

*Article 78.* NOTIFICATIONS AND COMMUNICATIONS

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

(*a*) If there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

(*b*) Be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(*c*) If transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1(*e*).

*Article 79.* CORRECTION OF ERRORS IN TEXTS OR IN CERTIFIED COPIES OF TREATIES

1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:

(*a*) By having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(*b*) By executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(*c*) By executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(*a*) No objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procès-verbal of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;

(*b*) An objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.

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4. The corrected text replaces the defective text *ab initio*, unless the signatory States and the contracting States otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a procès-verbal specifying the rectification and communicate a copy of it to the signatory States and to the contracting States.

*Article 80.* REGISTRATION AND PUBLICATION OF TREATIES

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

## PART VIII. FINAL PROVISIONS

*Article 81.* SIGNATURE

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention, as follows: until 30 November 1969, at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters, New York.

*Article 82.* RATIFICATION

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

*Article 83.* ACCESSION

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 81. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

*Article 84.* ENTRY INTO FORCE

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

*Article 85.* AUTHENTIC TEXTS

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

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna, this twenty-third day of May, one thousand nine hundred and sixty-nine.

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ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) One conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) One conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

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For Afghanistan:
Pour l'Afghanistan :
阿富汗：
За Афганистан:
Por el Afganistán:

Subject to the declaration attached[1]
ABDUL H. TABIBI[2]

For Albania:
Pour l'Albanie :
阿尔巴尼亚：
За Албанию:
Por Albania:

For Algeria:
Pour l'Algérie :
阿尔及利亚：
За Алжир:
Por Argelia:

For Argentina:
Pour l'Argentine :
阿根廷：
За Аргентину:
Por la Argentina:

E. DE LA GUARDIA

For Australia:
Pour l'Australie :
澳大利亚：
За Австралию:
Por Australia:

[1] Avec une déclaration, dont texte joint en annexe.
[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

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For Austria:
Pour l'Autriche :
奥地利：
За Австрию:
Por Austria:

For Barbados:
Pour la Barbade :
巴巴多斯：
За Барбадос:
Por Barbados:

GEORGE C. R. MOE

For Belgium:
Pour la Belgique :
比利时：
За Бельгию:
Por Bélgica:

For Bolivia:
Pour la Bolivie :
玻利维亚：
За Боливию:
Por Bolivia:

Sujeta a la declaración anexa[1]
J. ROMERO LOZA[2]

For Botswana:
Pour le Botswana :
博茨瓦纳：
За Ботсвану:
Por Botswana:

[1] Subject to the attached declaration — Avec une déclaration, dont texte joint en annexe.
[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

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For Brazil:
Pour le Brésil :
巴西:
За Бразилию:
Por el Brasil:

G. NASCIMENTO E SILVA

For Bulgaria:
Pour la Bulgarie :
保加利亚:
За Болгарию:
Por Bulgaria:

For Burma:
Pour la Birmanie :
缅甸:
За Бирму:
Por Birmania:

For Burundi:
Pour le Burundi :
布隆迪:
За Бурунди:
Por Burundi:

For the Byelorussian Soviet Socialist Republic:
Pour la République socialiste soviétique de Biélorussie :
白俄罗斯苏维埃社会主义共和国:
За Белорусскую Советскую Социалистическую Республику:
Por la República Socialista Soviética de Bielorrusia:

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For Cambodia:
Pour le Cambodge :
柬埔寨：
За Камбоджу:
Por Camboya:

SARIN CHHAK

For Cameroon:
Pour le Cameroun :
喀麥隆：
За Камерун:
Por el Camerún:

For Canada:
Pour le Canada :
加拿大：
За Канаду:
Por el Canadá:

For the Central African Republic:
Pour la République centrafricaine :
中非共和国：
За Центральноафриканскую Республику:
Por la República Centroafricana:

For Ceylon:
Pour le Ceylan :
錫蘭：
За Цейлон:
Por Ceilán:

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For Chad:
Pour le Tchad :
乍得:
За Чад:
Por el Chad:

For Chile:
Pour le Chili :
智利:
За Чили:
Por Chile:

PEDRO J. RODRÍGUEZ
EDMUNDO VARGAS

For China:
Pour la Chine :
中国:
За Китай:
Por China:

LIU CHIEH
April 27, 1970

For Colombia:
Pour la Colombie :
哥伦比亚:
За Колумбию:
Por Colombia:

ANTONIO BAYONA
HUMBERTO RUIZ
J. J. CAICEDO PERDOMO

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For the Congo (Brazzaville):
Pour le Congo (Brazzaville) :
刚果 (布拉薩市):
За Конго (Браззавиль):
Por el Congo (Brazzaville):

Sous réserve de ratification par mon pays[1]
S. BIKOUTHA

For the Congo (Democratic Republic of):
Pour le Congo (République démocratique du) :
刚果 (民主共和國):
За Демократическую Республику Конго:
Por el Congo (República Democrática de):

For Costa Rica:
Pour le Costa Rica :
哥斯达黎加:
За Коста-Рику:
Por Costa Rica:

*Ad referendum* y sujeto a las reservas anexas[2]
J. L. REDONDO GÓMEZ[3]

For Cuba:
Pour Cuba :
古巴:
За Кубу:
Por Cuba:

[1] Subject to ratification by my country.
[2] *Ad referendum* and subject to the attached reservations — *Ad referendum* et soumise aux réserves, dont texte joint en annexe.
[3] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

ICC-02/05-01/09-370-Anx1 16-07-2018 1079/1408 RH PT OA2



For Cyprus:
Pour Chypre :
塞浦路斯：
За Кипр:
Por Chipre:

For Czechoslovakia:
Pour la Tchécoslovaquie :
捷克斯洛伐克：
За Чехословакию:
Por Checoslovaquia:

For Dahomey:
Pour le Dahomey :
达荷美：
За Дагомею:
Por el Dahomey:

For Denmark:
Pour le Danemark :
丹麦：
За Данию:
Por Dinamarca:

OTTO BORCH
April 18, 1970

For the Dominican Republic:
Pour la République Dominicaine :
多米尼加共和国：
За Доминиканскую Республику:
Por la República Dominicana:

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For Ecuador:
Pour l'Equateur :
厄瓜多尔：
За Эквадор:
Por el Ecuador:

Con la declaración que se anexo[1]
GONZALO ESCUDERO MOSCOSO[2]

For El Salvador:
Pour El Salvador :
萨尔瓦多：
За Сальвадор:
Por El Salvador:

R. GALINDO POHL
16 de febrero de 1970

For Equatorial Guinea:
Pour la Guinée équatoriale :
赤道几内亚：
За Экваториальную Гвинею:
Por Guinea Ecuatorial:

For Ethiopia:
Pour l'Ethiopie :
埃塞俄比亚：
За Эфиопию:
Por Etiopía:

KIFLE WODAJO
30 April 1970

[1] With the attached declaration — Avec une déclaration, dont texte joint en annexe.
[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

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For the Federal Republic of Germany:
Pour la République fédérale d'Allemagne :
德意志聯邦共和國：
За Федеративную Республику Германии:
Por la República Federal de Alemania:

ALEXANDER BÖKER
30th April 1970

For Finland:
Pour la Finlande :
芬兰：
За Финляндию:
Por Finlandia:

ERIK CASTRÉN

For France:
Pour la France :
法国：
За Францию:
Por Francia:

For Gabon:
Pour le Gabon :
加蓬：
За Габон:
Por el Gabón:

For Gambia:
Pour la Gambie :
冈比亚：
За Гамбию:
Por Gambia:

ICC-02/05-01/09-370-Anx1 16-07-2018 1082/1408 RH PT OA2



For Ghana:
Pour le Ghana :
加纳：
За Гану:
Por Ghana:

EMMANUEL K. DADZIE
G. O. LAMPTEY

For Greece:
Pour la Grèce :
希腊：
За Грецию:
Por Grecia:

For Guatemala:
Pour le Guatemala :
危地马拉：
За Гватемалу:
Por Guatemala:

*Ad referendum* y sujeto a las reservas que constan en documento anexo[1]
ADOLFO MOLINA ORANTES[2]

For Guinea:
Pour la Guinée :
几内亚：
За Гвинею:
Por Guinea:

[1] *Ad referendum* and subject to the reservations contained in the attached document — *Ad referendum* et soumise aux réserves contenues dans le document ci-joint.

[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

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For Guyana:
Pour la Guyane :
圭亚那：
За Гайану:
Por Guyana:

JOHN CARTER

For Haiti:
Pour Haïti :
海地：
За Гаити:
Por Haití:

For the Holy See:
Pour le Saint-Siège :
教廷：
За Святейший Престол:
Por la Santa Sede:

OPILIO ROSSI
30 September 1969

For Honduras:
Pour le Honduras :
洪都拉斯：
За Гондурас:
Por Honduras:

MARIO CARÍAS ZAPATA

For Hungary:
Pour la Hongrie :
匈牙利：
За Венгрию:
Por Hungría:

ICC-02/05-01/09-370-Anx1 16-07-2018 1084/1408 RH PT OA2



For Iceland:
Pour l'Islande :
冰岛：
За Исландию:
Por Islandia:

For India:
Pour l'Inde :
印度：
За Индию:
Por la India:

For Indonesia:
Pour l'Indonésie :
印度尼西亚：
За Индонезию:
Por Indonesia:

For Iran:
Pour l'Iran :
伊朗：
За Иран:
Por el Irán:

A. MATINE-DAFTARY

For Iraq:
Pour l'Irak :
伊拉克：
За Ирак:
Por el Irak:

ICC-02/05-01/09-370-Anx1 16-07-2018 1085/1408 RH PT OA2



For Ireland:
Pour l'Irlande :
爱尔兰：
За Ирландию:
Por Irlanda:

For Israel:
Pour Israël :
以色列：
За Израиль:
Por Israel:

For Italy:
Pour l'Italie :
意大利：
За Италию:
Por Italia:

PIERO VINCI
22 April 1970

For the Ivory Coast:
Pour la Côte-d'Ivoire :
象牙海岸：
За Берег Слоновой Кости:
Por la Costa de Marfil:

LUCIEN YAPOBI
23 July 1969

For Jamaica:
Pour la Jamaïque :
牙买加：
За Ямайку:
Por Jamaica:

L. B. FRANCIS
K. RATTRAY

ICC-02/05-01/09-370-Anx1 16-07-2018 1086/1408 RH PT OA2



For Japan:
Pour le Japon :
日本：
За Японию:
Por el Japón:

For Jordan:
Pour la Jordanie :
约旦：
За Иорданию:
Por Jordania:

For Kenya:
Pour le Kenya :
肯尼亚：
За Кению:
Por Kenya:

I. S. Bhoi

For Kuwait:
Pour le Koweït :
科威特：
За Кувейт:
Por Kuwait:

For Laos:
Pour le Laos :
老挝：
За Лаос:
Por Laos:

ICC-02/05-01/09-370-Anx1 16-07-2018 1087/1408 RH PT OA2



For Lebanon:
Pour le Liban :
黎巴嫩：
За Ливан:
Por el Líbano:

For Lesotho:
Pour le Lesotho :
莱索托：
За Лесото:
Por Lesotho:

For Liberia:
Pour le Libéria :
利比里亚：
За Либерию:
Por Liberia:

NELSON BRODERICK

For Libya:
Pour la Libye :
利比亞：
За Ливию:
Por Libia:

For Liechtenstein:
Pour le Liechtenstein :
列支敦士登：
За Лихтенштейн:
Por Liechtenstein:

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For Luxembourg:
Pour le Luxembourg :
卢森堡：
За Люксембург:
Por Luxemburgo:

GASTON THORN
4 septembre 1969

For Madagascar:
Pour Madagascar :
马达加斯加：
За Мадагаскар:
Por Madagascar:

*Ad referendum*
B. RAZAFINTSEHENO

For Malawi:
Pour le Malawi :
马拉维：
За Малави:
Por Malawi:

For Malaysia:
Pour la Malaisie :
马来西亚：
За Малайскую Федерацию:
Por Malasia:

For the Maldive Islands:
Pour les îles Maldives :
馬爾代夫羣島：
За Мальдивские острова:
Por las Islas Maldivas:

ICC-02/05-01/09-370-Anx1 16-07-2018 1089/1408 RH PT OA2



For Mali:
Pour le Mali :
马里：
За Мали:
Por Malí:

For Malta:
Pour Malte :
马耳他：
За Мальту:
Por Malta:

For Mauritania:
Pour la Mauritanie :
毛里塔尼亚：
За Мавританию:
Por Mauritania:

For Mauritius:
Pour Maurice :
毛里求斯：
За Маврикий:
Por Mauricio:

For Mexico:
Pour le Mexique :
墨西哥：
За Мексику:
Por México:

EDUARDO SUÁREZ

ICC-02/05-01/09-370-Anx1 16-07-2018 1090/1408 RH PT OA2



For Monaco:
Pour Monaco :
摩纳哥 :
За Монако:
Por Mónaco:

For Mongolia:
Pour la Mongolie :
蒙古 :
За Монголию:
Por Mongolia:

For Morocco:
Pour le Maroc :
摩洛哥 :
За Марокко:
Por Marruecos:

Sous réserve de la déclaration ci-jointe[1]
TAOUFIQ KABBAJ[2]

For Nauru:
Pour Nauru :
瑙鲁 :
За Науру:
Por Nauru:

For Nepal:
Pour le Népal :
尼泊尔 :
За Непал:
Por Nepal:

PRADUMNA LAL RAJBHANDARY

[1] Subject to the attached declaration.
[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature — Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

ICC-02/05-01/09-370-Anx1 16-07-2018 1091/1408 RH PT OA2



For the Netherlands:
Pour les Pays-Bas :
荷兰：
За Нидерланды:
Por los Países Bajos:

For New Zealand:
Pour la Nouvelle-Zélande :
新西兰：
За Новую Зеландию:
Por Nueva Zelandia:

JOHN V. SCOTT
29 April 1970

For Nicaragua:
Pour le Nicaragua :
尼加拉瓜：
За Никарагуа:
Por Nicaragua:

For the Niger:
Pour le Niger :
尼日尔：
За Нигер:
Por el Níger:

For Nigeria:
Pour la Nigéria :
尼日利亚：
За Нигерию:
Por Nigeria:

T. O. ELIAS

ICC-02/05-01/09-370-Anx1 16-07-2018 1092/1408 RH PT OA2



For Norway:
Pour la Norvège :
挪威：
За Норвегию:
Por Noruega:

For Pakistan:
Pour le Pakistan :
巴基斯坦：
За Пакистан:
Por el Pakistán:

A. SHAHI
29 April, 1970

For Panama:
Pour le Panama :
巴拿马：
За Панаму:
Por Panamá:

For Paraguay:
Pour le Paraguay :
巴拉圭：
За Парагвай:
Por el Paraguay:

For Peru:
Pour le Pérou :
秘鲁：
За Перу:
Por el Perú:

LUIS ALVARADO GARRIDO
JUAN JOSÉ CALLE

ICC-02/05-01/09-370-Anx1 16-07-2018 1093/1408 RH PT OA2



For the Philippines:
Pour les Philippines :
菲律宾：
За Филиппины:
Por Filipinas:

ROBERTO CONCEPCIÓN

For Poland:
Pour la Pologne :
波兰：
За Польшу:
Por Polonia:

For Portugal:
Pour le Portugal :
葡萄牙：
За Португалию:
Por Portugal:

For the Republic of Korea:
Pour la République de Corée :
大韩民国：
За Корейскую Республику:
Por la República de Corea:

YANG SOO YU
27 November 1969

For the Republic of Viet-Nam:
Pour la République du Viet-Nam :
越南共和国：
За Республику Вьетнам:
Por la República de Viet-Nam:

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For Romania:
Pour la Roumanie :
罗马尼亚：
За Румынию:
Por Rumania:

For Rwanda:
Pour le Rwanda :
卢旺达：
За Руанду:
Por Rwanda:

For San Marino:
Pour Saint-Marin :
圣马力诺：
За Сан-Марино:
Por San Marino:

For Saudi Arabia:
Pour l'Arabie Saoudite :
沙特阿拉伯：
За Саудовскую Аравию:
Por Arabia Saudita:

For Senegal:
Pour le Sénégal :
塞内加尔：
За Сенегал:
Por el Senegal:

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For Sierra Leone:
Pour le Sierra Leone :
塞拉勒窝内:
За Сьерра-Леоне:
Por Sierra Leona:

For Singapore:
Pour Singapour :
新加坡:
За Сингапур:
Por Singapur:

For Somalia:
Pour la Somalie :
索马里:
За Сомали:
Por Somalia:

For South Africa:
Pour l'Afrique du Sud :
南非:
За Южную Африку:
Por Sudáfrica:

For Southern Yemen:
Pour le Yémen du Sud :
南也門:
За Южный Йемен:
Por el Yemen Meridional:

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For Spain:
Pour l'Espagne :
西班牙：
За Испанию:
Por España:

For the Sudan:
Pour le Soudan :
苏丹：
За Судан:
Por el Sudán:

AHMED SALAH BUKHARI

For Swaziland:
Pour le Souaziland :
斯威士兰：
За Свазиленд:
Por Swazilandia:

For Sweden:
Pour la Suède :
瑞典：
За Швецию:
Por Suecia:

TORSTEN ÖRN
23 April 1970

For Switzerland:
Pour la Suisse :
瑞士：
За Швейцарию:
Por Suiza:

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For Syria:
Pour la Syrie :
叙利亚：
За Сирию:
Por Siria:

For Thailand:
Pour la Thaïlande :
泰国：
За Таиланд:
Por Tailandia:

For Togo:
Pour le Togo :
多哥：
За Того:
Por el Togo:

For Trinidad and Tobago:
Pour la Trinité-et-Tobago :
特立尼达和多巴哥：
За Тринидад и Тобаго:
Por Trinidad y Tabago:

T. BADEN-SEMPER

For Tunisia:
Pour la Tunisie :
突尼斯：
За Тунис:
Por Túnez:

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For Turkey:
Pour la Turquie :
土耳其：
За Турцию:
Por Turquía:

For Uganda:
Pour l'Ouganda :
乌干达：
За Уганду:
Por Uganda:

For the Ukrainian Soviet Socialist Republic:
Pour la République socialiste soviétique d'Ukraine :
乌克兰苏维埃社会主义共和国：
За Украинскую Советскую Социалистическую Республику:
Por la República Socialista Soviética de Ucrania:

For the Union of Soviet Socialist Republics:
Pour l'Union des Républiques socialistes soviétiques :
苏维埃社会主义共和国联盟：
За Союз Советских Социалистических Республик:
Por la Unión de Repúblicas Socialistas Soviéticas:

For the United Arab Republic:
Pour la République arabe unie :
阿拉伯聯合共和國：
За Объединенную Арабскую Республику:
Por la República Arabe Unida:

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For the United Kingdom of Great Britain and Northern Ireland:
Pour le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord :
大不列颠及北爱尔兰联合王国:
За Соединенное Королевство Великобритании и Северной Ирландии:
Por el Reino Unido de Gran Bretaña e Irlanda del Norte:

Subject to the declaration, the text of which is attached[1]
CARADON[2]
20 April 1970

For the United Republic of Tanzania:
Pour la République-Unie de Tanzanie :
坦桑尼亚联合共和国:
За Объединенную Республику Танзания:
Por la República Unida de Tanzanía:

For the United States of America:
Pour les Etats-Unis d'Amérique :
美利坚合众国:
За Соединенные Штаты Америки:
Por los Estados Unidos de América:

RICHARD D. KEARNEY
24 April 1970

JOHN R. STEVENSON
24 April 1970

For the Upper Volta:
Pour la Haute-Volta :
上沃尔特:
За Верхнюю Вольту:
Por el Alto Volta:

[1] Avec une déclaration, dont texte joint en annexe.
[2] See p. 496 of this volume for the texts of the reservations and declarations made upon signature – Voir p. 496 du présent volume pour les textes des réserves et déclarations faites lors de la signature.

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For Uruguay:
Pour l'Uruguay :
乌拉圭：
За Уругвай:
Por el Uruguay:

EDUARDO JIMÉNEZ DE ARÉCHAGA
ALVARO ALVAREZ

For Venezuela:
Pour le Venezuela :
委内瑞拉：
За Венесуэлу:
Por Venezuela:

For Western Samoa:
Pour le Samoa-Occidental :
西萨摩亚：
За Западное Самоа:
Por Samoa Occidental:

For Yemen:
Pour le Yémen :
也门：
За Йемен:
Por el Yemen:

For Yugoslavia:
Pour la Yougoslavie :
南斯拉夫：
За Югославию:
Por Yugoslavia:

ALEKSANDAR JELIĆ

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For Zambia:
Pour la Zambie :
赞比亚:
За Замбию:
Por Zambia:

LISHOMWA MUUKA

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## RESERVATIONS AND DECLARATIONS MADE UPON SIGNATURE

### *AFGHANISTAN*

"Afghanistan's understanding of article 62 (fundamental change of circumstances) is as follows:

"Sub-paragraph 2 (*a*) of this article does not cover unequal and illegal treaties, or any treaties which were contrary to the principle of self-determination. This view was also supported by the Expert Consultant in his statement of 11 May 1968 in the Committee of the Whole and on 14 May 1969 (doc. A/CONF.39/L.40) to the Conference."

## RÉSERVES ET DÉCLARATIONS FAITES LORS DE LA SIGNATURE

### *AFGHANISTAN*

[TRADUCTION — TRANSLATION]

L'Afghanistan interprète l'article 62 (Changement fondamental de circonstances) de la manière suivante :

L'alinéa *a* du paragraphe 2 ne s'applique pas dans le cas de traités inégaux ou illégaux, ni dans le cas de tout autre traité contraire au principe de l'autodétermination. Cette interprétation est celle qui a été soutenue par l'Expert consultant dans sa déclaration du 11 mai 1968 devant la Commission plénière et dans la communication du 14 mai 1969 (A/CONF.39/L.40) qu'il a adressée à la Conférence.

### *BOLIVIA*

[SPANISH TEXT — TEXTE ESPAGNOL]

"1. La imperfección de la Convención de Viena sobre el derecho de los tratados posterga la realización de las aspiraciones de la humanidad.

"2. No obstante lo anterior, los preceptos aprobados por la Convención constituyen avances significativos inspirados en principios de justicia internacional que Bolivia ha sostenido tradicionalmente."

[TRANSLATION]

1. The shortcomings of the Vienna Convention on the Law of Treaties are such as to postpone the realization of the aspirations of mankind.

2. Nevertheless, the rules endorsed by the Convention do represent significant advances, based on the principles of international justice which Bolivia has traditionally supported.

### *BOLIVIE*

[TRADUCTION]

1. L'imperfection de la Convention de Vienne sur le droit des traités retarde la réalisation des aspirations de l'humanité.

2. Néanmoins, les normes que consacre la Convention marquent d'importants progrès fondés sur des principes de justice internationale que la Bolivie a traditionnellement défendus.

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*COSTA RICA* *COSTA RICA*

[SPANISH TEXT — TEXTE ESPAGNOL]

"1. En relación a los artículos 11 y 12 la delegación de Costa Rica hace la reserva de que el sistema jurídico constitucional de ese país no autoriza ninguna forma de consentimiento que no esté sujeto a ratificación de la Asamblea Legislativa.

"2. En cuanto al artículo 25 hace la reserva de que la Constitución Política de dicho país tampoco admite la entrada en vigor provisional de los tratados.

"3. En cuanto al artículo 27 interpreta que se refiere al derecho secundario, no así a las disposiciones de la Constitución Política.

"4. En relación al artículo 38 interpreta que una norma consuetudinaria de derecho internacional general no privará sobre ninguna norma del sistema interamericano del cual considera supletoria la presente Convención."

[TRANSLATION] [TRADUCTION]

1. With regard to articles 11 and 12, the delegation of Costa Rica wishes to make a reservation to the effect that the Costa Rican system of constitutional law does not authorize any form of consent which is not subject to ratification by the Legislative Assembly.

2. With regard to article 25, it wishes to make a reservation to the effect that the Political Constitution of Costa Rica does not permit the provisional application of treaties, either.

3. With regard to article 27, it interprets this article as referring to secondary law and not to the provisions of the Political Constitution.

4. With regard to article 38, its interpretation is that no customary rule of general international law shall take precedence over any rule of the Inter-American System to which, in its view, this Convention is supplementary.

1. En ce qui concerne les articles 11 et 12, la délégation du Costa Rica formule la réserve suivante : en matière constitutionnelle, le système juridique de ce pays n'autorise aucune forme de consentement qui ne soit sujette à ratification par l'Assemblée législative.

2. En ce qui concerne l'article 25, la délégation du Costa Rica formule la réserve suivante : la Constitution politique de ce pays n'admet pas non plus l'entrée en vigueur provisoire des traités.

3. La délégation du Costa Rica interprète l'article 27 comme visant les lois ordinaires mais non les dispositions de la Constitution politique.

4. La délégation du Costa Rica interprète l'article 38 de la manière suivante : une règle coutumière du droit international général ne prévaudra sur aucune règle du système interaméricain, au regard duquel la présente Convention revêt, à son avis, un caractère supplémentaire.

*ECUADOR* *ÉQUATEUR*

[SPANISH TEXT — TEXTE ESPAGNOL]

"El Ecuador, al firmar la presente Convención, no ha creído necesario formular reserva alguna al artículo 4 de este instrumento porque entiende que, entre las normas comprendidas en la primera parte del artículo 4, se encuentra el principio de solución

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pacífica de controversias, establecido en el Artículo 2, párrafo 3, de la Carta de las Naciones Unidas, cuyo carácter de *jus cogens* confiere a esa norma valor imperativo universal.

"El Ecuador considera asimismo que la primera parte del artículo 4, por tanto, es aplicable a los tratados existentes.

"Deja en claro en esta forma que dicho artículo recoge el principio inconcuso de que, cuando la Convención codifica normas *lex lata*, éstas, siendo normas preexistentes, pueden invocarse y aplicarse a tratados suscritos antes de la vigencia de esta Convención, la cual constituye su instrumento codificador."

[TRANSLATION]

In signing this Convention, Ecuador has not considered it necessary to make any reservation in regard to article 4 of the Convention because it understands that the rules referred to in the first part of article 4 include the principle of the peaceful settlement of disputes, which is set forth in Article 2, paragraph 3, of the Charter of the United Nations and which, as *jus cogens*, has universal and mandatory force.

Ecuador also considers that the first part of article 4 is applicable to existing treaties.

It wishes to place on record, in this form, its view that the said article 4 incorporates the indisputable principle that, in cases where the Convention codifies rules of *lex lata*, these rules, as pre-existing rules, may be invoked and applied to treaties signed before the entry into force of this Convention, which is the instrument codifying the rules.

[TRADUCTION]

En signant la présente Convention, l'Equateur n'a pas jugé nécessaire de formuler une réserve quelconque au sujet de l'article 4 de cet instrument, car il considère qu'au nombre des règles auxquelles se réfère la première partie de cet article figure le principe du règlement pacifique des différends, énoncé au paragraphe 3 de l'Article 2 de la Charte des Nations Unies, dont le caractère de *jus cogens* lui confère une valeur impérative universelle.

De même, l'Equateur considère également que la première partie de l'article 4 est applicable aux traités existants.

Il tient à préciser à cette occasion que ledit article s'appuie sur le principe incontestable selon lequel, lorsque la Convention codifie des règles relevant de la *lex lata*, ces règles, du fait qu'elles sont préexistantes, peuvent être invoquées et appliquées au regard de traités conclus avant l'entrée en vigueur de ladite Convention, laquelle constitue l'instrument les ayant codifiées.

*GUATEMALA*

*GUATEMALA*

[SPANISH TEXT — TEXTE ESPAGNOL]

"La delegación de Guatemala, al suscribir la Convención de Viena sobre el derecho de los tratados, formula las siguientes reservas:

"I. Guatemala no puede aceptar disposición alguna de la presente Convención que menoscabe sus derechos y su reclamación sobre el Territorio de Belice.

"II. Guatemala no aplicará los artículos 11, 12, 25 y 66 en lo que contravinieren preceptos de la Constitución de la República.

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"III. Guatemala aplicará lo dispuesto en el artículo 38 solamente en aquellos casos en que lo considere conveniente para los intereses del país."

[TRANSLATION]

The delegation of Guatemala, in signing the Vienna Convention on the Law of Treaties, wishes to make the following reservations:

I. Guatemala cannot accept any provision of this Convention which would prejudice its rights and its claim to the Territory of Belize.

II. Guatemala will not apply articles 11, 12, 25 and 66 in so far as they are contrary to the provisions of the Constitution of the Republic.

III. Guatemala will apply the provision contained in article 38 only in cases where it considers that it is in the national interest to do so.

[TRADUCTION]

En signant la Convention de Vienne sur le droit des traités, la délégation du Guatemala formule les réserves suivantes :

I. Le Guatemala ne peut accepter aucune disposition de la présente Convention qui porte atteinte à ses droits et à sa revendication sur le territoire de Belize.

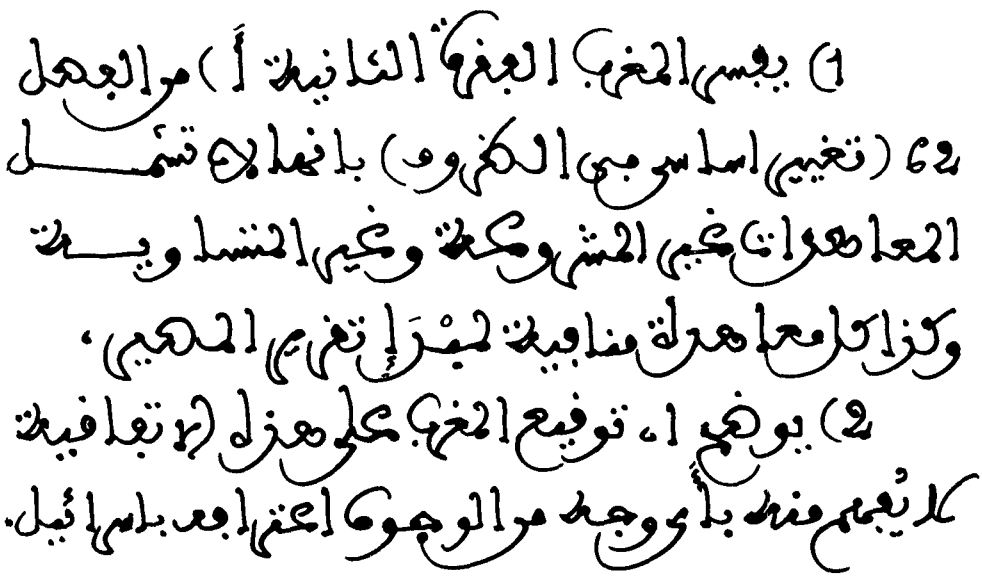
II. Le Guatemala n'appliquera pas les dispositions des articles 11, 12, 25 et 66, dans la mesure où elles contreviendraient aux principes consacrés dans la Constitution de la République.

III. Le Guatemala n'appliquera les dispositions de l'article 38 que dans le cas où il considérera que cela sert les intérêts du pays.

*MOROCCO*

*MAROC*

[ARABIC TEXT — TEXTE ARABE]



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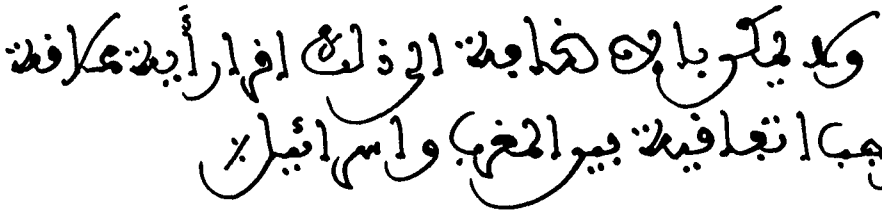

[TRANSLATION — TRADUCTION]

1. Morocco interprets paragraph 2 (*a*) of article 62 (Fundamental change of circumstances) as not applying to unlawful or inequitable treaties, or to any treaty contrary to the principle of self-determination. Morocco's views on paragraph 2 (*a*) were supported by the Expert Consultant in his statements in the Committee of the Whole on 11 May 1968 and before the Conference in plenary on 14 May 1969 (see document A/CONF.39/L.40).

2. It shall be understood that Morocco's signature of this Convention does not in any way imply that it recognized Israel. Furthermore, no treaty relationships will be established between Morocco and Israel.

«1. Le Maroc interprète le paragraphe 2, *a*, de l'article 62 (Changement fondamental de circonstances) comme ne couvrant pas les traités illicites et inégaux ainsi que tout traité contraire au principe de l'autodétermination. Le point de vue du Maroc sur le paragraphe 2, *a*, a été soutenu par l'Expert consultant dans son intervention du 11 mai 1968 en Commission plénière ainsi que le 14 mai 1969 à la Conférence plénière (document A/CONF.39/L.40).

«2. Il est entendu que la signature par le Maroc de la présente Convention ne signifie en aucune façon qu'il reconnaisse Israël. En outre, aucune relation conventionnelle ne sera établie entre le Maroc et Israël.»

*UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND*

"In signing the Vienna Convention on the Law of Treaties, the Government of the United Kingdom of Great Britain and Northern Ireland declare their understanding that nothing in article 66 of the Convention is intended to oust the jurisdiction of the International Court of Justice where such jurisdiction exists under any provisions in force binding the parties with regard to the settlement of disputes. In particular, and in relation to States parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court of Jus-

*ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD*

[TRADUCTION — TRANSLATION]

Le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord déclare considérer qu'aucune disposition de l'article 66 de ladite Convention ne vise à écarter la juridiction de la Cour internationale de Justice lorsque cette juridiction découle de clauses en vigueur entre les parties, concernant le règlement des différends et ayant force obligatoire à leur égard. Le Gouvernement du Royaume-Uni déclare notamment, au regard des Etats parties à la Convention de Vienne qui acceptent comme obligatoire la juridiction de la

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tice, the Government of the United Kingdom declare that they will not regard the provisions of sub-paragraph (*b*) of article 66 of the Vienna Convention as providing 'some other method of peaceful settlement' within the meaning of sub-paragraph (i) (*a*) of the Declaration of the Government of the United Kingdom accepting as compulsory the jurisdiction of the International Court of Justice which was deposited with the Secretary-General of the United Nations on the 1st of January, 1969.[1]

"The Government of the United Kingdom, while reserving their position for the time being with regard to the other declarations and reservations made by various States on signing the Convention, consider it necessary to state that the United Kingdom does not accept that Guatemala has any rights or any valid claim in respect of the territory of British Honduras."

Cour internationale de Justice, qu'il ne considérera pas les dispositions de l'alinéa *b* de l'article 66 de la Convention de Vienne comme fournissant «un autre mode de règlement pacifique», au sens du paragraphe i, *a*, de la Déclaration, déposée auprès du Secrétaire général de l'Organisation des Nations Unies le 1er janvier 1969, par laquelle le Gouvernement du Royaume-Uni a accepté comme obligatoire la juridiction de la Cour internationale de Justice[1].

Le Gouvernement du Royaume-Uni, tout en réservant pour le moment sa position vis-à-vis des autres déclarations et réserves faites par divers Etats lors de la signature de la Convention par ces derniers, juge nécessaire de déclarer que le Royaume-Uni ne reconnaît au Guatemala aucun droit ni titre légitime de réclamation en ce qui concerne le territoire du Honduras britannique.

## RESERVATIONS AND DECLARATIONS MADE UPON RATIFICATION OR ACCESSION (*a*)

### *ARGENTINA*

[SPANISH TEXT — TEXTE ESPAGNOL]

"*a*) La República Argentina no considera aplicable a su respecto la norma contenida en el artículo 45, apartado *b*, por cuanto la misma consagra la renuncia anticipada de derechos".

"*b*) La República Argentina no acepta que un cambio fundamental en las circunstancias ocurrido con respecto a las existentes en el momento de la celebración de un tratado y que no fue previsto por las partes pueda alegarse como causa para dar por terminado el tratado o retirarse de él y, además, objeta las reservas formuladas por Afganistán, Marruecos y Siria al artículo 62, párrafo 2, apartado *a*, y todas las reservas del mismo alcance que la de los Estados mencionados que se presenten en el futuro sobre el artículo 62".

[TRANSLATION]

(*a*) The Argentine Republic does not regard the rule contained in article 45 (*b*) as applicable to it inasmuch as the rule in question provides for the renunciation of rights in advance.

[1] United Nations, *Treaty Series*, vol. 654, p. 335.

## RÉSERVES ET DÉCLARATIONS FAITES LORS DE LA RATIFICATION OU DE L'ADHÉSION (*a*)

### *ARGENTINE*

[TRADUCTION]

*a*) La République argentine ne considère pas que la règle énoncée à l'article 45, *b*, lui est applicable dans la mesure où celle-ci prévoit la renonciation anticipée à certains droits.

[1] Nations Unies, *Recueil des Traités*, vol. 654, p. 335.

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(*b*) The Argentine Republic does not accept the idea that a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may be invoked as a ground for terminating or withdrawing from the treaty; moreover, it objects to the reservations made by Afghanistan, Morocco and Syria with respect to article 62, paragraph 2 (*a*), and to any reservations to the same effect as those of the States referred to which may be made in the future with respect to article 62.

*b*) La République argentine n'admet pas qu'un changement fondamental de circonstances qui s'est produit par rapport à celles qui existaient au moment de la conclusion du traité et qui n'avait pas été prévu par les parties puisse être invoqué comme motif pour mettre fin au traité ou pour s'en retirer; de plus, elle s'élève contre les réserves formulées par l'Afghanistan, le Maroc et la Syrie au sujet du paragraphe 2, *a*, de l'article 62 et contre toutes autres réserves de même effet que celles des Etats susmentionnés qui pourraient être formulées à l'avenir au sujet de l'article 62.

[SPANISH TEXT — TEXTE ESPAGNOL]

"La aplicación de la presente Convención a territorios cuya soberanía fuera discutida entre dos o más Estados que sean parte o no de la misma, no podrá ser interpretada como alteración, renuncia o abandono de la posición que cada uno ha sostenido hasta el presente".

[TRANSLATION]

The application of this Convention to territories whose sovereignty is a subject of dispute between two or more States, whether or not they are parties to it, cannot be deemed to imply a modification, renunciation or abandonment of the position heretofore maintained by each of them.

[TRADUCTION]

L'application de la présente Convention dans des territoires sur lesquels deux ou plusieurs Etats, qu'ils soient ou non parties à ladite Convention, ont des prétentions adverses à exercer la souveraineté, ne pourra être interprétée comme signifiant que chacun d'eux modifie la position qu'il a maintenue jusqu'à présent, y renonce ou l'abandonne.

*CANADA* (a)

"In acceding to the Vienna Convention on the Law of Treaties, the government of Canada declares its understanding that nothing in article 66 of the Convention is intended to exclude the jurisdiction of the International Court of Justice where such jurisdiction exists under the provisions of any treaty in force binding the parties with regard to the settlement of disputes. In relation to states parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court of Jus-

*CANADA* (a)

«En adhérant à la Convention de Vienne sur le droit des traités, le Gouvernement du Canada déclare reconnaître qu'il n'y a rien dans l'article 66 de la Convention qui tende à exclure la compétence de la Cour internationale de Justice lorsque cette compétence est établie en vertu des dispositions d'un traité en vigueur dont les parties sont liées relativement au règlement des différends. En ce qui concerne les Etats parties à la Convention de Vienne qui acceptent que la compétence de la Cour internationale

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tice, the government of Canada declares that it does not regard the provisions of article 66 of the Vienna Convention as providing 'some other method of peaceful settlement' within the meaning of paragraph 2 (*a*) of the declaration of the government of Canada accepting as compulsory the jurisdiction of the International Court of Justice which was deposited with the Secretary-General of the United Nations on April 7, 1970."[1]

de Justice soit obligatoire, le Gouvernement du Canada déclare qu'il ne considère pas que les dispositions de l'article 66 de la Convention de Vienne proposent «un autre moyen de règlement pacifique», selon la teneur de l'alinéa *a* du paragraphe 2 de la déclaration que le Gouvernement du Canada a remise au Secrétaire général de l'Organisation des Nations Unies le 7 avril 1970, par laquelle il acceptait que la compétence de la Cour internationale de Justice soit obligatoire[1].»

*DENMARK*

[TRANSLATION — TRADUCTION]

As between itself and any State which formulates, wholly or in part, a reservation relating to the provisions of article 66 of the Convention concerning the compulsory settlement of certain disputes, Denmark will not consider itself bound by those provisions of part V of the Convention, according to which the procedures for settlement set forth in article 66 are not to apply in the event of reservations formulated by other States.

*DANEMARK*

«Vis-à-vis de pays formulant entièrement ou partiellement des réserves en ce qui concerne les dispositions de l'article 66 de la Convention portant sur le règlement obligatoire de certains différends, le Danemark ne se considère pas lié par les dispositions de la partie V de la Convention, selon lesquelles les procédures de règlement indiquées à l'article 66 ne seront pas appliquées par suite de réserves formulées par d'autres pays.»

*FINLAND*

"Finland declares its understanding that nothing in paragraph 2 of article 7 of the Convention is intended to modify any provisions of internal law in force in any Contracting State concerning competence to conclude treaties. Under the Constitution of Finland the competence to conclude treaties is given to the President of the Republic, who also decides on the issuance of full powers to the Head of Government and the Minister for Foreign Affairs.

*FINLANDE*

[TRADUCTION — TRANSLATION]

La Finlande déclare qu'elle considère qu'aucune des dispositions du paragraphe 2 de l'article 7 de la Convention ne vise à modifier les dispositions de droit interne concernant la compétence pour conclure des traités en vigueur dans un Etat contractant. En vertu de la Constitution finlandaise, c'est le Président de la République qui est habilité à conclure des traités et c'est également lui qui décide de donner pleins pouvoirs au Chef du Gouvernement et au Ministre des affaires étrangères.

[1] United Nations, *Treaty Series*, vol. 724, p. 63.

[1] Nations Unies, *Recueil des Traités*, vol. 724, p. 63.

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"Finland also declares that as to its relation with any State which has made or makes a reservation to the effect that this State will not be bound by some or all of the provisions of article 66, Finland will consider itself bound neither by those procedural provisions nor by the substantive provisions of part V of the Convention to which the procedures provided for in article 66 do not apply as a result of the said reservation."

La Finlande déclare également qu'en ce qui concerne ses relations avec tout Etat qui a fait ou fait une réserve telle que cet Etat n'est pas lié par quelques-unes des dispositions de l'article 66 ou par toutes ces dispositions la Finlande ne se considérera liée ni par ces dispositions de procédure ni par les dispositions de fond de la partie V de la Convention auxquelles les procédures prévues à l'article 66 ne s'appliquent pas par suite de ladite réserve.

*KUWAIT* (a)

*KOWEÏT* (a)

[ARABIC TEXT — TEXTE ARABE]

مع التحفظ الخاص بأن الارتباط بهذه الاتفاقية لا يحوى بأية حال معنى الاعتراف بأسرائيل ولا يؤدى الى الدخول معها فى معاملات مما تنظمة هذه الاتفاقية ، كما تعهد بمراعاتها والامر بمراعاتها دون أنتهاك حرمتها .

[TRANSLATION[1] — TRADUCTION[2]]

"The participation of Kuwait in this Convention does not mean in any way recognition of Israel by the Government of the State of Kuwait and that, furthermore, no treaty relations will arise between the State of Kuwait and Israel."

[TRADUCTION — TRANSLATION]

La participation du Koweït à ladite Convention ne signifie en aucune façon que le Gouvernement de l'Etat du Koweït reconnaisse Israël, et qu'en outre aucune relation conventionnelle ne sera établie entre l'Etat du Koweït et Israël.

*MOROCCO*

*[For the text of the declaration, see p. 499 of this volume.]*

*MAROC*

*[Pour le texte de la déclaration, voir p. 499 du présent volume.]*

*SYRIAN ARAB REPUBLIC* (a)

*RÉPUBLIQUE ARABE SYRIENNE* (a)

[ARABIC TEXT — TEXTE ARABE]

٢ — ان قبول الجمهورية العربية السورية هذه الاتفاقية وابرام حكومتها لها لا يحوى بأية حال معنى الاعتراف باسرائيل ولا يؤدى الى دخولها معها في معاملات مما تنظمه أحكامها .

[1] Translation supplied by the Government of Kuwait.
[2] Traduction fournie par le Gouvernement du Koweït.

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ب — ان الجمهورية العربية السورية تعتبر أن المادة الواحدة والثمانين من هذه الاتفاقية لا تتفق وأهداف الاتفاقية وغايتها اذ أنها لا تمكن جميع الدول بدون تفرقة أو تمييز من أن تصبح اطرافا فيها .

ج — ان حكومة الجمهورية العربية السورية لا تقبل بحال من الاحوال عدم سريان مبدأ التغيير الجوهري للظروف على المعاهدات التي تنشيء حدودا في الفقرة ٢ (أ) من المادة الثانية والستين لان ذلك يعتبر خرقا واضحا لواحدة من القواعد الآمرة في القواعد العامة للقانون الدولي والقاضية بحق الشعوب في تقرير مصيرها .

د — ان حكومة الجمهورية العربية السورية تفهم حكم المادة الثانية والخمسين على النحو التالي :

" ان عبارة التهديد بالقوة واستخدامها الواردة في هذه المادة تنصرف ايضا الى ممارسة الضغوط الاقتصادية والسياسية والعسكرية والنفسية وسائر انواع الضغوط الاخرى التي من شأنها حمل الدولة على الدخول في معاهدة ضد رغبتها أو مصلحتها .

هـ — ان انضمام الجمهورية العربية السورية الى هذه الاتفاقية وابرام حكومتها لها لا يسري على الملحق بهذه الاتفاقية المتعلق بالتوفيق الالزامي .

[TRANSLATION — TRADUCTION]

A. Acceptance of this Convention by the Syrian Arab Republic and ratification of it by its Government shall in no way signify recognition of Israel and cannot have as a result the establishment with the latter of any contact governed by the provisions of this Convention.

B. The Syrian Arab Republic considers that article 81 is not in conformity with the aims and purposes of the Convention in that it does not allow all States, without distinction or discrimination, to become parties to it.

C. The Government of the Syrian Arab Republic does not in any case accept the non-applicability of the principle of a fundamental change of circumstances with regard to treaties establishing boundaries, referred to in article 62, paragraph 2 (*a*), inasmuch as it regards this as a flagrant violation of an obligatory norm which forms part of general in-

[TRADUCTION[1] — TRANSLATION[2]]

«A) L'acceptation de cette Convention par la République arabe syrienne et sa ratification par son Gouvernement ne peuvent comporter en aucune façon le sens d'une reconnaissance d'Israël et ne peuvent aboutir à entretenir avec lui aucun contact réglé par les dispositions de la Convention.

«B) La République arabe syrienne considère que l'article quatre-vingt-un de cette Convention ne s'accorde pas avec ses buts et ses desseins car il ne permet pas à tous les Etats sans discrimination ou distinction d'en devenir parties.

«C) Le Gouvernement de la République arabe syrienne n'accepte en aucun cas la non-application du principe du changement fondamental de circonstances sur les traités établissant des frontières au paragraphe 2, alinéa *a*, de l'article soixante-deux, car cela est considéré comme une violation flagrante de l'une des règles obligatoires parmi les règles

[1] Traduction fournie par le Gouvernement de la République arabe syrienne.

[2] Translation supplied by the Government of the Syrian Arab Republic.

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ternational law and which recognizes the right of peoples to self-determination.

D. The Government of the Syrian Arab Republic interprets the provisions in article 52 as follows:

> The expression "the threat or use of force" used in this article extends also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests.

E. The accession of the Syrian Arab Republic to this Convention and the ratification of it by its Government shall not apply to the Annex to the Convention, which concerns obligatory conciliation.

générales du Code international et qui prévoit le droit des peuples à l'autodétermination.

«D) Le Gouvernement de la République arabe syrienne comprend la disposition de l'article cinquante-deux, comme suit :

> «Le terme de la menace ou l'emploi de la force prévu par cet article s'applique également à l'exercice des contraintes économiques, politiques, militaires et psychologiques ainsi que tous les genres de contraintes qui entraînent l'obligation d'un Etat à conclure un traité contre son désir ou son intérêt.»

«E) L'adhésion de la République arabe syrienne à cette Convention et sa ratification par son Gouvernement ne s'appliquent pas à l'Annexe à la Convention relative à la conciliation obligatoire.»

*TUNISIA* (a)

[TRANSLATION — TRADUCTION]

The dispute referred to in article 66 (*a*) requires the consent of all parties thereto in order to be submitted to the International Court of Justice for a decision.

*TUNISIE* (a)

«Le différend prévu au paragraphe *a* de l'article 66 nécessite l'accord de toutes les parties à ce différend pour être soumis à la décision de la Cour internationale de Justice.»

*UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND*

It is [the United Kingdom's] understanding that nothing in article 66 of the Convention is intended to oust the jurisdiction of the International Court of Justice where such jurisdiction exists under any provisions in force binding the parties with regard to the settlement of disputes. In particular, and in relation to States parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court, the

*ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD*

[TRADUCTION — TRANSLATION]

Le Royaume-Uni considère qu'aucune disposition de l'article 66 de la Convention ne vise à écarter la juridiction de la Cour internationale de Justice lorsque cette juridiction découle de clauses en vigueur entre les parties, concernant le règlement des différends et ayant force obligatoire à leur égard. Notamment, au regard des Etats parties à la Convention de Vienne qui acceptent comme obligatoire la juridiction de la Cour internatio-

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United Kingdom will not regard the provisions of sub-paragraph (*b*) of article 66 of the Vienna Convention on the Law of Treaties as providing 'some other method of peaceful settlement' within the meaning of sub-paragraph (i) (*a*) of the Declaration of the Government of the United Kingdom which was deposited with the Secretary-General of the United Nations on the 1st of January 1969."

*UNITED REPUBLIC OF TANZANIA* (a)

"Article 66 of the Convention shall not be applied to the United Republic of Tanzania by any State which enters a reservation on any provision of part V or the whole of that part of the Convention."

OBJECTION[1] to the declaration made by the Government of Finland upon ratification[2]

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

*Received on:*
7 December 1977

"The Government of the United Kingdom of Great Britain and Northern Ireland note that the instrument of ratification of the Government of Finland, which was deposited with the Secretary-General on 19 August 1977, contains a declaration relating to paragraph 2 of article 7 of the Convention. The Government of the United Kingdom wish to inform the Secretary-General that they do not regard that declaration as in any way affecting the interpretation or application of article 7."

[1] Unless otherwise indicated, the texts of the objections were received at the time of ratification or accession.
[2] See p. 503 of this volume.

nale de Justice, le Royaume-Uni ne considérera pas les dispositions de l'alinéa *b* de l'article 66 de la Convention de Vienne sur le droit des traités comme fournissant «un autre moyen de règlement pacifique», au sens de l'alinéa i, *a*, de la Déclaration que le Gouvernement du Royaume-Uni a déposée auprès du Secrétaire général de l'Organisation des Nations Unies le 1er janvier 1969.

*RÉPUBLIQUE-UNIE DE TANZANIE* (a)

[TRADUCTION — TRANSLATION]

Aucun Etat formulant des réserves à propos d'une quelconque disposition de la partie V de la Convention, ou de l'ensemble de cette partie, ne pourra invoquer l'article 66 de la Convention vis-à-vis de la République-Unie de Tanzanie.

OBJECTION[1] à la déclaration faite par le Gouvernement finlandais lors de la ratification[2]

ROYAUME-UNI DE GRANDE BRETAGNE ET D'IRLANDE DU NORD

*Reçue le :*
7 décembre 1977

[TRADUCTION — TRANSLATION]

Le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord prend note que l'instrument de ratification du Gouvernement finlandais, déposé auprès du Secrétaire général le 19 août 1977, contient une déclaration relative au paragraphe 2 de l'article 7 de la Convention. Le Gouvernement du Royaume-Uni informe le Secrétaire général qu'il considère que cette déclaration ne modifie aucunement l'interprétation ou l'application de l'article 7.

[1] Sauf indication contraire, la date de réception est celle de la ratification ou de l'adhésion.
[2] Voir p. 503 du présent volume.

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OBJECTION to the reservation made by the Government of Guatemala upon signature[1]

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

"With reference to a reservation in relation to the territory of British Honduras made by Guatemala on signing the Convention, the United Kingdom does not accept that Guatemala has any rights or any valid claim with respect to that territory;

"The United Kingdom fully reserves its position in other respects with regard to the declarations made by various States on signature, to some of which the United Kingdom would object, if they were to be confirmed on ratification."

OBJECTIONS to the declaration made by the Government of the Syrian Arab Republic upon accession[2]

CANADA

*Received on:*
22 October 1971

". . . Canada does not consider itself in treaty relations with the Syrian Arab Republic in respect of those provisions of the Vienna Convention on the Law of Treaties to which the compulsory conciliation procedures set out in the annex to that Convention are applicable."

OBJECTION à la réserve faite par le Gouvernement guatémaltèque lors de la signature[1]

ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD

[TRADUCTION — TRANSLATION]

S'agissant de la réserve relative au territoire du Honduras britannique qui a été formulée par le Guatemala lors de la signature de la Convention, le Royaume-Uni ne reconnaît au Guatemala aucun droit ni titre légitime de réclamation en ce qui concerne ce territoire.

Le Royaume-Uni réserve pleinement sa position sur d'autres points vis-à-vis des déclarations qui ont été faites par divers Etats lors de la signature de la Convention; si certaines d'entre elles venaient à être confirmées lors de la ratification, le Royaume-Uni formulerait des objections à leur encontre.

OBJECTIONS à la réserve faite par le Gouvernement de la République arabe syrienne lors de l'adhésion[2]

CANADA

*Reçue le :*
22 octobre 1971

«Le Canada ne se considère pas comme lié par traité avec la République arabe syrienne à l'égard des dispositions de la Convention de Vienne sur le droit des traités auxquelles s'appliquent les procédures de conciliation obligatoire énoncées à l'annexe de ladite Convention.»

[1] See p. 498 of this volume.
[2] See p. 504 of this volume.

[1] Voir p. 498 du présent volume.
[2] Voir p. 504 du présent volume.

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NEW ZEALAND

*Received on:*
14 October 1971

". . . The New Zealand Government objects to the reservation entered by the Government of Syria to the obligatory conciliation procedures contained in the annex to the Vienna Convention on the Law of Treaties and does not accept the entry into force of the Convention as between New Zealand and Syria."

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

"The United Kingdom does not accept that the interpretation of article 52 put forward by the Government of Syria correctly reflects the conclusions reached at the Conference of Vienna on the subject of coercion; the Conference dealt with this matter by adopting a Declaration on this subject which forms part of the Final Act.

"The United Kingdom objects to the reservation entered by the Government of Syria in respect of the annex to the Convention and does not accept the entry into force of the Convention as between the United Kingdom and Syria".

OBJECTION to the reservations made by the Government of the Syrian Arab Republic and by the Government of Tunisia, respectively, upon accession[1]

SWEDEN

*Received on:*

4 February 1975

"Article 66 of the Convention contains certain provisions regarding procedures

[1] See pp. 504 and 506 of this volume.

NOUVELLE-ZÉLANDE

*Reçue le :*
14 octobre 1971

[TRADUCTION — TRANSLATION]

Le Gouvernement néo-zélandais objecte à la réserve formulée par le Gouvernement syrien relative aux procédures de conciliation obligatoire prévues dans l'annexe à la Convention de Vienne sur le droit des traités et n'accepte pas l'entrée en vigueur de la Convention entre la Nouvelle-Zélande et la Syrie.

ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD

[TRADUCTION — TRANSLATION]

Le Royaume-Uni ne considère pas que l'interprétation de l'article 52 qui a été avancée par le Gouvernement syrien reflète avec exactitude les conclusions auxquelles la Conférence de Vienne est parvenue au sujet de la contrainte; la Conférence a réglé cette question en adoptant à son sujet une déclaration qui fait partie de l'Acte final.

Le Royaume-Uni formule une objection contre la réserve faite par le Gouvernement syrien au sujet de l'annexe à la Convention et ne reconnaît pas l'entrée en vigueur de cette dernière entre le Royaume-Uni et la Syrie.

OBJECTION aux réserves faites par le Gouvernement de la République arabe syrienne et par le Gouvernement de la Tunisie, respectivement, lors de l'adhésion[1]

SUÈDE

*Reçue le :*

4 février 1975

[TRADUCTION — TRANSLATION]

L'article 66 de la Convention contient certaines dispositions concernant les

[1] Voir p. 504 et p. 506 du présent volume.

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for judicial settlement, arbitration and conciliation. According to these provisions a dispute concerning the application or the interpretation of article 53 or 64, which deal with the so-called *jus cogens*, may be submitted to the International Court of Justice. If the dispute concerns the application or the interpretation of any of the other articles in Part V of the Convention, the conciliation procedure specified in the Annex to the Convention may be set in motion.

"The Swedish Government considers that these provisions regarding the settlement of disputes are an important part of the Convention and that they cannot be separated from the substantive rules with which they are connected. Consequently, the Swedish Government considers it necessary to raise objections to any reservation which is made by another State and whose aim is to exclude the application, wholly or in part, of the provisions regarding the settlement of disputes. While not objecting to the entry into force of the Convention between Sweden and such a State, the Swedish Government considers that their treaty relations will not include either the procedural provision in respect of which a reservation has been made or the substantive provisions to which that procedural provision relates.

"For the reasons set out above, the Swedish Government objects to the reservation of the Syrian Arab Republic, according to which its accession to the Convention shall not include the Annex, and to the reservation of Tunisia, according to which the dispute referred to in article 66 (*a*) requires the consent of all parties thereto in order to be submitted to the International Court of Justice for a decision. In view of these reservations, the Swedish Government considers, firstly, that the treaty relations between Sweden and the Syrian Arab Republic will not include those provisions of Part V of the Convention to

procédures du règlement judiciaire, d'arbitrage et de conciliation. Aux termes de ces dispositions, un différend concernant l'application ou l'interprétation des articles 53 ou 64, qui traitent de ce que l'on appelle le *jus cogens*, peut être soumis à la décision de la Cour internationale de Justice. Si le différend concerne l'application ou l'interprétation de l'un quelconque des autres articles de la partie V de la Convention, la procédure de conciliation indiquée à l'annexe à la Convention peut être mise en œuvre.

Le Gouvernement suédois estime que ces dispositions relatives au règlement des différends constituent une partie importante de la Convention et qu'elles ne peuvent être dissociées des règles de fond auxquelles elles sont liées. Par conséquent, le Gouvernement suédois objecte à toutes les réserves qu'un autre Etat pourrait faire dans le but d'éviter, totalement ou partiellement, l'application des dispositions relatives au règlement des différends. Bien qu'il ne s'oppose pas à l'entrée en vigueur de la Convention entre la Suède et un tel Etat, le Gouvernement suédois estime que ni les dispositions de procédure faisant l'objet de réserves ni les dispositions de fond auxquelles ces dispositions de procédure se rapportent ne seront comprises dans leurs relations conventionnelles.

Pour les raisons évoquées ci-dessus, le Gouvernement suédois objecte à la réserve de la République arabe syrienne selon laquelle son adhésion à la Convention n'entraîne pas son adhésion à l'annexe à la Convention, et à la réserve de la Tunisie selon laquelle le différend dont il est question à l'article 66, *a*, ne peut être soumis à la décision de la Cour internationale de Justice qu'avec l'assentiment de toutes les parties à ce différend. Etant donné ces réserves, le Gouvernement suédois estime, premièrement, que les dispositions de la partie V de la Convention auxquelles se rapporte la procédure de conciliation indiquée à

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which the conciliation procedure in the Annex applies and, secondly, that the treaty relations between Sweden and Tunisia will not include articles 53 and 64 of the Convention.

"The Swedish Government has also taken note of the declaration of the Syrian Arab Republic, according to which it interprets the expression 'the threat or use of force' as used in article 52 of the Convention so as to extend also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests. On this point, the Swedish Government observes that since article 52 refers to threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations, it should be interpreted in the light of the practice which has developed or will develop on the basis of the Charter."

l'annexe ne seront pas comprises dans les relations conventionnelles entre la Suède et la République arabe syrienne et, deuxièmement, que les relations conventionnelles entre la Suède et la Tunisie n'engloberont pas les articles 53 et 64 de la Convention.

Le Gouvernement suédois a également pris note de la déclaration faite par la République arabe syrienne selon laquelle celle-ci interprète l'expression «la menace ou l'emploi de la force» utilisée à l'article 52 de la Convention comme s'appliquant également à l'emploi de contraintes économiques, politiques, militaires et psychologiques et les pressions de toute nature exercées en vue de contraindre un Etat à conclure un traité contre son gré ou contre ses intérêts. A ce propos, le Gouvernement suédois fait remarquer qu'étant donné que l'article 52 traite de la menace ou de l'emploi de la force en violation des principes du droit international incorporés dans la Charte des Nations Unies, il conviendrait de l'interpréter en tenant compte de la pratique qui s'est instaurée ou qui s'instaurera en ce qui concerne l'application des dispositions de la Charte.

OBJECTIONS to the reservation made by the Government of Tunisia upon accession[1]

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

*Received on:*

22 June 1972

". . . The United Kingdom objects to the reservation entered by the Government of Tunisia in respect of article 66 (*a*) of the Convention and does not accept the entry into force of the Convention as between the United Kingdom and Tunisia."

[1] See p. 506 of this volume.

OBJECTIONS à la réserve faite par le Gouvernement tunisien lors de l'adhésion[1]

ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD

*Reçue le :*

22 juin 1972

[TRADUCTION — TRANSLATION]

Le Royaume-Uni objecte à la réserve formulée par le Gouvernement tunisien au sujet de l'article 66, *a*, de la Convention et ne reconnaît pas l'entrée en vigueur de cette dernière entre le Royaume-Uni et la Tunisie.

[1] Voir p. 506 du présent volume.

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NEW ZEALAND

*Received on:*

10 August 1972

". . . The New Zealand Government objects to the reservation entered by the Government of Tunisia in respect of article 66 (*a*) of the Convention and does not consider New Zealand to be in treaty relations with Tunisia in respect of those provisions of the Convention to which the dispute settlement procedure provided for in article 66 (*a*) is applicable."

NOUVELLE-ZÉLANDE

*Reçue le :*

10 août 1972

[TRADUCTION — TRANSLATION]

Le Gouvernement néo-zélandais fait objection à la réserve émise par le Gouvernement tunisien à propos de l'article 66, *a*, de la Convention, et il considère que la Nouvelle-Zélande n'est pas liée par traité avec la Tunisie en ce qui concerne les dispositions de la Convention auxquelles la procédure de règlement des différends prévues à l'article 66, *a*, est applicable.

United Nations S/RES/1593 (2005)

Security Council

Distr.: General
31 March 2005

# Resolution 1593 (2005)

## Adopted by the Security Council at its 5158th meeting, on 31 March 2005

*The Security Council*,

*Taking note* of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),

*Recalling* article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

*Also recalling* articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims,

*Taking note* of the existence of agreements referred to in Article 98-2 of the Rome Statute,

*Determining* that the situation in Sudan continues to constitute a threat to international peace and security,

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

1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;

2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

3. *Invites* the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;

4. *Also encourages* the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur;

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5. *Also emphasizes* the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary;

6. *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;

7. *Recognizes* that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

8. *Invites* the Prosecutor to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

9. *Decides* to remain seized of the matter.

United Nations S/RES/1593 (2005)

Security Council

Distr.: General
31 March 2005

# Resolution 1593 (2005)

## Adopted by the Security Council at its 5158th meeting, on 31 March 2005

*The Security Council*,

*Taking note* of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),

*Recalling* article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

*Also recalling* articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims,

*Taking note* of the existence of agreements referred to in Article 98-2 of the Rome Statute,

*Determining* that the situation in Sudan continues to constitute a threat to international peace and security,

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

1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;

2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

3. *Invites* the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;

4. *Also encourages* the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur;

5. *Also emphasizes* the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary;

6. *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;

7. *Recognizes* that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

8. *Invites* the Prosecutor to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

9. *Decides* to remain seized of the matter.

# Guest Post: The ICC Changes Its Mind on the Immunity from Arrest of President Al Bashir, But It Is Wrong Again

by Paola Gaeta

[Paola Gaeta is a Professor at the Law Faculty of the University of Geneva, Adjunct Professor, Graduate Institute of International and Development Studies and the Director of Geneva Academy of International Humanitarian Law and Human Rights.]

On 9th April, Pre-Trial Chamber II of the International Criminal Court ('the ICC' or 'the Court') issued another **decision** concerning the lack of compliance by a State party with its request to arrest and surrender Sudanese President Al Bashir. The decision thus adds to others on the same matter and all involving African member States of the ICC. This time the State concerned is the Democratic Republic of Congo ('DRC'), which did not arrest President Al Bashir during an official visit to the country and despite a specific request to that effect by the Court.

The DRC argued, among other things, that it was not obliged to execute the request for arrest and surrender of Al Bashir on the basis of Article 98 (1) of the Rome Statute. This provision provides that the Court may not proceed with a request of cooperation or assistance whenever the requested State, in order to execute such a request, would have to breach –with respect to a third State—its international legal undertakings in the area of immunities, including personal immunities. In such cases, the Court may issue a request for assistance or co-operation to a member State only after obtaining a waiver of the relevant immunities from the third State concerned. Since the Court had not obtained the waiver of immunities, the DRC contended that it was not obliged to comply with the request of the Court.

The Pre-Trial Chamber rejected this argument. Surprisingly, it did not do so by referring to the two decisions of 2011 (against **Malawi** and **Chad**, respectively) that had already tackled the matter. Not at all: the Pre-Trial Chamber did not dedicate one word to this case law, as if these two decisions were never delivered. True, the Court is not bound by its own decisions, as Article 21(2) of the Rome Statute makes clear in providing that the Court 'may apply principles and rules of law as interpreted in its previous decisions'. Nevertheless, this provision certainly does not mean that the Court can change its jurisprudence without even clarifying the reasons why. This is particularly true when the criminal responsibility of an individual accused of very serious international crimes is at stake. But it is also true with respect to a highly sensitive issue such as that of immunities of Al Bashir as head of State of a State not party to the Rome Statute, and the more so in light of the stand taken by the African Union on that matter on multiple occasions. The highly political tension between the African Union and the Court on this and other matters is far from being settled and the jurisprudence of the Court, which is not impeccable, certainly won't help to alleviate it.

I do not want to say that the 2011 Pre-Trial Chamber decisions on the question of immunities of Al Bashir were convincing. Quite the contrary: as correctly emphasized by Dapo Akande in a post on EJIL Talk! those decisions adopted a stand which made Article 98 (1) of the Rome Statute redundant, something which is 'contrary to a basic principle of treaty interpretation'.

Unfortunately, this last of Pre-Trial Chamber II is not more convincing than those issued in 2011. This decision correctly recognizes that Article 98 (1) of the Statute directs the Court to secure the cooperation of a State not party to the Rome Statute for the waiver or lifting of the immunity of its Head of State. This in order to prevent 'the requested State from acting inconsistently with its international obligations towards the non-State party with respect to the immunities attached to the latter's Head of State'. However, according to the Chamber, the Court does not need to obtain the cooperation of Sudan to remove the immunities of Al Bashir. This is so because the Security Council, in obliging Sudan to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor', eliminated 'any impediment to the proceedings before the Court, including the lifting of immunities'. For the Chamber, any other interpretation would be 'senseless'. The Chamber thus concludes that the requirement under Article 98(1) of the Statute was already ensured by the relevant Security Council's Resolution, by virtue of which it 'implicitly waived the immunities granted to Omar Al Bashir under international law'. Consequently, for the Chamber the DRC was obliged under the Rome Statute to arrest and surrender Al Bashir, which it failed to do and hence violated its obligations as a State party to the Rome Statute.

It appears clear to me that the reasoning followed by the Pre-Trial Chamber is based on a wrong interpretation of Article 98(1) of the Rome Statute. This provision is not concerned with whether a State that is not party to the Rome Statute is obliged to cooperate with the Court. Article 98(1) says that the Court may not proceed with requests of cooperation which would put the requested State in the position to act inconsistently with its obligations on immunities vis-à-vis third States 'unless the Court can first obtain the cooperation of that third State for the waiver of immunity' (emphasis added). The question here is not the existence of a legal obligation upon the third State to cooperate, but the actual cooperation that the Court must obtain from the third State to waive the immunity.

In addition, I do not see how the obligation of cooperation imposed on Sudan by the Security Council can modify the powers and competence of the Court, including the powers of the Court vis-à-vis member States in the matter of judicial cooperation. The Court is an international organization, created by a treaty and exercising, as all international organizations, the powers and competences attributed to it by its member States. The obligations set forth by the Security Council upon a UN member State with a binding decision under Chapter VII of the UN Charter cannot affect the rights and powers of another international organization, in this case the ICC, as they are regulated in the respective constitutive instrument of such other international organization. The decision of the Security Council on the obligation of Sudan to cooperate cannot relieve the Court from the necessity to implement a requirement for the correct exercise of a power as it is the case of Article 98 (1) of the Rome Statute. The Court has not obtained the cooperation of Sudan for the waiver of immunity of Al Bashir, as Article 98 (1) provides. To the best of my knowledge, the Court has not even attempted to obtain from Sudan

such a waiver. The fact that Sudan would be legally obliged to comply with such a request – should the Court decide to submit one to Sudan – does not imply that the terms of Article 98 (1) are respected, should Sudan refuse to provide the waiver of immunities.

Finally, I do not understand how the Pre-Trial Chamber could claim that the obligation of Sudan to cooperate with the Court, by virtue of the relevant resolution of the Security Council, would be 'senseless' if not interpreted as implying the waiver of immunities of the Head of State of Sudan. The fact that Sudan is obliged to cooperate with the Court is not deprived of sense if one recognizes that its head of State is protected by immunities under international law in the territory of foreign states. After all, extradition treaties are not deprived of sense simply because, as the ICJ has clarified, a state may not even circulate internationally an arrest warrant against a foreign sitting head of state or government, or ministers for foreign affairs.

Commentators who have argued that the Security Council's decision has a bearing on the matter of immunities have been not so naïve to claim that the inapplicability of Article 98(1) of the Rome Statute stems from the obligation of Sudan to cooperate with the Court. They have been much more sophisticated than the Pre-Trial Chamber. For instance, in a **paper** published in the JICJ, Dapo Akande argues that whenever the Security Council triggers the jurisdiction of the Court (as in the case of Darfur, Sudan), States that are not members of the Rome Statute become bound by the latter since the referral by the Security Council 'is a decision to confer jurisdiction on the Court (in circumstances where such jurisdiction may otherwise not exist)'. Therefore Sudan, and other non-member States of the ICC, would be obliged to accept that the Court exercises its jurisdiction in accordance with the Statute. Sudan would therefore be obliged by Article 27(2) of the Rome Statute, and its State officials would not be entitled to personal immunities before national jurisdictions that could therefore arrest and surrender incriminated officials to the ICC to comply with its request.

I do not find this argument convincing. I contend that the referral of a situation to the Court by the Security Council constitutes just one of the conditions for the exercise by the Court of its criminal jurisdiction, and does not constitute the source of the jurisdiction of the Court. This applies also when the Security Council refers to the Court a situation where the crimes are committed in the territory or by a national of a state not party to the Rome Statute. This is however not the point here. The point is that the Court cannot take the luxury of changing its mind on a sensitive issue such as that of the immunities of Al Bashir without even saying why; and in addition to issuing another unconvincing decision on the matter.

I have personally no sympathy for President Al Bashir. I do hope, as many do, that sooner or later he will be brought before the Court, or at least induced to surrender, to respond to the serious allegations brought against him. I do not believe, however, that the Court is making justice to international law by delivering decisions that, at least with respect to issue of the obligation of States parties to arrest Al Bashir, are, with all due respect, frankly wrong.

April 23rd, 2014 - 10:00 AM EDT | **Trackback Link** |
http://opiniojuris.org/2014/04/23/guest-post-icc-changes-mind-immunity-arrest-president-al-bashir-wrong/

**6 Responses**

But there are two complicating matters: (1) how to interpret the S.C. resolution. Recall the S.C. res. re: Libya that overrode Libya's discretion under the Montreal Convention re: aut dedere aut judicare. The S.C. res. had primacy in view of U.N. arts. 39, 41, 48, and 103.
and (2) the fact that there is no sitting head of state immunity with respect to the jurisdiction of an international criminal tribunal (like the ICC). This lack of immunity regarding an international criminal trbunal (recognized by the ICJ) would be relevant to the tribunal's competence and the proper, policy-serving read of its constitutive instrument (e.g., whether the "obligation" of a state under IL re: nonimmunity before an int'l crim. trib. exists and controls). The foreign state is not being asked to prosecute in its domestic courts but to render the accused to the ICC.

**4.23.2014**
**at 11:19 am EST**

Jordan

Hi Jordan. Well, on the immunity of heads of state before the ICC I agree with you, but the ICC only possesses 'jurisdiction to adjudicate' while for the jurisdiction to enforce it shall rely upon States parties….these are two distinct things. And among States parties, the Rome Statute clearly derogates from personal immunities, but when it comes to third States, Article 98(1) comes into play and its meaning is very clear to me. As for the Security Council resolution, it imposes an obligation on Sudan while Article 98 addresses the requirements for the Court to address a request to member States. Again we are on two different plans. The only consequence to me that can derive from the Security Council resolution is that if a State arrests AlBashir, Sudan would be precluded to claim the international responsibility of that State for having violated the personal immunities of its President. I know I am not in the mainstream, but I am not sure the Court could benefit from becoming a sort of quasi-ad hoc Security Council Tribunal…..It is time to have international criminal justice independent as much as possible from the Security Council.
I hope you are doing fine. Best. P.

**4.23.2014**
**at 12:07 pm EST**

Paola Gaeta

Hi Paola! p.s. I'm fine.
My more basic point is that a particular S.C. res. could create an obligation for all UN members (perhaps impliedly as well as expressly) and that that obligation will override any inconsistent obligation of a UN member under the Rome Statute. Moreover, the UN Charter-based obligation would be relevant for interpretation of 98(1).
I have not looked at the actual language of the U.N. S.C. res. re: referral of the Sudan.
All interesting.
Best, Jordan

**4.23.2014**
**at 2:21 pm EST**

Jordan

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For your information, I note that we, that is Abel Knottnerus and myself, have also critically commented on this decision; see our post on EJILTalk:
**http://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-%E2%80%92-but-gets-the-law-wrong-again/**

**4.24.2014**
**at 3:30 am EST**

André de Hoogh

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Dear Professor Gaeta,

As you already know, I totally agree with you on that issue. I do not want to comment in details the three decisions of the Pre-Trial Chamber that you analysed on Al Bashir Case. But let me just say two general things:

(1) The fact that the ICC Statute confers the right of referral of the ICC to the SC is a serious "legal congenital malformation". Knowing the composition of the SC and knowing that the majority of the SC members, which detain the veto, are not parties to the ICC Statute, to me, it was simply preposterous to confer a right of referral of the ICC to the SC. Clearly, this is a grave breach of the principle of independence of justice. Sometimes, I wonder whether the ICC is not a "baby" of the SC?

(2) Despite this "congenital malformation", one could expected that ICC judges do their best to escape from the clutches of the SC, by interpreting the Statute in a way which makes them more independent. Unfortunately, this is not the case and, at many time the judges have proved that they are happy to remain slaves of the SC. The three decisions of the Pre-Trial Chamber you mentioned confirm that feeling!

All the best,
Antoine

**4.28.2014**
**at 10:23 pm EST**

Antoine Kaboré

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Antoine, I fully agree with you…When I was in Trento, attending a conference organized in the aftermath of the adoption of the Rome Statute, I vividly remember a speaker who was a delegate of a powerful country in Rome saying: Do you think we have created an independent court? if so I tell you: read the Statute….So it is true, the SC has a lot of power over the ICC and the judges should do their utmost to be and "to appear" independent from the Security Council. Once Lousie Arbour said that if the SC has been crucila for the re-birth of international criminal justice, time is ripe for the latter to get a divorce! All the best and thanks a lot for your comment.

**5.02.2014**
**at 5:26 am EST**

Paola Gaeta

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**Trackbacks and Pingbacks**

There are no trackbacks or pingbacks associated with this post at this time.

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United Nations S/RES/1593 (2005)

Security Council

Distr.: General
31 March 2005

# Resolution 1593 (2005)

## Adopted by the Security Council at its 5158th meeting, on 31 March 2005

*The Security Council*,

*Taking note* of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),

*Recalling* article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

*Also recalling* articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims,

*Taking note* of the existence of agreements referred to in Article 98-2 of the Rome Statute,

*Determining* that the situation in Sudan continues to constitute a threat to international peace and security,

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

1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;

2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

3. *Invites* the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;

4. *Also encourages* the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur;

5. *Also emphasizes* the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary;

6. *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;

7. *Recognizes* that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

8. *Invites* the Prosecutor to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

9. *Decides* to remain seized of the matter.

United Nations S/PV.5158

# Security Council

Sixtieth year

*Provisional*

**5158**th meeting

Thursday, 31 March 2005, 10.30 p.m.

New York

| | | |
|---|---|---|
| *President:* | Mr. Sardenberg | (Brazil) |
| *Members:* | Algeria | Mr. Baali |
| | Argentina | Mr. Mayoral |
| | Benin | Mr. Adechi |
| | China | Mr. Wang Guangya |
| | Denmark | Ms. Løj |
| | France | Mr. De La Sablière |
| | Greece | Mr. Vassilakis |
| | Japan | Mr. Oshima |
| | Philippines | Mr. Baja |
| | Romania | Mr. Motoc |
| | Russian Federation | Mr. Denisov |
| | United Kingdom of Great Britain and Northern Ireland | Sir Emyr Jones Parry |
| | United Republic of Tanzania | Mr. Mahiga |
| | United States of America | Mrs. Patterson |

## Agenda

Reports of the Secretary-General on the Sudan

Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council (S/2005/60)

This record contains the text of speeches delivered in English and of the interpretation of speeches delivered in the other languages. The final text will be printed in the *Official Records of the Security Council*. Corrections should be submitted to the original languages only. They should be incorporated in a copy of the record and sent under the signature of a member of the delegation concerned to the Chief of the Verbatim Reporting Service, room C-154A.

05-29247 (E)

** 0529247 **

*The meeting was called to order at 10.35 p.m.*

**Adoption of the agenda**

*The agenda was adopted.*

**Reports of the Secretary-General on the Sudan**

**Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council (S/2005/60)**

**The President**: I should like to inform the Council that I have received a letter from the representative of the Sudan, in which he requests to be invited to participate in the consideration of the item on the Council's agenda. In conformity with the usual practice, I propose, with the consent of the Council, to invite that representative to participate in the discussion without the right to vote, in accordance with the relevant provisions of the Charter and rule 37 of the Council's provisional rules of procedure.

There being no objection, it is so decided.

*At the invitation of the President, Mr. Erwa (Sudan) took a seat at the Council table.*

**The President**: The Security Council will now resume its consideration of the item on its agenda.

I welcome the presence of the Secretary-General, Mr. Kofi Annan, at this meeting.

Members of the Council have before them document S/2005/60, containing a letter dated 31 January 2005 from the Secretary-General, transmitting the report of the International Commission of Inquiry on Darfur.

Members of the Council also have before them document S/2005/218, which contains the text of a draft resolution submitted by the United Kingdom of Great Britain and Northern Ireland.

It is my understanding that the Council is ready to proceed to the vote on the draft resolution before it. If I hear no objection, I shall now put the draft resolution to the vote.

There being no objection, it is so decided.

*A vote was taken by show of hands.*

*In favour*:

Argentina, Benin, Denmark, France, Greece, Japan, Philippines, Romania, Russian Federation, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania

*Against*:

None

*Abstaining*:

Algeria, Brazil, China, United States of America

**The President**: The result of the voting is as follows: 11 votes in favour, none against and 4 abstentions. The draft resolution has been adopted as resolution 1593 (2005).

I shall now give the floor to those members of the Council who wish to make statements following the voting.

**Mrs. Patterson** (United States of America): Allow me to thank you, Sir, and your delegation for your endeavours during your presidency of the Council this month.

The adoption this month of two resolutions on the Sudan — peacekeeping and sanctions — demonstrates the Council's strong commitment to fostering peace and stability throughout the Sudan. The Council has succeeded in keeping the momentum moving forward on international support for peace in the Sudan. The 10,000-strong peacekeeping force authorized by the Council will assist the parties to the Comprehensive Peace Agreement in implementing that historic peace accord.

The sanctions resolution recognizes that conflict, violence and atrocities in Darfur continue and that the Council must take steps now to pressure the parties to end the violence in Darfur and to conclude a political settlement peacefully. We strongly urge the parties to the conflict in Darfur to cease the violence and atrocities and to resume political negotiations immediately in order to reach a political settlement peacefully.

As we all know, the contributions of the African Union have been and remain integral to the peaceful resolution of the conflict in Darfur. We commend the African Union and its leadership for their continued mission in Darfur. We continue to encourage the African mission in the Sudan to quickly ramp up its authorized force level to enable it to expand its areas of

patrol. We continue to strongly support the African Union's efforts to resolve the conflict in Darfur and urge all Member States to contribute to the mission.

We strongly support bringing to justice those responsible for the crimes and atrocities that have occurred in Darfur and ending the climate of impunity there. Violators of international humanitarian law and human rights law must be held accountable. In September, we concluded that genocide had occurred in Darfur and we called for and supported the creation of the International Commission of Inquiry. United Nations estimates are that 180,000 people have died from violence, atrocities and the hunger and disease caused by the conflict. Justice must be served in Darfur.

By adopting this resolution, the international community has established an accountability mechanism for the perpetrators of crimes and atrocities in Darfur. The resolution will refer the situation in Darfur to the International Criminal Court (ICC) for investigation and prosecution. While the United States believes that the better mechanism would have been a hybrid tribunal in Africa, it is important that the international community speak with one voice in order to help promote effective accountability.

The United States continues to fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute. That strikes at the essence of the nature of sovereignty. Because of our concerns, we do not agree to a Security Council referral of the situation in Darfur to the ICC and abstained in the voting on today's resolution. We decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in the Sudan and because the resolution provides protection from investigation or prosecution for United States nationals and members of the armed forces of non-State parties.

The United States is and will continue to be an important contributor to the peacekeeping and related humanitarian efforts in the Sudan. The language providing protection for the United States and other contributing States is precedent-setting, as it clearly acknowledges the concerns of States not party to the Rome Statute and recognizes that persons from those States should not be vulnerable to investigation or prosecution by the ICC, absent consent by those States or a referral by the Security Council. We believe that, in the future, absent consent of the State involved, any investigations or prosecutions of nationals of non-party States should come only pursuant to a decision by the Security Council.

Consistent with our long-standing views about the appropriate role of the Security Council, we expect that, by having the Security Council refer the situation in Darfur to the ICC, firm political oversight of the process will be exercised. The Council's action today plays an important role in that regard. We expect that the Council will continue to exercise such oversight as investigations and prosecutions pursuant to the referral proceed.

Protection from the jurisdiction of the Court should not be viewed as unusual. Indeed, under article 124, even parties to the Rome Statute can opt out from the Court's jurisdiction over war crimes for a period of seven full years, and important supporters of the Court have in fact availed themselves of that opportunity to protect their own personnel. If it is appropriate to afford such protection from the jurisdiction of the Court to States that have agreed to the Rome Statute, it cannot be inappropriate to afford protection to those that have never agreed. It is our view that non-party States should be able to opt out of the Court's jurisdiction, as parties to the Statute can, and the Council should be prepared to take action to that effect as appropriate situations arise in the future.

Although we abstained on this Security Council referral to the ICC, we have not dropped, and indeed continue to maintain, our long-standing and firm objections and concerns regarding the ICC. We believe that the Rome Statute is flawed and does not have sufficient protections from the possibility of politicized prosecutions. We reiterate our fundamental objection to the Rome Statute's assertions that the ICC has jurisdiction over the nationals, including government officials, of States that have not become parties to the Rome Statute. Non-parties have no obligations in connection with that treaty unless otherwise decided by the Security Council, upon which Members of this Organization have conferred primary responsibility for the maintenance of international peace and security.

We are pleased that the resolution recognizes that none of the expenses incurred in connection with the referral will be borne by the United Nations and that,

instead, such costs will be borne by the parties to the Rome Statute and those that contribute voluntarily. That principle is extremely important and we want to be perfectly clear that any effort to retrench on that principle by this or other organizations to which we contribute could result in our withholding funding or taking other action in response. That is a situation that we must avoid.

As is well known, in connection with our concerns about the jurisdiction of the Court and the potential for politicized prosecutions, we have concluded agreements with 99 countries — over half the States Members of this Organization — since the entry into force of the Rome Statute to protect against the possibility of transfer or surrender of United States persons to the Court. We appreciate that the resolution takes note of the existence of those agreements and will continue to pursue additional such agreements with other countries as we move forward.

Recognizing that non-parties have no obligation under the Rome Statute, the resolution recognizes and accepts that the ability of some States to cooperate with the ICC investigation will be restricted in connection with applicable domestic law. For the United States, we are restricted by United States statutes that reflect deep concerns about the Court from providing assistance and support to the ICC.

In the Darfur case, the Council included, at our request, a provision that exempts persons of non-party States in the Sudan from ICC prosecution. We respect the position of those countries that are parties to the Rome Statute of the International Criminal Court, but persons from countries not party that are supporting the United Nations or the African Union's efforts should not be placed in jeopardy. This resolution provides clear protections for United States persons. No United States person supporting the operations in the Sudan will be subject to investigation or prosecution because of this resolution.

That does not mean that there will be immunity for American citizens who act in violation of the law. We will continue to discipline our own people when appropriate.

Let me conclude by reminding everyone that the point of these three resolutions is to help the people of the Sudan. They have suffered through appalling civil conflicts that have resulted in untold suffering. We cannot bring justice to all the victims. What we can do is help the people of the Sudan turn a historic page and enjoy a much, much better future. This month's three Sudan resolutions are designed to help reach that goal.

**Mr. Baali** (Algeria) (*spoke in French*): Algeria reaffirms its firm condemnation of the grave violations of human rights and international humanitarian law committed in Darfur. It also expresses its sympathy for and solidarity with the victims of that tragedy. From the outbreak of the crisis, Algeria has been involved in the international community's efforts to end the suffering of the civilian population and to find a political solution. In that regard, Algeria has spared no effort to support the effective measures taken by the African Union and its Chairman, President Obasanjo, to stabilize the situation and help the parties to find a peaceful solution to that fratricidal conflict.

Algeria firmly believes that fighting impunity is a crucial element for the entrenchment of peace and stability. That need is all the more essential in the case of Darfur because the conflict, which has raged for several years, has damaged relations between the communities. The process of fighting impunity must therefore also aim at restoring harmonious relations between the populations of Darfur and serve the cause of peace.

From our point of view, all steps taken by the international community must seek four equally important objectives. First, they must bring to justice those guilty of crimes through credible, fair and transparent trials. Secondly, they must render justice to the victims by restoring their rights and by compensating them for the moral and material damages they have suffered. Thirdly, the steps taken must promote national reconciliation, a political settlement of the crisis and the strengthening of peace and stability throughout the Sudan. Finally, they must gain the Sudanese people's support for a process in which they are the most important concern and that ensures, in particular, the Government's cooperation, which is essential for bringing that process to completion.

Taking those considerations into account, Algeria believes that the African Union is best placed to take charge of that sensitive and delicate undertaking. We are convinced that the African Union can satisfy the requirements for peace without sacrificing the requirement of justice that we all owe the victims. For, while it is true that there can be no peace without justice, it is equally true that without peace, there will be no justice.

On behalf of the African Union, President Obasanjo made a proposal founded precisely on the desire to reconcile those two fundamental requirements, mindful that utmost prudence must be exercised when taking action. We regret that the members of the Council have declined to study that proposal in depth or to assess it in the light of the possibilities it offers for attaining our common objective of placing the fight against impunity in the service of the strengthening of peace and national reconciliation.

We also underline that one cannot claim to support the African Union and leave to it the task of proposing African solutions suited to the various types of crises the continent has experienced, only to brush aside its proposals to the Council without even deigning to consider them.

In that context, I wish to recall that when the situation in Darfur erupted, only the African Union dared to send soldiers to monitor the ceasefire and protect the civilian population, and that, in the face of a complex crisis, only the African Union was able to persuade the parties to engage in negotiations for a peaceful solution to the conflict.

What is true of the situation in the Sudan is true of all conflicts in Africa, where African heads of State, through often intense mediation, have been able to put an end to conflicts. And it is the African approach, based on justice and reconciliation, that has enabled communities that have ripped one another apart to make the effort, once justice has been served, to learn how to live together once again.

The resolution that has just been adopted took a different approach. My delegation had no choice but to abstain.

I wish to conclude my statement by expressing a regret. I regret that, out of a concern for compromise at all costs and at whatever price, those defending the principle of universal justice have in fact ensured that, in this domain, the use of double standards — of which some have accused the Council — and a two-track justice were most unexpectedly demonstrated.

**Mr. Wang** Guangya (China) (*spoke in Chinese*): The Chinese delegation abstained in the voting on the resolution. We have always closely followed the situation in the Darfur region of the Sudan and support efforts to reach an agreement on an early political settlement of the question of Darfur through the negotiations held under the auspices of the African Union. At the same time, like other members of the international community, we deeply deplore the gross violations of international humanitarian and human rights law in Darfur.

Undoubtedly, the perpetrators must be brought to justice. The question is: What is the most effective and feasible approach in this connection? In addressing the issue of impunity, we believe that, when trying to ensure justice, it is also necessary to make every effort to avoid any negative impact on the political negotiations on Darfur. When punishing the perpetrators, it is also necessary to promote national reconciliation. When trying to solve the question of Darfur, it is also necessary to sustain the hard-won results in the North-South peace process.

Based on that position and out of respect for national judicial sovereignty, we would prefer to see perpetrators of gross violations of human rights stand trial in the Sudanese judicial system. We have noted that the Sudanese judiciary has recently taken legal action against individuals involved. In order to ensure the justice, transparency and credibility of the trials, the international community could provide appropriate technical assistance and necessary monitoring. Of course, the African panel for criminal justice and reconciliation, proposed by Nigeria on behalf of the African Union, could also serve as a way out. We are not in favour of referring the question of Darfur to the International Criminal Court (ICC) without the consent of the Sudanese Government, because we are afraid that that would not only severely complicate efforts to secure an early settlement of the Darfur issue, but also have unforeseeable consequences for the north-south peace process in the Sudan.

It should also be pointed out that China is not a State party to the Rome Statute and has major reservations with regard to certain of its provisions. We cannot accept any exercise of the ICC's jurisdiction against the will of non-State parties, and we would find it difficult to endorse any Security Council authorization of such an exercise of jurisdiction by the ICC.

For those reasons, China had no alternative but to abstain on the draft resolution sponsored by the United Kingdom.

**Ms. Løj** (Denmark): It has been two months since the Security Council received the report of the International Commission of Inquiry regarding the ongoing atrocities in Darfur. The report strongly recommended the referral of the crimes in Darfur to the International Criminal Court (ICC). Throughout the Council's long negotiation process, Denmark has supported that recommendation. The ICC has the mandate, the capacity and the funding necessary to ensure swift and cost-effective prosecution. From that perspective, we are indeed very encouraged that the Council has just adopted a resolution that will bring an internationally recognized follow-up to the reported crimes in Darfur. Any further postponement of this issue would only have weakened confidence in the resolve of the Council.

Denmark recognizes the difficulties that some members have in accepting the compromise text before us. We appreciate the flexibility shown by all parties. Furthermore, Denmark was able to vote in favour of the resolution only after careful consideration of some of the formulations in the text. With regard to the language on exclusive jurisdiction, it is our interpretation that it does not affect the universal jurisdiction of Member States in areas such as war crimes, torture and terrorism. As regards the formulation regarding the existence of the agreements referred to in article 98, paragraph 2, of the Rome Statute, Denmark would like to stress that that reference is purely factual; it is merely referring to the existence of such agreements. Thus, the reference in no way impinges on the integrity of the Rome Statute.

That having been said, we believe that the resolution is a genuine and valid compromise leading to the very first referral of a situation to the ICC by the Security Council. Denmark thus looks forward to seeing the Court take the first important steps towards ending the culture of impunity in Darfur.

**Mr. Baja** (Philippines): This is the third resolution — the third child born of the Security Council's consideration of the situation in the Sudan, in particular Darfur. At this late hour — in the twilight of the Brazilian presidency — we cannot but recall a story that originated in Wales, the home of the sponsor of resolution 1593 (2005). There was a middle-aged couple who had two stunningly beautiful teenage daughters, but who decided to try one last time for the son they had always wanted. After months of trying, the wife became pregnant, and, sure enough, delivered a healthy baby boy nine months later. The happy father rushed to the nursery to see his new son. He took one look at him, but was horrified to find that he was the ugliest child he had ever seen. He went to his wife and said that there was no way that he could have fathered the child. "Look at the two beautiful daughters I fathered", he cried. Then he gave her a stern look, and asked, "Have you been fooling around?" The wife smiled sweetly and said, "Not this time".

We voted for resolution 1593 (2005) in response to the urgency and the gravity of the crimes which the Security Council and the international community are expected and obliged to address. This is a case of choosing between the unborn and an infant whose legitimacy is still being questioned. Any further impasse — any further inaction — on the part of the Council, two months after the report of the Commission of Inquiry, would have reduced this august body to a nadir of irrelevance with regard to ending impunity and responding to the protection of human rights and humanitarian law. It would have been a simple case of copping out.

We do, however, share the concerns of some delegations about the manner in which resolution 1593 (2005) was arrived at. Once again, fault lines in the Council and potential veto threats prevented the emergence of a strong, robust and clear signal from this body — which the Council badly needs these days. Perhaps that is the reason why the call for Security Council reform grows louder as the days go by.

We also believe that the International Criminal Court (ICC) may be a casualty of resolution 1593 (2005). Operative paragraph 6 of the resolution is killing its credibility — softly, perhaps, but killing it nevertheless. We may ask whether the Security Council has the prerogative to mandate the limitation of the jurisdiction of the ICC under the Rome Statute once the exercise of its jurisdiction has advanced. Operative paragraph 6 subtly subsumed the independence of the ICC into the political and diplomatic vagaries of the Security Council. Nevertheless, that eventuality may well be worth the sacrifice if impunity is, indeed, ended in Darfur; if human rights are, indeed, finally protected and promoted; and if, indeed, the rule of law there is upheld. Thus, we voted in favour of resolution 1593 (2005).

**Mr. Oshima** (Japan): My delegation voted in favour of the draft resolution proposed by the United

Kingdom because impunity for serious violations of human rights and crimes against humanity committed in Darfur must not be allowed, and because, in order to bring the perpetrators to justice, Japan supports, in principle, the referral of the case of Darfur to the International Criminal Court (ICC) within the appropriate time frame, although Japan is not a party to the Rome Statute. We wish to record our position, however, that we would have much preferred a Council decision on this matter to have been taken with broader agreement.

Nonetheless, we welcome the fact that, in a spirit of compromise and flexibility, a decision has been taken to address the important issue of impunity. Now that this resolution has been adopted, my Government expects the parties concerned to abide by it and to cooperate in its implementation to bring those responsible to justice.

**Sir Emyr Jones Parry** (United Kingdom): Tonight, by this vote, the Security Council has acted to ensure accountability for the grave crimes committed in Darfur, and I hope to send a salutary warning to anyone intending to commit any further such atrocities.

The United Kingdom welcomes the Council's decision to refer the situation to the International Criminal Court, which is for us the most efficient and effective means available to deal with impunity and to ensure justice for the people of Darfur.

Council members have deeply held differences of view on the issue of the International Criminal Court, which makes the agreement reached today all the more welcome and important. Our discussions have been characterized on all sides by a high degree of commitment and mutual comprehension, and a readiness to cooperate. This outcome will, we hope, serve as a basis for Council decisions on future such occasions and will as such create a durable and generally acceptable basis on which to proceed.

The Council must continue tackling the conflict in Darfur as part of an integrated strategy for dealing with the Sudan as a whole. We therefore welcome the recent adoption of the resolutions on the peace support operation and on measures. We must increase our support for the African Union mission, which is playing such an important role in Darfur. The Secretary-General's report, requested by the Council in resolution 1590 (2005), will be an important element in taking forward this vital agenda.

We must redouble our efforts to ensure safety, security, political progress and peace for the people of Darfur and for the Sudan as a whole. They have suffered enough. They deserve our continuing interest, our help and our support. We believe that the three resolutions that the Council has adopted in the last week constitute a substantial contribution to that end.

**Mr. Mayoral** (Argentina) (*spoke in Spanish*): The Argentine Republic voted in favour of this resolution on the basis of the report submitted to the Security Council by the High Commissioner for Human Rights, which stated clearly that serious violations of human rights and crimes against humanity had been committed and verified in Darfur.

The report stated that there was irrefutable evidence in that respect and that the legal context for dealing with such serious human rights violations was the International Criminal Court, through a referral by the Council to the Court's Prosecutor. Argentina also understands that the International Criminal Court is the proper forum for the international community as a whole to combat impunity wherever it might occur and to bring to justice those responsible for the most serious crimes.

We believe that this resolution allows us to provide strong support to the Court and constitutes a significant step within the United Nations towards ensuring the proper functioning of the international human rights system, for which the Court is, and must be, an essential tool.

We wish to highlight the fact that this is the first time that the Security Council, making use of article 13 of the Rome Statute, has referred to the Prosecutor a situation in which — according to the report, whose veracity we do not doubt — it appears that one or more types of crimes over which the Court has jurisdiction have been committed. We believe that this is undoubtedly a crucial precedent.

We believe that the letter and spirit of the Rome Statute must be respected and that the balance of its provisions must be preserved, taking into account the legitimate concerns of States without weakening in any way the powers of the Court. For that reason, we regret that we had to adopt a text that establishes an exception to the jurisdiction of the Court. It is our hope that this will not become standard practice.

We would like to make it clear that the exception provided for in paragraph 6 should be limited exclusively to those nationals or members of the armed forces of a State that is not party to the Rome Statute that are participating in peacekeeping operations established or authorized by the Security Council.

Finally, we wish to establish clearly that we are against any position or agreement which generically would exclude the nationals of a State from the jurisdiction of the Court, because that would affect the basis for such jurisdiction and thwart the letter and the spirit of the Rome Statute.

**Mr. De La Sablière** (France) (*spoke in French*): France has long been drawing the attention of the Security Council to the situation in Darfur. The events in that region of the Sudan are deeply troubling, and our greatest concern is for the plight of the people there. They are, as we all are aware, the primary victims of this conflict. Furthermore, and this is even more serious, they are its primary targets.

The reports that the Secretary-General has been submitting every month to the Council have provided a detailed picture of those atrocities. Entire villages are being attacked, plundered and destroyed, and their inhabitants are being brutalized, massacred and forcibly driven from their homes.

The Security Council therefore is in duty bound to take action. As we have continually reiterated, its policy must include three elements.

First, there is a need to assist the African Union in strengthening its monitoring and protection system. That is what our Council began to do by adopting resolution 1590 (2005) last week, and that is what we must continue to do speedily and with resolve.

There is also a need to continue to exert pressure on the warring parties to make them fulfil their obligations and to ensure that they arrive at a political settlement of the conflict. That is what our Council did several days ago by adopting resolution 1591 (2005).

Finally, there is a need to put an end to impunity. That was the Council's remaining task.

Alarmed by the magnitude of the atrocities perpetrated in Darfur, the Council had asked an International Commission of Inquiry to investigate the situation. The Commission's report, made public two months ago, confirms that mass violations of human rights and international humanitarian law have taken place. It denounces the crimes against humanity and the war crimes that have occurred. It recommends, given the circumstances, the referral of the situation to the International Criminal Court, which is the sole body with jurisdiction which can impartially, effectively and rapidly bring to trial those who bear major responsibility for those crimes.

The Secretary-General and the High Commissioner for Human Rights pressed the Council to urgently provide a favourable outcome following that recommendation. France, too, believed that referral to the International Criminal Court was the only solution — both because we believe that it is our duty to do right by the victims and because taking such action will prevent the violations from continuing. That is why France took the initiative on this problem and voted in favour of the resolution just adopted by the Council.

France welcomes the historic resolution that has just been adopted. For the first time, the Security Council has referred a situation to the International Criminal Court. Thus, it has sent a twofold and very forceful message not only to all those who have committed or might be tempted to commit atrocities in Darfur, but also to the victims: the international community will not allow those crimes to go unpunished.

The resolution also marks a turning point, for it sends the same message beyond Darfur to the perpetrators of crimes against humanity and war crimes, who until now have all too often escaped justice. The Security Council will remain vigilant to ensure that there is no impunity.

To achieve that result, my country was prepared to recognize — regarding the situation in Darfur and under certain conditions — a jurisdictional immunity vis-à-vis the International Criminal Court for certain nationals or personnel of States not parties to the Rome Statute. Here, I must emphasize that the jurisdictional immunity provided for in the text we have just adopted obviously cannot run counter to other international obligations of States and will be subject, where appropriate, to the interpretation of the courts of my country.

In conclusion, I should like to reaffirm France's confidence in the International Criminal Court and to express the hope that the suspicions — which we

believe to be unfounded — will soon fall away regarding that institution, the symbol of such hope for the victims of atrocities.

**Mr. Vassilakis** (Greece) (*spoke in French*): In the first three months of the year, the Security Council addressed the issue of the Sudan on several occasions. The collective wish of the Council was to see the implementation of the Naivasha Comprehensive Peace Agreement as swiftly as possible. We also succeeded in adopting the resolution establishing the United Nations force to monitor the implementation of the Agreement. In addition, the Security Council reached agreement with regard to the situation in Darfur. Thus, we adopted a resolution on specific measures that, we hope, will help to find a political solution in that region, which has suffered enough.

The last issue that the Security Council had to address was the violation of humanitarian law. It is the issue of impunity, which we must never allow to go unpunished. The issue of violations of humanitarian law is one to which my country attaches very great importance; that is why we are a party to the International Criminal Court. We would have preferred a resolution text without exceptions, but we were guided by our concern that it would be far more important to have a resolution that took into account certain differing views than to have no resolution at all and to allow violations of humanitarian law to go unpunished.

When we address issues in which moderation is given top priority, we achieve positive results. It is in that spirit that we voted in favour of the resolution. We believe that it strengthens the authority of the Security Council in its efforts to promote peace, security, international justice and law in all societies, particularly those in conflict. The resolution also strengthens the authority of the International Criminal Court, which will have the chance to prove itself and show what it can do.

The resolution creates certain exceptions for the specific case of the Sudan for countries not parties to the Statute of the International Criminal Court. That will create certain problems of interpretation regarding the application of the principle of exclusive international jurisdiction. In our view, the resolution does not infringe on that principle, which is firmly rooted in the Statute of the Court and in other international agreements. Despite that, we preferred to vote in favour rather than to allow violations of humanitarian law to go unpunished.

We are sure that the three resolutions adopted by the Security Council this month will help to restore peace in the Sudan and the prosperity of its people.

**Mr. Mahiga** (United Republic of Tanzania): The United Republic of Tanzania voted in favour of the resolution we have just adopted with considerable reservations. The human tragedy in Darfur is a matter of serious concern to us and to Africa, as it is to the international community. In that regard, in the interest of justice and accountability, we believe that further delay in reaching an agreement in the hope of a more desirable outcome would not serve the ends of justice or the aspirations of the people of Darfur to peace, justice and reconciliation. Regrettably, the delay in addressing those expectations has been the result of an undue focus on the mechanism at the expense of addressing urgently the plight of the people of Darfur.

We are relieved that the Council has ultimately taken action on the matter. Tanzania is a State party to the International Criminal Court — a Court established to bring to justice those accused of genocide and other serious crimes against humanity. We strongly believe that the Court is the most appropriate international organ for dealing with the situation in Darfur, as recommended by the Commission of Inquiry. However, we are concerned that the resolution also addresses other issues that are, in our view, extraneous to the imperative at hand. We are therefore unable to accept that the resolution should in any way be interpreted as seeking to circumvent the jurisdiction of the Court. In spite of those shortcomings, it is our hope that the resolution will assist in addressing the issue of impunity in Darfur.

We are gratified that the resolution provides for the possibility of conducting proceedings in Africa as a way of contributing to Africa's efforts to dispense justice and to fight impunity. We also welcome the fact that the resolution recognizes the proposal by Nigeria regarding the need to provide national healing and reconciliation in the Sudan, in cooperation with the African Union and the international community, as appropriate.

It is our hope that the international community will not fail the people of the Sudan as a whole and of Darfur in particular.

**Mr. Motoc** (Romania): I will be brief, not only because we are nearing exhaustion and the hour is late, but also because I feel there is little to add to a vote that speaks for itself in terms of the Council's ability to come together and find solutions to the most intricate matters submitted for its consideration — solutions that are in harmony with our peoples' expectations of a fairer, and hence safer, world at the dawn of the twenty-first century.

Romania deems the adoption of resolution 1593 (2005) at the very end — indeed, at the last minute — of a thoroughly successful Brazilian presidency for the month as a stand against impunity; as an expression of confidence in the ICC's ability effectively to handle complex cases like that which the Council has today referred to it; and as proof that our common resolve to bring an end to impunity in the Sudan and Darfur has ultimately proved stronger than the differences members might have. At the end of the day, what the Council said today is that there is no way, in our times, that anyone, anywhere in the world, can get away without just retribution for the commission of serious crimes.

Like my Greek colleague, we also hold it manifest that, by deciding to refer the case of reported crimes in Darfur to the ICC, the Security Council enhances its conflict prevention and resolution capabilities.

There are two things I consider it important to recall tonight. The first is the debt we owe to the Cassese Commission for making it possible for us to reach this point. The second is that upholding the ICC as we have, by adopting resolution 1593 (2005), will be to no avail unless we remain supportive of the Court as it exercises its prerogatives upon our referral.

**Mr. Denisov** (Russian Federation) (*spoke in Russian*): The members of the Security Council have frequently reaffirmed that the struggle against impunity is one of the most important elements of a long-term political settlement in Darfur and the Sudan as a whole. All who are guilty of gross violations of human rights in Darfur must be duly punished, as is rightly pointed out in the report of the International Commission of Inquiry.

We believe that the resolution adopted today by the Security Council will contribute to an effective solution in the fight against impunity in Darfur in the context of providing for the normalization and stability of the situation in that region of the Sudan.

**Mr. Adechi** (Benin) (*spoke in French*): The vote just taken by the Security Council is a major event in the context of the tireless efforts of the international community to promote the rule of law and to protect humanity against the terrible events witnessed in recent decades. The vote was also in keeping with action by the Council to find a solution to the lethal conflict under way in Darfur.

We regret the fact that the text we have adopted contains a provision of immunity from jurisdiction, which runs counter to the spirit of the Rome Statute.

However, Benin had four reasons for voting in favour of the resolution. First, Benin is party to the treaty establishing the International Criminal Court. Secondly, the ongoing deterioration of the situation in Darfur requires the Security Council to take urgent action to end violations against civilians there. One prerequisite of such action is to end the reign of impunity by providing impartial justice. Thirdly, referring the matter to the International Criminal Court ensures that credible and timely action will be taken against persons charged with atrocities and serious crimes. Fourthly, Benin voted in support of the resolution out of respect for human dignity and the right to life that has been denied to thousands of people in Darfur, to whom the international community owes protection in view of their vulnerability. That obligation has been recognized by the African Union in the Ezulwini Consensus adopted by its Executive Council, meeting in extraordinary session on 7 and 8 March this year. In the Ezulwini Consensus, the African Union recognizes the Security Council's right to exercise its international responsibility to protect a population when that population's Government either cannot or will not do so. The rendering of justice is an element of that obligation.

It is of the highest importance to provide reliable and fair justice that offers equal respect for the rights of victims and their victimizers. We can thereby help the people of the Sudan to achieve their legitimate dream of putting an end to the bloodthirsty conflict as soon as possible and to look to the future with serenity and hope. We can also thereby offer a good foundation for national reconciliation, because the national reconciliation we all wish to see in the Sudan can succeed only if impartial justice is done. In that

respect, we agree with the Commission of Inquiry that it will be up to the Sudanese parties themselves to decide, after broad consultations, on the appropriate mechanism to promote national reconciliation.

**The President**: I shall now make a statement in my capacity as representative of Brazil.

Brazil is in favour of the referral of the situation in Darfur to the International Criminal Court (ICC). Nevertheless, Brazil was not able to join those members that voted in favour of the resolution. We remain committed to bringing to justice those accused of the crimes mentioned in the report of the Commission of Inquiry, and in that sense we are ready to fully cooperate whenever necessary with the International Criminal Court.

The maintenance of international peace and the fight against impunity cannot be viewed as conflicting objectives. Brazil reiterates that the ICC provides all the necessary checks and balances to prevent possible abuses and politically motivated misuse of its jurisdiction. Thus, efforts to secure broader immunities from the jurisdiction of the Court are both unwarranted and unhelpful, in our view.

This is the first time the Council has approved a referral of criminal matters to the International Criminal Court, and that approval offers a rare opportunity for the Council to act promptly in one of the most important issues on the international agenda. However, from our point of view, the referral should not be approved at any cost. Brazil understands that there are limits to negotiating the approval of the referral within the Council, and they refer, first, to the responsibilities of the Council vis-à-vis an international instrument; secondly, to the integrity of the Rome Statute, which now has 98 ratifications; and thirdly, to the consistency of the position we have sustained since the negotiations on the Rome Statute. For those reasons, Brazil abstained in the voting on the resolution on the referral.

As recommended by the report of the International Commission of Inquiry, the ICC remains the only acceptable instance of criminal law for dealing with the issue of accountability in the Sudan. We have exhaustively negotiated a text that could better reflect both the concerns of countries non-parties to the Rome Statute, as well as the commitments of those countries that have ratified that instrument.

For the sake of the referral, Brazil painstakingly agreed during the negotiations upon provisions that presented a serious level of difficulty for my Government, such as the exemption from jurisdiction for nationals of those countries not parties to the Statute, even though — considering the need to approve the referral — Brazil acceded to such a limited immunity. To go further would constitute an inadequate and risky interference of the Council in the constitutional basis of an independent judicial body and a position inconsistent with the principles we have defended in the past on this issue. The text just approved contains a preambular paragraph through which the Council takes note of the existence of agreements referred to in article 98-2 of the Rome Statute. My delegation has difficulty in supporting a reference that not only does not favour the fight against impunity but also stresses a provision whose application has been a highly controversial issue. We understand that it would be a contradiction to mention, in the very text of a referral by the Council to the ICC, measures that limit the jurisdictional activity of the Court.

In addition, Brazil also was not in a position to support operative paragraph 6, through which the Council recognizes the existence of exclusive jurisdiction, a legal exception that is inconsistent in international law.

These are substantial issues that, in our view, will not contribute to strengthening the role of the ICC — which is our aspiration. Brazil has consistently rejected initiatives aimed at extending exemptions of certain categories of individuals from ICC jurisdiction, and we maintain our position to prevent efforts that may have the effect of dismantling the achievements reached in the field of international criminal justice. Both the acceleration and the format of negotiations during the last few days have prevented some delegations from balancing the clear objective of referral to the ICC against the hindrances imposed thereon. Insurmountable constraints thus prevented Brazil from voting in favour of a proposal that we have always understood would be the appropriate instrument to help curb violence and end impunity in Darfur.

I now resume my function as President of the Council.

I give the floor to the representative of the Sudan.

**Mr. Erwa** (Sudan) (*spoke in Arabic*): Once more the Council has persisted in adopting further unwise decisions against my country, which is rewarded for putting an end to the longest conflict in Africa with further sanctions and procedures, which only serve to further complicate the situation on the ground.

The world in its entirety knows full well that the differences that lasted for about two months within the Council over the question of accountability have nothing whatsoever to do with the achievement of stability in Darfur. The disagreement over the International Criminal Court (ICC) is long-standing and well known. There are resolutions regarding the ICC that have been stalled for years. Then the Darfur question came to be used in order to endorse this principle, which has been the subject of controversy for years — and not for the sake of justice. It is a paradox that the language used in bargaining over this resolution was the same language that buffeted the Council before, in another African question, and everyone knows that full well. Justice here is a great good used in the service of evil.

Moreover, the resolution just adopted is full of exceptions, in view of the fact that the State concerned with these exceptions is not party to the ICC. By the same token, we would like to remind the Council that the Sudan also is not party to the ICC. This makes the implementation of a resolution like this fraught with a series of procedural impediments and legitimate reservations as long as the Council believes that the scales of justice and law are based on exceptions and the exploitation of the crises of the developing countries and their affliction with conflicts and civil wars in the settlement of political positions and bargaining among major Powers. The fact remains that the Council today did not settle the question of accountability in Darfur. Rather, it exposed the fact that this Criminal Court was originally intended for developing and weak States, and that it is a tool for the exercise of the culture of superiority and to impose cultural superiority. It is a tool for those who believe that they have a monopoly on virtues on this world, rife with injustice and tyranny.

This august Council, by adopting this resolution, has once again ridden roughshod over the African position. The initiative by Nigeria, in its position as Chair of the African Union, was not even the subject of consideration, let alone the subject of interest, or of consultations — even brief consultations — to evaluate it; this while the African Union is present on the ground in Darfur, where it is playing a role whose effectiveness and efficiency were affirmed by the representative of this Organization in all of his reports. Moreover, this resolution was adopted at a time when the Sudanese judiciary has gone a long way in holding trials. This judiciary is capable and qualified and is resolved to uphold accountability and enforce verdicts, without exception.

We thank those countries that colonized us earlier and taught us laws. But some here wanted to activate the ICC and exploit the question of Darfur as a mere pretext, in spite of knowing that such exploitation of the issues of concern to people and profiting from crises and conflicts simply for political gain and bargaining has nothing to do with justice and humanity, let alone the preservation of international legitimacy and international peace and security, and other such slogans and titles.

Everyone knows that the question of accountability is a long and complicated process that cannot be concluded overnight. While the Council is keen on holding my country to account and to urge it to hold trials and achieve security and stability overnight, in a territory whose area approximates that of Iraq, we find that very same Council continuing to use the policy of double standards. The Council even goes so far as to affirm that exceptions are only for major Powers and that this Court is simply a stick used for weak States and that it is an extension of this Council of yours, which has always adopted resolutions and sanctions only against weak countries, while major Powers and those under their protection ride roughshod over the resolutions of this Council, cynically disregard them and consider them a dead letter.

We hear many expressions here such as “the accountability of the Council” and “confidence in the Council” from the members of this Council. Is there any credibility or confidence left in this Chamber? To the claim made by some that this resolution sends a message to all the parties that no one will now enjoy impunity, I would add — in order to avoid hypocrisy — “Except if he belongs to a certain category of States”.

History is replete with examples of former empires that exercised hegemony and practised colonialism. This Organization was born out of the ruins of the empire of the Third Reich. Perhaps we are

witnessing a new age of hegemony in a new guise — and perhaps history will once again spawn a new international organization out of the ruins of a new empire.

In conclusion, I would like to reiterate — as I indicated in my previous statement — that such unwise resolutions contain provisions that make their implementation practically difficult. Such resolutions will only serve to weaken the prospects for settlement and further complicate an already complex situation.

**The President**: There are no further speakers inscribed on my list.

The Security Council has thus concluded the present stage of its consideration of the item on its agenda. The Council will remain seized of the matter.

*The meeting rose at 11.55 p.m.*

United Nations S/PV.5158

# Security Council

Sixtieth year

*Provisional*

**5158**th meeting

Thursday, 31 March 2005, 10.30 p.m.

New York

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| *President:* | Mr. Sardenberg | (Brazil) |
| *Members:* | Algeria | Mr. Baali |
| | Argentina | Mr. Mayoral |
| | Benin | Mr. Adechi |
| | China | Mr. Wang Guangya |
| | Denmark | Ms. Løj |
| | France | Mr. De La Sablière |
| | Greece | Mr. Vassilakis |
| | Japan | Mr. Oshima |
| | Philippines | Mr. Baja |
| | Romania | Mr. Motoc |
| | Russian Federation | Mr. Denisov |
| | United Kingdom of Great Britain and Northern Ireland | Sir Emyr Jones Parry |
| | United Republic of Tanzania | Mr. Mahiga |
| | United States of America | Mrs. Patterson |

## Agenda

Reports of the Secretary-General on the Sudan

Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council (S/2005/60)

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05-29247 (E)

** 0529247 **

*The meeting was called to order at 10.35 p.m.*

**Adoption of the agenda**

*The agenda was adopted.*

**Reports of the Secretary-General on the Sudan**

**Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council (S/2005/60)**

**The President**: I should like to inform the Council that I have received a letter from the representative of the Sudan, in which he requests to be invited to participate in the consideration of the item on the Council's agenda. In conformity with the usual practice, I propose, with the consent of the Council, to invite that representative to participate in the discussion without the right to vote, in accordance with the relevant provisions of the Charter and rule 37 of the Council's provisional rules of procedure.

There being no objection, it is so decided.

*At the invitation of the President, Mr. Erwa (Sudan) took a seat at the Council table.*

**The President**: The Security Council will now resume its consideration of the item on its agenda.

I welcome the presence of the Secretary-General, Mr. Kofi Annan, at this meeting.

Members of the Council have before them document S/2005/60, containing a letter dated 31 January 2005 from the Secretary-General, transmitting the report of the International Commission of Inquiry on Darfur.

Members of the Council also have before them document S/2005/218, which contains the text of a draft resolution submitted by the United Kingdom of Great Britain and Northern Ireland.

It is my understanding that the Council is ready to proceed to the vote on the draft resolution before it. If I hear no objection, I shall now put the draft resolution to the vote.

There being no objection, it is so decided.

*A vote was taken by show of hands.*

*In favour*:

Argentina, Benin, Denmark, France, Greece, Japan, Philippines, Romania, Russian Federation, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania

*Against*:

None

*Abstaining*:

Algeria, Brazil, China, United States of America

**The President**: The result of the voting is as follows: 11 votes in favour, none against and 4 abstentions. The draft resolution has been adopted as resolution 1593 (2005).

I shall now give the floor to those members of the Council who wish to make statements following the voting.

**Mrs. Patterson** (United States of America): Allow me to thank you, Sir, and your delegation for your endeavours during your presidency of the Council this month.

The adoption this month of two resolutions on the Sudan — peacekeeping and sanctions — demonstrates the Council's strong commitment to fostering peace and stability throughout the Sudan. The Council has succeeded in keeping the momentum moving forward on international support for peace in the Sudan. The 10,000-strong peacekeeping force authorized by the Council will assist the parties to the Comprehensive Peace Agreement in implementing that historic peace accord.

The sanctions resolution recognizes that conflict, violence and atrocities in Darfur continue and that the Council must take steps now to pressure the parties to end the violence in Darfur and to conclude a political settlement peacefully. We strongly urge the parties to the conflict in Darfur to cease the violence and atrocities and to resume political negotiations immediately in order to reach a political settlement peacefully.

As we all know, the contributions of the African Union have been and remain integral to the peaceful resolution of the conflict in Darfur. We commend the African Union and its leadership for their continued mission in Darfur. We continue to encourage the African mission in the Sudan to quickly ramp up its authorized force level to enable it to expand its areas of

patrol. We continue to strongly support the African Union's efforts to resolve the conflict in Darfur and urge all Member States to contribute to the mission.

We strongly support bringing to justice those responsible for the crimes and atrocities that have occurred in Darfur and ending the climate of impunity there. Violators of international humanitarian law and human rights law must be held accountable. In September, we concluded that genocide had occurred in Darfur and we called for and supported the creation of the International Commission of Inquiry. United Nations estimates are that 180,000 people have died from violence, atrocities and the hunger and disease caused by the conflict. Justice must be served in Darfur.

By adopting this resolution, the international community has established an accountability mechanism for the perpetrators of crimes and atrocities in Darfur. The resolution will refer the situation in Darfur to the International Criminal Court (ICC) for investigation and prosecution. While the United States believes that the better mechanism would have been a hybrid tribunal in Africa, it is important that the international community speak with one voice in order to help promote effective accountability.

The United States continues to fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute. That strikes at the essence of the nature of sovereignty. Because of our concerns, we do not agree to a Security Council referral of the situation in Darfur to the ICC and abstained in the voting on today's resolution. We decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in the Sudan and because the resolution provides protection from investigation or prosecution for United States nationals and members of the armed forces of non-State parties.

The United States is and will continue to be an important contributor to the peacekeeping and related humanitarian efforts in the Sudan. The language providing protection for the United States and other contributing States is precedent-setting, as it clearly acknowledges the concerns of States not party to the Rome Statute and recognizes that persons from those States should not be vulnerable to investigation or prosecution by the ICC, absent consent by those States or a referral by the Security Council. We believe that, in the future, absent consent of the State involved, any investigations or prosecutions of nationals of non-party States should come only pursuant to a decision by the Security Council.

Consistent with our long-standing views about the appropriate role of the Security Council, we expect that, by having the Security Council refer the situation in Darfur to the ICC, firm political oversight of the process will be exercised. The Council's action today plays an important role in that regard. We expect that the Council will continue to exercise such oversight as investigations and prosecutions pursuant to the referral proceed.

Protection from the jurisdiction of the Court should not be viewed as unusual. Indeed, under article 124, even parties to the Rome Statute can opt out from the Court's jurisdiction over war crimes for a period of seven full years, and important supporters of the Court have in fact availed themselves of that opportunity to protect their own personnel. If it is appropriate to afford such protection from the jurisdiction of the Court to States that have agreed to the Rome Statute, it cannot be inappropriate to afford protection to those that have never agreed. It is our view that non-party States should be able to opt out of the Court's jurisdiction, as parties to the Statute can, and the Council should be prepared to take action to that effect as appropriate situations arise in the future.

Although we abstained on this Security Council referral to the ICC, we have not dropped, and indeed continue to maintain, our long-standing and firm objections and concerns regarding the ICC. We believe that the Rome Statute is flawed and does not have sufficient protections from the possibility of politicized prosecutions. We reiterate our fundamental objection to the Rome Statute's assertions that the ICC has jurisdiction over the nationals, including government officials, of States that have not become parties to the Rome Statute. Non-parties have no obligations in connection with that treaty unless otherwise decided by the Security Council, upon which Members of this Organization have conferred primary responsibility for the maintenance of international peace and security.

We are pleased that the resolution recognizes that none of the expenses incurred in connection with the referral will be borne by the United Nations and that,

instead, such costs will be borne by the parties to the Rome Statute and those that contribute voluntarily. That principle is extremely important and we want to be perfectly clear that any effort to retrench on that principle by this or other organizations to which we contribute could result in our withholding funding or taking other action in response. That is a situation that we must avoid.

As is well known, in connection with our concerns about the jurisdiction of the Court and the potential for politicized prosecutions, we have concluded agreements with 99 countries — over half the States Members of this Organization — since the entry into force of the Rome Statute to protect against the possibility of transfer or surrender of United States persons to the Court. We appreciate that the resolution takes note of the existence of those agreements and will continue to pursue additional such agreements with other countries as we move forward.

Recognizing that non-parties have no obligation under the Rome Statute, the resolution recognizes and accepts that the ability of some States to cooperate with the ICC investigation will be restricted in connection with applicable domestic law. For the United States, we are restricted by United States statutes that reflect deep concerns about the Court from providing assistance and support to the ICC.

In the Darfur case, the Council included, at our request, a provision that exempts persons of non-party States in the Sudan from ICC prosecution. We respect the position of those countries that are parties to the Rome Statute of the International Criminal Court, but persons from countries not party that are supporting the United Nations or the African Union's efforts should not be placed in jeopardy. This resolution provides clear protections for United States persons. No United States person supporting the operations in the Sudan will be subject to investigation or prosecution because of this resolution.

That does not mean that there will be immunity for American citizens who act in violation of the law. We will continue to discipline our own people when appropriate.

Let me conclude by reminding everyone that the point of these three resolutions is to help the people of the Sudan. They have suffered through appalling civil conflicts that have resulted in untold suffering. We cannot bring justice to all the victims. What we can do is help the people of the Sudan turn a historic page and enjoy a much, much better future. This month's three Sudan resolutions are designed to help reach that goal.

**Mr. Baali** (Algeria) (*spoke in French*): Algeria reaffirms its firm condemnation of the grave violations of human rights and international humanitarian law committed in Darfur. It also expresses its sympathy for and solidarity with the victims of that tragedy. From the outbreak of the crisis, Algeria has been involved in the international community's efforts to end the suffering of the civilian population and to find a political solution. In that regard, Algeria has spared no effort to support the effective measures taken by the African Union and its Chairman, President Obasanjo, to stabilize the situation and help the parties to find a peaceful solution to that fratricidal conflict.

Algeria firmly believes that fighting impunity is a crucial element for the entrenchment of peace and stability. That need is all the more essential in the case of Darfur because the conflict, which has raged for several years, has damaged relations between the communities. The process of fighting impunity must therefore also aim at restoring harmonious relations between the populations of Darfur and serve the cause of peace.

From our point of view, all steps taken by the international community must seek four equally important objectives. First, they must bring to justice those guilty of crimes through credible, fair and transparent trials. Secondly, they must render justice to the victims by restoring their rights and by compensating them for the moral and material damages they have suffered. Thirdly, the steps taken must promote national reconciliation, a political settlement of the crisis and the strengthening of peace and stability throughout the Sudan. Finally, they must gain the Sudanese people's support for a process in which they are the most important concern and that ensures, in particular, the Government's cooperation, which is essential for bringing that process to completion.

Taking those considerations into account, Algeria believes that the African Union is best placed to take charge of that sensitive and delicate undertaking. We are convinced that the African Union can satisfy the requirements for peace without sacrificing the requirement of justice that we all owe the victims. For, while it is true that there can be no peace without justice, it is equally true that without peace, there will be no justice.

On behalf of the African Union, President Obasanjo made a proposal founded precisely on the desire to reconcile those two fundamental requirements, mindful that utmost prudence must be exercised when taking action. We regret that the members of the Council have declined to study that proposal in depth or to assess it in the light of the possibilities it offers for attaining our common objective of placing the fight against impunity in the service of the strengthening of peace and national reconciliation.

We also underline that one cannot claim to support the African Union and leave to it the task of proposing African solutions suited to the various types of crises the continent has experienced, only to brush aside its proposals to the Council without even deigning to consider them.

In that context, I wish to recall that when the situation in Darfur erupted, only the African Union dared to send soldiers to monitor the ceasefire and protect the civilian population, and that, in the face of a complex crisis, only the African Union was able to persuade the parties to engage in negotiations for a peaceful solution to the conflict.

What is true of the situation in the Sudan is true of all conflicts in Africa, where African heads of State, through often intense mediation, have been able to put an end to conflicts. And it is the African approach, based on justice and reconciliation, that has enabled communities that have ripped one another apart to make the effort, once justice has been served, to learn how to live together once again.

The resolution that has just been adopted took a different approach. My delegation had no choice but to abstain.

I wish to conclude my statement by expressing a regret. I regret that, out of a concern for compromise at all costs and at whatever price, those defending the principle of universal justice have in fact ensured that, in this domain, the use of double standards — of which some have accused the Council — and a two-track justice were most unexpectedly demonstrated.

**Mr. Wang** Guangya (China) (*spoke in Chinese*): The Chinese delegation abstained in the voting on the resolution. We have always closely followed the situation in the Darfur region of the Sudan and support efforts to reach an agreement on an early political settlement of the question of Darfur through the negotiations held under the auspices of the African Union. At the same time, like other members of the international community, we deeply deplore the gross violations of international humanitarian and human rights law in Darfur.

Undoubtedly, the perpetrators must be brought to justice. The question is: What is the most effective and feasible approach in this connection? In addressing the issue of impunity, we believe that, when trying to ensure justice, it is also necessary to make every effort to avoid any negative impact on the political negotiations on Darfur. When punishing the perpetrators, it is also necessary to promote national reconciliation. When trying to solve the question of Darfur, it is also necessary to sustain the hard-won results in the North-South peace process.

Based on that position and out of respect for national judicial sovereignty, we would prefer to see perpetrators of gross violations of human rights stand trial in the Sudanese judicial system. We have noted that the Sudanese judiciary has recently taken legal action against individuals involved. In order to ensure the justice, transparency and credibility of the trials, the international community could provide appropriate technical assistance and necessary monitoring. Of course, the African panel for criminal justice and reconciliation, proposed by Nigeria on behalf of the African Union, could also serve as a way out. We are not in favour of referring the question of Darfur to the International Criminal Court (ICC) without the consent of the Sudanese Government, because we are afraid that that would not only severely complicate efforts to secure an early settlement of the Darfur issue, but also have unforeseeable consequences for the north-south peace process in the Sudan.

It should also be pointed out that China is not a State party to the Rome Statute and has major reservations with regard to certain of its provisions. We cannot accept any exercise of the ICC's jurisdiction against the will of non-State parties, and we would find it difficult to endorse any Security Council authorization of such an exercise of jurisdiction by the ICC.

For those reasons, China had no alternative but to abstain on the draft resolution sponsored by the United Kingdom.

**Ms. Løj** (Denmark): It has been two months since the Security Council received the report of the International Commission of Inquiry regarding the ongoing atrocities in Darfur. The report strongly recommended the referral of the crimes in Darfur to the International Criminal Court (ICC). Throughout the Council's long negotiation process, Denmark has supported that recommendation. The ICC has the mandate, the capacity and the funding necessary to ensure swift and cost-effective prosecution. From that perspective, we are indeed very encouraged that the Council has just adopted a resolution that will bring an internationally recognized follow-up to the reported crimes in Darfur. Any further postponement of this issue would only have weakened confidence in the resolve of the Council.

Denmark recognizes the difficulties that some members have in accepting the compromise text before us. We appreciate the flexibility shown by all parties. Furthermore, Denmark was able to vote in favour of the resolution only after careful consideration of some of the formulations in the text. With regard to the language on exclusive jurisdiction, it is our interpretation that it does not affect the universal jurisdiction of Member States in areas such as war crimes, torture and terrorism. As regards the formulation regarding the existence of the agreements referred to in article 98, paragraph 2, of the Rome Statute, Denmark would like to stress that that reference is purely factual; it is merely referring to the existence of such agreements. Thus, the reference in no way impinges on the integrity of the Rome Statute.

That having been said, we believe that the resolution is a genuine and valid compromise leading to the very first referral of a situation to the ICC by the Security Council. Denmark thus looks forward to seeing the Court take the first important steps towards ending the culture of impunity in Darfur.

**Mr. Baja** (Philippines): This is the third resolution — the third child born of the Security Council's consideration of the situation in the Sudan, in particular Darfur. At this late hour — in the twilight of the Brazilian presidency — we cannot but recall a story that originated in Wales, the home of the sponsor of resolution 1593 (2005). There was a middle-aged couple who had two stunningly beautiful teenage daughters, but who decided to try one last time for the son they had always wanted. After months of trying, the wife became pregnant, and, sure enough, delivered a healthy baby boy nine months later. The happy father rushed to the nursery to see his new son. He took one look at him, but was horrified to find that he was the ugliest child he had ever seen. He went to his wife and said that there was no way that he could have fathered the child. "Look at the two beautiful daughters I fathered", he cried. Then he gave her a stern look, and asked, "Have you been fooling around?" The wife smiled sweetly and said, "Not this time".

We voted for resolution 1593 (2005) in response to the urgency and the gravity of the crimes which the Security Council and the international community are expected and obliged to address. This is a case of choosing between the unborn and an infant whose legitimacy is still being questioned. Any further impasse — any further inaction — on the part of the Council, two months after the report of the Commission of Inquiry, would have reduced this august body to a nadir of irrelevance with regard to ending impunity and responding to the protection of human rights and humanitarian law. It would have been a simple case of copping out.

We do, however, share the concerns of some delegations about the manner in which resolution 1593 (2005) was arrived at. Once again, fault lines in the Council and potential veto threats prevented the emergence of a strong, robust and clear signal from this body — which the Council badly needs these days. Perhaps that is the reason why the call for Security Council reform grows louder as the days go by.

We also believe that the International Criminal Court (ICC) may be a casualty of resolution 1593 (2005). Operative paragraph 6 of the resolution is killing its credibility — softly, perhaps, but killing it nevertheless. We may ask whether the Security Council has the prerogative to mandate the limitation of the jurisdiction of the ICC under the Rome Statute once the exercise of its jurisdiction has advanced. Operative paragraph 6 subtly subsumed the independence of the ICC into the political and diplomatic vagaries of the Security Council. Nevertheless, that eventuality may well be worth the sacrifice if impunity is, indeed, ended in Darfur; if human rights are, indeed, finally protected and promoted; and if, indeed, the rule of law there is upheld. Thus, we voted in favour of resolution 1593 (2005).

**Mr. Oshima** (Japan): My delegation voted in favour of the draft resolution proposed by the United

Kingdom because impunity for serious violations of human rights and crimes against humanity committed in Darfur must not be allowed, and because, in order to bring the perpetrators to justice, Japan supports, in principle, the referral of the case of Darfur to the International Criminal Court (ICC) within the appropriate time frame, although Japan is not a party to the Rome Statute. We wish to record our position, however, that we would have much preferred a Council decision on this matter to have been taken with broader agreement.

Nonetheless, we welcome the fact that, in a spirit of compromise and flexibility, a decision has been taken to address the important issue of impunity. Now that this resolution has been adopted, my Government expects the parties concerned to abide by it and to cooperate in its implementation to bring those responsible to justice.

**Sir Emyr Jones Parry** (United Kingdom): Tonight, by this vote, the Security Council has acted to ensure accountability for the grave crimes committed in Darfur, and I hope to send a salutary warning to anyone intending to commit any further such atrocities.

The United Kingdom welcomes the Council's decision to refer the situation to the International Criminal Court, which is for us the most efficient and effective means available to deal with impunity and to ensure justice for the people of Darfur.

Council members have deeply held differences of view on the issue of the International Criminal Court, which makes the agreement reached today all the more welcome and important. Our discussions have been characterized on all sides by a high degree of commitment and mutual comprehension, and a readiness to cooperate. This outcome will, we hope, serve as a basis for Council decisions on future such occasions and will as such create a durable and generally acceptable basis on which to proceed.

The Council must continue tackling the conflict in Darfur as part of an integrated strategy for dealing with the Sudan as a whole. We therefore welcome the recent adoption of the resolutions on the peace support operation and on measures. We must increase our support for the African Union mission, which is playing such an important role in Darfur. The Secretary-General's report, requested by the Council in resolution 1590 (2005), will be an important element in taking forward this vital agenda.

We must redouble our efforts to ensure safety, security, political progress and peace for the people of Darfur and for the Sudan as a whole. They have suffered enough. They deserve our continuing interest, our help and our support. We believe that the three resolutions that the Council has adopted in the last week constitute a substantial contribution to that end.

**Mr. Mayoral** (Argentina) (*spoke in Spanish*): The Argentine Republic voted in favour of this resolution on the basis of the report submitted to the Security Council by the High Commissioner for Human Rights, which stated clearly that serious violations of human rights and crimes against humanity had been committed and verified in Darfur.

The report stated that there was irrefutable evidence in that respect and that the legal context for dealing with such serious human rights violations was the International Criminal Court, through a referral by the Council to the Court's Prosecutor. Argentina also understands that the International Criminal Court is the proper forum for the international community as a whole to combat impunity wherever it might occur and to bring to justice those responsible for the most serious crimes.

We believe that this resolution allows us to provide strong support to the Court and constitutes a significant step within the United Nations towards ensuring the proper functioning of the international human rights system, for which the Court is, and must be, an essential tool.

We wish to highlight the fact that this is the first time that the Security Council, making use of article 13 of the Rome Statute, has referred to the Prosecutor a situation in which — according to the report, whose veracity we do not doubt — it appears that one or more types of crimes over which the Court has jurisdiction have been committed. We believe that this is undoubtedly a crucial precedent.

We believe that the letter and spirit of the Rome Statute must be respected and that the balance of its provisions must be preserved, taking into account the legitimate concerns of States without weakening in any way the powers of the Court. For that reason, we regret that we had to adopt a text that establishes an exception to the jurisdiction of the Court. It is our hope that this will not become standard practice.

We would like to make it clear that the exception provided for in paragraph 6 should be limited exclusively to those nationals or members of the armed forces of a State that is not party to the Rome Statute that are participating in peacekeeping operations established or authorized by the Security Council.

Finally, we wish to establish clearly that we are against any position or agreement which generically would exclude the nationals of a State from the jurisdiction of the Court, because that would affect the basis for such jurisdiction and thwart the letter and the spirit of the Rome Statute.

**Mr. De La Sablière** (France) (*spoke in French*): France has long been drawing the attention of the Security Council to the situation in Darfur. The events in that region of the Sudan are deeply troubling, and our greatest concern is for the plight of the people there. They are, as we all are aware, the primary victims of this conflict. Furthermore, and this is even more serious, they are its primary targets.

The reports that the Secretary-General has been submitting every month to the Council have provided a detailed picture of those atrocities. Entire villages are being attacked, plundered and destroyed, and their inhabitants are being brutalized, massacred and forcibly driven from their homes.

The Security Council therefore is in duty bound to take action. As we have continually reiterated, its policy must include three elements.

First, there is a need to assist the African Union in strengthening its monitoring and protection system. That is what our Council began to do by adopting resolution 1590 (2005) last week, and that is what we must continue to do speedily and with resolve.

There is also a need to continue to exert pressure on the warring parties to make them fulfil their obligations and to ensure that they arrive at a political settlement of the conflict. That is what our Council did several days ago by adopting resolution 1591 (2005).

Finally, there is a need to put an end to impunity. That was the Council's remaining task.

Alarmed by the magnitude of the atrocities perpetrated in Darfur, the Council had asked an International Commission of Inquiry to investigate the situation. The Commission's report, made public two months ago, confirms that mass violations of human rights and international humanitarian law have taken place. It denounces the crimes against humanity and the war crimes that have occurred. It recommends, given the circumstances, the referral of the situation to the International Criminal Court, which is the sole body with jurisdiction which can impartially, effectively and rapidly bring to trial those who bear major responsibility for those crimes.

The Secretary-General and the High Commissioner for Human Rights pressed the Council to urgently provide a favourable outcome following that recommendation. France, too, believed that referral to the International Criminal Court was the only solution — both because we believe that it is our duty to do right by the victims and because taking such action will prevent the violations from continuing. That is why France took the initiative on this problem and voted in favour of the resolution just adopted by the Council.

France welcomes the historic resolution that has just been adopted. For the first time, the Security Council has referred a situation to the International Criminal Court. Thus, it has sent a twofold and very forceful message not only to all those who have committed or might be tempted to commit atrocities in Darfur, but also to the victims: the international community will not allow those crimes to go unpunished.

The resolution also marks a turning point, for it sends the same message beyond Darfur to the perpetrators of crimes against humanity and war crimes, who until now have all too often escaped justice. The Security Council will remain vigilant to ensure that there is no impunity.

To achieve that result, my country was prepared to recognize — regarding the situation in Darfur and under certain conditions — a jurisdictional immunity vis-à-vis the International Criminal Court for certain nationals or personnel of States not parties to the Rome Statute. Here, I must emphasize that the jurisdictional immunity provided for in the text we have just adopted obviously cannot run counter to other international obligations of States and will be subject, where appropriate, to the interpretation of the courts of my country.

In conclusion, I should like to reaffirm France's confidence in the International Criminal Court and to express the hope that the suspicions — which we

believe to be unfounded — will soon fall away regarding that institution, the symbol of such hope for the victims of atrocities.

**Mr. Vassilakis** (Greece) (*spoke in French*): In the first three months of the year, the Security Council addressed the issue of the Sudan on several occasions. The collective wish of the Council was to see the implementation of the Naivasha Comprehensive Peace Agreement as swiftly as possible. We also succeeded in adopting the resolution establishing the United Nations force to monitor the implementation of the Agreement. In addition, the Security Council reached agreement with regard to the situation in Darfur. Thus, we adopted a resolution on specific measures that, we hope, will help to find a political solution in that region, which has suffered enough.

The last issue that the Security Council had to address was the violation of humanitarian law. It is the issue of impunity, which we must never allow to go unpunished. The issue of violations of humanitarian law is one to which my country attaches very great importance; that is why we are a party to the International Criminal Court. We would have preferred a resolution text without exceptions, but we were guided by our concern that it would be far more important to have a resolution that took into account certain differing views than to have no resolution at all and to allow violations of humanitarian law to go unpunished.

When we address issues in which moderation is given top priority, we achieve positive results. It is in that spirit that we voted in favour of the resolution. We believe that it strengthens the authority of the Security Council in its efforts to promote peace, security, international justice and law in all societies, particularly those in conflict. The resolution also strengthens the authority of the International Criminal Court, which will have the chance to prove itself and show what it can do.

The resolution creates certain exceptions for the specific case of the Sudan for countries not parties to the Statute of the International Criminal Court. That will create certain problems of interpretation regarding the application of the principle of exclusive international jurisdiction. In our view, the resolution does not infringe on that principle, which is firmly rooted in the Statute of the Court and in other international agreements. Despite that, we preferred to vote in favour rather than to allow violations of humanitarian law to go unpunished.

We are sure that the three resolutions adopted by the Security Council this month will help to restore peace in the Sudan and the prosperity of its people.

**Mr. Mahiga** (United Republic of Tanzania): The United Republic of Tanzania voted in favour of the resolution we have just adopted with considerable reservations. The human tragedy in Darfur is a matter of serious concern to us and to Africa, as it is to the international community. In that regard, in the interest of justice and accountability, we believe that further delay in reaching an agreement in the hope of a more desirable outcome would not serve the ends of justice or the aspirations of the people of Darfur to peace, justice and reconciliation. Regrettably, the delay in addressing those expectations has been the result of an undue focus on the mechanism at the expense of addressing urgently the plight of the people of Darfur.

We are relieved that the Council has ultimately taken action on the matter. Tanzania is a State party to the International Criminal Court — a Court established to bring to justice those accused of genocide and other serious crimes against humanity. We strongly believe that the Court is the most appropriate international organ for dealing with the situation in Darfur, as recommended by the Commission of Inquiry. However, we are concerned that the resolution also addresses other issues that are, in our view, extraneous to the imperative at hand. We are therefore unable to accept that the resolution should in any way be interpreted as seeking to circumvent the jurisdiction of the Court. In spite of those shortcomings, it is our hope that the resolution will assist in addressing the issue of impunity in Darfur.

We are gratified that the resolution provides for the possibility of conducting proceedings in Africa as a way of contributing to Africa's efforts to dispense justice and to fight impunity. We also welcome the fact that the resolution recognizes the proposal by Nigeria regarding the need to provide national healing and reconciliation in the Sudan, in cooperation with the African Union and the international community, as appropriate.

It is our hope that the international community will not fail the people of the Sudan as a whole and of Darfur in particular.

**Mr. Motoc** (Romania): I will be brief, not only because we are nearing exhaustion and the hour is late, but also because I feel there is little to add to a vote that speaks for itself in terms of the Council's ability to come together and find solutions to the most intricate matters submitted for its consideration — solutions that are in harmony with our peoples' expectations of a fairer, and hence safer, world at the dawn of the twenty-first century.

Romania deems the adoption of resolution 1593 (2005) at the very end — indeed, at the last minute — of a thoroughly successful Brazilian presidency for the month as a stand against impunity; as an expression of confidence in the ICC's ability effectively to handle complex cases like that which the Council has today referred to it; and as proof that our common resolve to bring an end to impunity in the Sudan and Darfur has ultimately proved stronger than the differences members might have. At the end of the day, what the Council said today is that there is no way, in our times, that anyone, anywhere in the world, can get away without just retribution for the commission of serious crimes.

Like my Greek colleague, we also hold it manifest that, by deciding to refer the case of reported crimes in Darfur to the ICC, the Security Council enhances its conflict prevention and resolution capabilities.

There are two things I consider it important to recall tonight. The first is the debt we owe to the Cassese Commission for making it possible for us to reach this point. The second is that upholding the ICC as we have, by adopting resolution 1593 (2005), will be to no avail unless we remain supportive of the Court as it exercises its prerogatives upon our referral.

**Mr. Denisov** (Russian Federation) (*spoke in Russian*): The members of the Security Council have frequently reaffirmed that the struggle against impunity is one of the most important elements of a long-term political settlement in Darfur and the Sudan as a whole. All who are guilty of gross violations of human rights in Darfur must be duly punished, as is rightly pointed out in the report of the International Commission of Inquiry.

We believe that the resolution adopted today by the Security Council will contribute to an effective solution in the fight against impunity in Darfur in the context of providing for the normalization and stability of the situation in that region of the Sudan.

**Mr. Adechi** (Benin) (*spoke in French*): The vote just taken by the Security Council is a major event in the context of the tireless efforts of the international community to promote the rule of law and to protect humanity against the terrible events witnessed in recent decades. The vote was also in keeping with action by the Council to find a solution to the lethal conflict under way in Darfur.

We regret the fact that the text we have adopted contains a provision of immunity from jurisdiction, which runs counter to the spirit of the Rome Statute.

However, Benin had four reasons for voting in favour of the resolution. First, Benin is party to the treaty establishing the International Criminal Court. Secondly, the ongoing deterioration of the situation in Darfur requires the Security Council to take urgent action to end violations against civilians there. One prerequisite of such action is to end the reign of impunity by providing impartial justice. Thirdly, referring the matter to the International Criminal Court ensures that credible and timely action will be taken against persons charged with atrocities and serious crimes. Fourthly, Benin voted in support of the resolution out of respect for human dignity and the right to life that has been denied to thousands of people in Darfur, to whom the international community owes protection in view of their vulnerability. That obligation has been recognized by the African Union in the Ezulwini Consensus adopted by its Executive Council, meeting in extraordinary session on 7 and 8 March this year. In the Ezulwini Consensus, the African Union recognizes the Security Council's right to exercise its international responsibility to protect a population when that population's Government either cannot or will not do so. The rendering of justice is an element of that obligation.

It is of the highest importance to provide reliable and fair justice that offers equal respect for the rights of victims and their victimizers. We can thereby help the people of the Sudan to achieve their legitimate dream of putting an end to the bloodthirsty conflict as soon as possible and to look to the future with serenity and hope. We can also thereby offer a good foundation for national reconciliation, because the national reconciliation we all wish to see in the Sudan can succeed only if impartial justice is done. In that

respect, we agree with the Commission of Inquiry that it will be up to the Sudanese parties themselves to decide, after broad consultations, on the appropriate mechanism to promote national reconciliation.

**The President**: I shall now make a statement in my capacity as representative of Brazil.

Brazil is in favour of the referral of the situation in Darfur to the International Criminal Court (ICC). Nevertheless, Brazil was not able to join those members that voted in favour of the resolution. We remain committed to bringing to justice those accused of the crimes mentioned in the report of the Commission of Inquiry, and in that sense we are ready to fully cooperate whenever necessary with the International Criminal Court.

The maintenance of international peace and the fight against impunity cannot be viewed as conflicting objectives. Brazil reiterates that the ICC provides all the necessary checks and balances to prevent possible abuses and politically motivated misuse of its jurisdiction. Thus, efforts to secure broader immunities from the jurisdiction of the Court are both unwarranted and unhelpful, in our view.

This is the first time the Council has approved a referral of criminal matters to the International Criminal Court, and that approval offers a rare opportunity for the Council to act promptly in one of the most important issues on the international agenda. However, from our point of view, the referral should not be approved at any cost. Brazil understands that there are limits to negotiating the approval of the referral within the Council, and they refer, first, to the responsibilities of the Council vis-à-vis an international instrument; secondly, to the integrity of the Rome Statute, which now has 98 ratifications; and thirdly, to the consistency of the position we have sustained since the negotiations on the Rome Statute. For those reasons, Brazil abstained in the voting on the resolution on the referral.

As recommended by the report of the International Commission of Inquiry, the ICC remains the only acceptable instance of criminal law for dealing with the issue of accountability in the Sudan. We have exhaustively negotiated a text that could better reflect both the concerns of countries non-parties to the Rome Statute, as well as the commitments of those countries that have ratified that instrument.

For the sake of the referral, Brazil painstakingly agreed during the negotiations upon provisions that presented a serious level of difficulty for my Government, such as the exemption from jurisdiction for nationals of those countries not parties to the Statute, even though — considering the need to approve the referral — Brazil acceded to such a limited immunity. To go further would constitute an inadequate and risky interference of the Council in the constitutional basis of an independent judicial body and a position inconsistent with the principles we have defended in the past on this issue. The text just approved contains a preambular paragraph through which the Council takes note of the existence of agreements referred to in article 98-2 of the Rome Statute. My delegation has difficulty in supporting a reference that not only does not favour the fight against impunity but also stresses a provision whose application has been a highly controversial issue. We understand that it would be a contradiction to mention, in the very text of a referral by the Council to the ICC, measures that limit the jurisdictional activity of the Court.

In addition, Brazil also was not in a position to support operative paragraph 6, through which the Council recognizes the existence of exclusive jurisdiction, a legal exception that is inconsistent in international law.

These are substantial issues that, in our view, will not contribute to strengthening the role of the ICC — which is our aspiration. Brazil has consistently rejected initiatives aimed at extending exemptions of certain categories of individuals from ICC jurisdiction, and we maintain our position to prevent efforts that may have the effect of dismantling the achievements reached in the field of international criminal justice. Both the acceleration and the format of negotiations during the last few days have prevented some delegations from balancing the clear objective of referral to the ICC against the hindrances imposed thereon. Insurmountable constraints thus prevented Brazil from voting in favour of a proposal that we have always understood would be the appropriate instrument to help curb violence and end impunity in Darfur.

I now resume my function as President of the Council.

I give the floor to the representative of the Sudan.

**Mr. Erwa** (Sudan) (*spoke in Arabic*): Once more the Council has persisted in adopting further unwise decisions against my country, which is rewarded for putting an end to the longest conflict in Africa with further sanctions and procedures, which only serve to further complicate the situation on the ground.

The world in its entirety knows full well that the differences that lasted for about two months within the Council over the question of accountability have nothing whatsoever to do with the achievement of stability in Darfur. The disagreement over the International Criminal Court (ICC) is long-standing and well known. There are resolutions regarding the ICC that have been stalled for years. Then the Darfur question came to be used in order to endorse this principle, which has been the subject of controversy for years — and not for the sake of justice. It is a paradox that the language used in bargaining over this resolution was the same language that buffeted the Council before, in another African question, and everyone knows that full well. Justice here is a great good used in the service of evil.

Moreover, the resolution just adopted is full of exceptions, in view of the fact that the State concerned with these exceptions is not party to the ICC. By the same token, we would like to remind the Council that the Sudan also is not party to the ICC. This makes the implementation of a resolution like this fraught with a series of procedural impediments and legitimate reservations as long as the Council believes that the scales of justice and law are based on exceptions and the exploitation of the crises of the developing countries and their affliction with conflicts and civil wars in the settlement of political positions and bargaining among major Powers. The fact remains that the Council today did not settle the question of accountability in Darfur. Rather, it exposed the fact that this Criminal Court was originally intended for developing and weak States, and that it is a tool for the exercise of the culture of superiority and to impose cultural superiority. It is a tool for those who believe that they have a monopoly on virtues on this world, rife with injustice and tyranny.

This august Council, by adopting this resolution, has once again ridden roughshod over the African position. The initiative by Nigeria, in its position as Chair of the African Union, was not even the subject of consideration, let alone the subject of interest, or of consultations — even brief consultations — to evaluate it; this while the African Union is present on the ground in Darfur, where it is playing a role whose effectiveness and efficiency were affirmed by the representative of this Organization in all of his reports. Moreover, this resolution was adopted at a time when the Sudanese judiciary has gone a long way in holding trials. This judiciary is capable and qualified and is resolved to uphold accountability and enforce verdicts, without exception.

We thank those countries that colonized us earlier and taught us laws. But some here wanted to activate the ICC and exploit the question of Darfur as a mere pretext, in spite of knowing that such exploitation of the issues of concern to people and profiting from crises and conflicts simply for political gain and bargaining has nothing to do with justice and humanity, let alone the preservation of international legitimacy and international peace and security, and other such slogans and titles.

Everyone knows that the question of accountability is a long and complicated process that cannot be concluded overnight. While the Council is keen on holding my country to account and to urge it to hold trials and achieve security and stability overnight, in a territory whose area approximates that of Iraq, we find that very same Council continuing to use the policy of double standards. The Council even goes so far as to affirm that exceptions are only for major Powers and that this Court is simply a stick used for weak States and that it is an extension of this Council of yours, which has always adopted resolutions and sanctions only against weak countries, while major Powers and those under their protection ride roughshod over the resolutions of this Council, cynically disregard them and consider them a dead letter.

We hear many expressions here such as “the accountability of the Council” and “confidence in the Council” from the members of this Council. Is there any credibility or confidence left in this Chamber? To the claim made by some that this resolution sends a message to all the parties that no one will now enjoy impunity, I would add — in order to avoid hypocrisy — “Except if he belongs to a certain category of States”.

History is replete with examples of former empires that exercised hegemony and practised colonialism. This Organization was born out of the ruins of the empire of the Third Reich. Perhaps we are

witnessing a new age of hegemony in a new guise — and perhaps history will once again spawn a new international organization out of the ruins of a new empire.

In conclusion, I would like to reiterate — as I indicated in my previous statement — that such unwise resolutions contain provisions that make their implementation practically difficult. Such resolutions will only serve to weaken the prospects for settlement and further complicate an already complex situation.

**The President**: There are no further speakers inscribed on my list.

The Security Council has thus concluded the present stage of its consideration of the item on its agenda. The Council will remain seized of the matter.

*The meeting rose at 11.55 p.m.*

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA *v.* SERBIA AND MONTENEGRO)

**JUDGMENT OF 26 FEBRUARY 2007**

# 2007

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# AFFAIRE RELATIVE À L'APPLICATION DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(BOSNIE-HERZÉGOVINE c. SERBIE-ET-MONTÉNÉGRO)

**ARRÊT DU 26 FÉVRIER 2007**

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JUDGMENT

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA *v.* SERBIA AND MONTENEGRO)

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APPLICATION DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(BOSNIE-HERZÉGOVINE c. SERBIE-ET-MONTÉNÉGRO)

26 FÉVRIER 2007

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## LIST OF ACRONYMS

| *Abbreviation* | *Full name* | *Comments* |
|---|---|---|
| ARBiH | Army of the Republic of Bosnia and Herzegovina | |
| FRY | Federal Republic of Yugoslavia | Name of Serbia and Montenegro between 27 April 1992 (adoption of the Constitution) and 3 February 2003 |
| ICTR | International Criminal Tribunal for Rwanda | |
| ICTY | International Criminal Tribunal for the former Yugoslavia | |
| ILC | International Law Commission | |
| JNA | Yugoslav People's Army | Army of the SFRY (ceased to exist on 27 April 1992, with the creation of the VJ) |
| MUP | Ministarstvo Unutrašnjih Pollova | Ministry of the Interior |
| NATO | North Atlantic Treaty Organization | |
| SFRY | Socialist Federal Republic of Yugoslavia | |
| TO | Teritorijalna Odbrana | Territorial Defence Forces |
| UNHCR | United Nations High Commissioner for Refugees | |
| UNPROFOR | United Nations Protection Force | |
| VJ | Yugoslav Army | Army of the FRY, under the Constitution of 27 April 1992 (succeeded to the JNA) |
| VRS | Army of the Republika Srpska | |

INTERNATIONAL COURT OF JUSTICE

2007
26 February
General List
No. 91

YEAR 2007

**26 February 2007**

# CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA *v.* SERBIA AND MONTENEGRO)

## JUDGMENT

*Present:* *President* HIGGINS; *Vice-President* AL-KHASAWNEH; *Judges* RANJEVA, SHI, KOROMA, OWADA, SIMMA, TOMKA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV; *Judges* ad hoc MAHIOU, KREĆA; *Registrar* COUVREUR.

In the case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide,

*between*

Bosnia and Herzegovina,

represented by

Mr. Sakib Softić,

as Agent;

Mr. Phon van den Biesen, Attorney at Law, Amsterdam,

as Deputy Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the United Nations International Law Commission,

Mr. Thomas M. Franck, Professor Emeritus of Law, New York University School of Law,

Ms Brigitte Stern, Professor at the University of Paris I,

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Mr. Luigi Condorelli, Professor at the Faculty of Law of the University of Florence,
Ms Magda Karagiannakis, B.Ec., LL.B., LL.M., Barrister at Law, Melbourne, Australia,
Ms Joanna Korner Q.C., Barrister at Law, London,
Ms Laura Dauban, LL.B. (Hons),
Mr. Antoine Ollivier, Temporary Lecturer and Research Assistant, University of Paris X-Nanterre,

as Counsel and Advocates;

Mr. Morten Torkildsen, BSc., MSc., Torkildsen Granskin og Rådgivning, Norway,

as Expert Counsel and Advocate;

H.E. Mr. Fuad Šabeta, Ambassador of Bosnia and Herzegovina to the Kingdom of the Netherlands,
Mr. Wim Muller, LL.M., M.A.,
Mr. Mauro Barelli, LL.M. (University of Bristol),
Mr. Ermin Sarajlija, LL.M.,
Mr. Amir Bajrić, LL.M.,
Ms Amra Mehmedić, LL.M.,
Ms Isabelle Moulier, Research Student in International Law, University of Paris I,
Mr. Paolo Palchetti, Associate Professor at the University of Macerata, Italy,

as Counsel,

*and*

Serbia and Montenegro,

represented by

H.E. Mr. Radoslav Stojanović, S.J.D., Head of the Law Council of the Ministry of Foreign Affairs of Serbia and Montenegro, Professor at the Belgrade University School of Law,

as Agent;

Mr. Saša Obradović, First Counsellor of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands,
Mr. Vladimir Cvetković, Second Secretary of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands,

as Co-Agents;

Mr. Tibor Varady, S.J.D. (Harvard), Professor of Law at the Central European University, Budapest, and Emory University, Atlanta,
Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Member of the International Law Commission, member of the English Bar, Distinguished Fellow of All Souls College, Oxford,
Mr. Xavier de Roux, Maîtrise de droit, avocat à la cour, Paris,
Ms Nataša Fauveau-Ivanović, avocat à la cour, Paris, member of the Council of the International Criminal Bar,
Mr. Andreas Zimmerman, LL.M. (Harvard), Professor of Law at the University of Kiel, Director of the Walther-Schücking Institute,

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Mr. Vladimir Djerić, LL.M. (Michigan), Attorney at Law, Mikijelj, Janković & Bogdanović, Belgrade, President of the International Law Association of Serbia and Montenegro,
Mr. Igor Olujić, Attorney at Law, Belgrade,

as Counsel and Advocates;

Ms Sanja Djajić, S.J.D, Associate Professor at the Novi Sad University School of Law,
Ms Ivana Mroz, LL.M. (Minneapolis),
Mr. Svetislav Rabrenović, Expert-associate at the Office of the Prosecutor for War Crimes of the Republic of Serbia,
Mr. Aleksandar Djurdjić, LL.M., First Secretary at the Ministry of Foreign Affairs of Serbia and Montenegro,
Mr. Miloš Jastrebić, Second Secretary at the Ministry of Foreign Affairs of Serbia and Montenegro,
Mr. Christian J. Tams, LL.M., Ph.D. (Cambridge), Walther-Schücking Institute, University of Kiel,
Ms Dina Dobrkovic, LL.B.,

as Assistants,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

1. On 20 March 1993, the Government of the Republic of Bosnia and Herzegovina (with effect from 14 December 1995 "Bosnia and Herzegovina") filed in the Registry of the Court an Application instituting proceedings against the Federal Republic of Yugoslavia (with effect from 4 February 2003, "Serbia and Montenegro" and with effect from 3 June 2006, the Republic of Serbia — see paragraphs 67 and 79 below) in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter "the Genocide Convention" or "the Convention"), as well as various matters which Bosnia and Herzegovina claimed were connected therewith. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Application was immediately communicated to the Government of the Federal Republic of Yugoslavia (hereinafter "the FRY") by the Registrar; and in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. In conformity with Article 43 of the Rules of Court, the Registrar addressed the notification provided for in Article 63, paragraph 1, of the Statute to all the States appearing on the list of the parties to the Genocide Convention held by the Secretary-General of the United Nations as depositary. The Registrar also sent to the Secretary-General the notification provided for in Article 34, paragraph 3, of the Statute.

4. On 20 March 1993, immediately after the filing of its Application, Bosnia

and Herzegovina submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court. On 31 March 1993, Bosnia and Herzegovina filed in the Registry, and invoked as an additional basis of jurisdiction, the text of a letter dated 8 June 1992, addressed jointly by the President of the then Republic of Montenegro and the President of the then Republic of Serbia to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia. On 1 April 1993, the FRY submitted written observations on Bosnia and Herzegovina's request for provisional measures, in which it, in turn, recommended that the Court indicate provisional measures to be applied to Bosnia and Herzegovina. By an Order dated 8 April 1993, the Court, after hearing the Parties, indicated certain provisional measures with a view to the protection of rights under the Genocide Convention.

5. By an Order dated 16 April 1993, the President of the Court fixed 15 October 1993 as the time-limit for the filing of the Memorial of Bosnia and Herzegovina and 15 April 1994 as the time-limit for the filing of the Counter-Memorial of the FRY.

6. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Bosnia and Herzegovina chose Mr. Elihu Lauterpacht and the FRY chose Mr. Milenko Kreća.

7. On 27 July 1993, Bosnia and Herzegovina submitted a new request for the indication of provisional measures. By letters of 6 August and 10 August 1993, the Agent of Bosnia and Herzegovina indicated that his Government wished to invoke additional bases of jurisdiction in the case: the Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes on the Protection of Minorities, signed at Saint-Germain-en-Laye on 10 September 1919, and customary and conventional international laws of war and international humanitarian law. By a letter of 13 August 1993, the Agent of Bosnia and Herzegovina confirmed his Government's intention also to rely on the above-mentioned letter from the Presidents of Montenegro and Serbia dated 8 June 1992 as an additional basis of jurisdiction (see paragraph 4).

8. On 10 August 1993, the FRY also submitted a request for the indication of provisional measures and on 10 August and 23 August 1993, it filed written observations on Bosnia and Herzegovina's new request. By an Order dated 13 September 1993, the Court, after hearing the Parties, reaffirmed the measures indicated in its Order of 8 April 1993 and stated that those measures should be immediately and effectively implemented.

9. By an Order dated 7 October 1993, the Vice-President of the Court, at the request of Bosnia and Herzegovina, extended the time-limit for the filing of the Memorial to 15 April 1994 and accordingly extended the time-limit for the filing of the Counter-Memorial to 15 April 1995. Bosnia and Herzegovina filed its Memorial within the time-limit thus extended. By a letter dated 9 May 1994, the Agent of the FRY submitted that the Memorial filed by Bosnia and Herzegovina failed to meet the requirements of Article 43 of the Statute and Articles 50 and 51 of the Rules of Court. By letter of 30 June 1994, the Registrar, acting on the instructions of the Court, requested Bosnia and Herzegovina, pursuant to Article 50, paragraph 2, of the Rules of Court, to file as annexes to its Memorial the extracts of the documents to which it referred therein. Bosnia and

Herzegovina accordingly filed Additional Annexes to its Memorial on 4 January 1995.

10. By an Order dated 21 March 1995, the President of the Court, at the request of the FRY, extended the time-limit for the filing of the Counter-Memorial to 30 June 1995. Within the time-limit thus extended, the FRY, referring to Article 79, paragraph 1, of the Rules of Court of 14 April 1978, raised preliminary objections concerning the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, by an Order of 14 July 1995, the President of the Court noted that, by virtue of Article 79, paragraph 3, of the 1978 Rules of Court, the proceedings on the merits were suspended, and fixed 14 November 1995 as the time-limit within which Bosnia and Herzegovina might present a written statement of its observations and submissions on the preliminary objections raised by the FRY. Bosnia and Herzegovina filed such a statement within the time-limit thus fixed.

11. By a letter dated 2 February 1996, the Agent of the FRY submitted to the Court the text of the General Framework Agreement for Peace in Bosnia and Herzegovina and the annexes thereto, initialled in Dayton, Ohio, on 21 November 1995, and signed in Paris on 14 December 1995 (hereinafter the "Dayton Agreement").

12. Public hearings were held on preliminary objections between 29 April and 3 May 1996. By a Judgment of 11 July 1996, the Court dismissed the preliminary objections and found that it had jurisdiction to adjudicate on the dispute on the basis of Article IX of the Genocide Convention and that the Application was admissible.

13. By an Order dated 23 July 1996, the President fixed 23 July 1997 as the time-limit for the filing of the Counter-Memorial of the FRY. The Counter-Memorial, which was filed on 22 July 1997, contained counter-claims. By a letter dated 28 July 1997, Bosnia and Herzegovina, invoking Article 80 of the 1978 Rules of Court, challenged the admissibility of the counter-claims. On 22 September 1997, at a meeting held between the President of the Court and the Agents of the Parties, the Agents accepted that their respective Governments submit written observations on the question of the admissibility of the counter-claims. Bosnia and Herzegovina and the FRY submitted their observations to the Court on 10 October 1997 and 24 October 1997, respectively. By an Order dated 17 December 1997, the Court found that the counter-claims submitted by the FRY were admissible as such and formed part of the current proceedings since they fulfilled the conditions set out in Article 80, paragraphs 1 and 2, of the 1978 Rules of Court. The Court further directed Bosnia and Herzegovina to submit a Reply and the FRY to submit a Rejoinder relating to the claims of both Parties and fixed 23 January 1998 and 23 July 1998 as the respective time-limits for the filing of those pleadings. The Court also reserved the right of Bosnia and Herzegovina to present its views on the counter-claims of the FRY in an additional pleading.

14. By an Order dated 22 January 1998, the President, at the request of Bosnia and Herzegovina, extended the time-limit for the filing of the Reply of Bosnia and Herzegovina to 23 April 1998 and accordingly extended the time-limit for the filing of the Rejoinder of the FRY to 22 January 1999.

15. On 15 April 1998, the Co-Agent of the FRY filed "Additional Annexes

to the Counter-Memorial of the Federal Republic of Yugoslavia". By a letter dated 14 May 1998, the Deputy Agent of Bosnia and Herzegovina, referring to Articles 50 and 52 of the Rules of Court, objected to the admissibility of these documents in view of their late filing. On 22 September 1998, the Parties were informed that the Court had decided that the documents in question "[were] admissible as Annexes to the Counter-Memorial to the extent that they were established, in the original language, on or before the date fixed by the Order of 23 July 1996 for the filing of the Counter-Memorial" and that "[a]ny such document established after that date [would] have to be submitted as an Annex to the Rejoinder, if Yugoslavia so wishe[d]".

16. On 23 April 1998, within the time-limit thus extended, Bosnia and Herzegovina filed its Reply. By a letter dated 27 November 1998, the FRY requested the Court to extend the time-limit for the filing of its Rejoinder to 22 April 1999. By a letter dated 9 December 1998, Bosnia and Herzegovina objected to any extension of the time-limit fixed for the filing of the Rejoinder. By an Order of 11 December 1998, the Court, having regard to the fact that Bosnia and Herzegovina had been granted an extension of the time-limit for the filing of its Reply, extended the time-limit for the filing of the Rejoinder of the FRY to 22 February 1999. The FRY filed its Rejoinder within the time-limit thus extended.

17. On 19 April 1999, the President of the Court held a meeting with the representatives of the Parties in order to ascertain their views with regard to questions of procedure. Bosnia and Herzegovina indicated that it did not intend to file an additional pleading concerning the counter-claims made by the FRY and considered the case ready for oral proceedings. The Parties also expressed their views about the organization of the oral proceedings.

18. By a letter dated 9 June 1999, the then Chairman of the Presidency of Bosnia and Herzegovina, Mr. Zivko Radisić, informed the Court of the appointment of a Co-Agent, Mr. Svetozar Miletić. By a letter dated 10 June 1999, the thus appointed Co-Agent informed the Court that Bosnia and Herzegovina wished to discontinue the case. By a letter of 14 June 1999, the Agent of Bosnia and Herzegovina asserted that the Presidency of Bosnia and Herzegovina had taken no action to appoint a Co-Agent or to terminate the proceedings before the Court. By a letter of 15 June 1999, the Agent of the FRY stated that his Government accepted the discontinuance of the proceedings. By a letter of 21 June 1999, the Agent of Bosnia and Herzegovina reiterated that the Presidency had not made any decision to discontinue the proceedings and transmitted to the Court letters from two members of the Presidency, including the new Chairman of the Presidency, confirming that no such decision had been made.

19. By letters dated 30 June 1999 and 2 September 1999, the President of the Court requested the Chairman of the Presidency to clarify the position of Bosnia and Herzegovina regarding the pendency of the case. By a letter dated 3 September 1999, the Agent of the FRY submitted certain observations on this matter, concluding that there was an agreement between the Parties to discontinue the case. By a letter dated 15 September 1999, the Chairman of the Presidency of Bosnia and Herzegovina informed the Court that at its 58th session held on 8 September 1999, the Presidency had concluded that: (i) the Presidency "did not make a decision to discontinue legal proceedings before the International Court of Justice"; (ii) the Presidency "did not make a decision to name a Co-Agent in this case"; (iii) the Presidency would "inform [the Court] timely about any further decisions concerning this case".

20. By a letter of 20 September 1999, the President of the Court informed

the Parties that the Court intended to schedule hearings in the case beginning in the latter part of February 2000 and requested the Chairman of the Presidency of Bosnia and Herzegovina to confirm that Bosnia and Herzegovina's position was that the case should so proceed. By a letter of 4 October 1999, the Agent of Bosnia and Herzegovina confirmed that the position of his Government was that the case should proceed and he requested the Court to set a date for the beginning of the oral proceedings as soon as possible. By a letter dated 10 October 1999, the member of the Presidency of Bosnia and Herzegovina from the Republika Srpska informed the Court that the letter of 15 September 1999 from the Chairman of the Presidency was "without legal effects" *inter alia* because the National Assembly of the Republika Srpska, acting pursuant to the Constitution of Bosnia and Herzegovina, had declared the decision of 15 September "destructive of a vital interest" of the Republika Srpska. On 22 October 1999, the President informed the Parties that, having regard to the correspondence received on this matter, the Court had decided not to hold hearings in the case in February 2000.

21. By a letter dated 23 March 2000 transmitting to the Court a letter dated 20 March 2000 from the Chairman of the Presidency, the Agent of Bosnia and Herzegovina reaffirmed that the appointment of a Co-Agent by the former Chairman of the Presidency of Bosnia and Herzegovina on 9 June 1999 lacked any legal basis and that the communications of the Co-Agent did not reflect the position of Bosnia and Herzegovina. Further, the Agent asserted that, contrary to the claims of the member of the Presidency of Bosnia and Herzegovina from the Republic of Srpska, the letter of 15 September 1999 was not subject to the veto mechanism contained in the Constitution of Bosnia and Herzegovina. The Agent requested the Court to set a date for oral proceedings at its earliest convenience.

22. By a letter dated 13 April 2000, the Agent of the FRY transmitted to the Court a document entitled "Application for the Interpretation of the Decision of the Court on the Pendency of the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia)", requesting an interpretation of the decision of the Court to which the President of the Court had referred in his letter dated 22 October 1999. By a letter dated 18 April 2000, the Registrar informed the Agent of the FRY that, according to Article 60 of the Statute, a request for interpretation could relate only to a judgment of the Court and therefore the document transmitted to the Court on 13 April 2000 could not constitute a request for interpretation and had not been entered on the Court's General List. The Registrar further explained that the sole decision to which reference was made in the letter of 22 October 1999 was that no hearings would be held in February 2000. The Registrar requested the Agent to transmit as soon as possible any comments he might have on the letter dated 23 March 2000 from the Agent of Bosnia and Herzegovina and the letter from the Chairman of the Presidency enclosed therewith. By a letter dated 25 April 2000, the Agent of the FRY submitted such comments to the Court and requested that the Court record and implement the agreement for the discontinuance of the case evidenced by the exchange of the letter of the Co-Agent of the Applicant dated 10 June 1999 and the letter of the Agent of the FRY dated 15 June 1999. By a letter dated 8 May 2000, the Agent of Bosnia and Herzegovina submitted certain observations regarding the letter dated 25 April 2000 from the Agent of the FRY and reiterated the wish of his Government to continue with the proceedings in the case. By letters dated 8 June, 26 June and 4 October 2000 from the

FRY and letters dated 9 June and 21 September 2000 from Bosnia and Herzegovina, the Agents of the Parties restated their positions.

23. By a letter dated 29 September 2000, Mr. Svetozar Miletić, who had purportedly been appointed Co-Agent on 9 June 1999 by the then Chairman of the Presidency of Bosnia and Herzegovina, reiterated his position that the case had been discontinued. By a letter dated 6 October 2000, the Agent of Bosnia and Herzegovina stated that this letter and the recent communication from the Agent of the FRY had not altered the commitment of the Government of Bosnia and Herzegovina to continue the proceedings.

24. By letters dated 16 October 2000 from the President of the Court and from the Registrar, the Parties were informed that, at its meeting of 10 October 2000, the Court, having examined all the correspondence received on this question, had found that Bosnia and Herzegovina had not demonstrated its will to withdraw the Application in an unequivocal manner. The Court had thus concluded that there had been no discontinuance of the case by Bosnia and Herzegovina. Consequently, in accordance with Article 54 of the Rules, the Court, after having consulted the Parties, would, at an appropriate time, fix a date for the opening of the oral proceedings.

25. By a letter dated 18 January 2001, the Minister for Foreign Affairs of the FRY requested the Court to grant a stay of the proceedings or alternatively to postpone the opening of the oral proceedings for a period of 12 months due, *inter alia*, to the change of Government of the FRY and the resulting fundamental change in the policies and international position of that State. By a letter dated 25 January 2001, the Agent of Bosnia and Herzegovina communicated the views of his Government on the request made by the FRY and reserved his Government's final judgment on the matter, indicating that, in the intervening period, Bosnia and Herzegovina's position continued to be that there should be an expedited resolution of the case.

26. By a letter dated 20 April 2001, the Agent of the FRY informed the Court that his Government wished to withdraw the counter-claims submitted by the FRY in its Counter-Memorial. The Agent also informed the Court that his Government was of the opinion that the Court did not have jurisdiction *ratione personae* over the FRY and further that the FRY intended to submit an application for revision of the Judgment of 11 July 1996. On 24 April 2001, the FRY filed in the Registry of the Court an Application instituting proceedings whereby, referring to Article 61 of the Statute, it requested the Court to revise the Judgment delivered on Preliminary Objections on 11 July 1996 (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina)*, hereinafter referred to as "the *Application for Revision* case"). In the present case the Agent of the FRY submitted, under cover of a letter dated 4 May 2001, a document entitled "Initiative to the Court to Reconsider *ex officio* Jurisdiction over Yugoslavia", accompanied by one volume of annexes (hereinafter "the Initiative"). The Agent informed the Court that the Initiative was based on facts and arguments which were essentially identical to those submitted in the FRY's Application for revision of the Judgment of 11 July 1996 since his Government believed that these were both appropriate procedural avenues. In the Initiative, the FRY requested the Court to adjudge and declare that it had no jurisdiction *ratione personae* over the FRY, contending that it had not been a party to the Statute of the Court until its admission to the United Nations on 1 November 2000, that it had not been

and still was not a party to the Genocide Convention; it added moreover that its notification of accession to that Convention dated 8 March 2001 contained a reservation to Article IX thereof. The FRY asked the Court to suspend the proceedings on the merits until a decision was rendered on the Initiative.

27. By a letter dated 12 July 2001 and received in the Registry on 15 August 2001, Bosnia and Herzegovina informed the Court that it had no objection to the withdrawal of the counter-claims by the FRY and stated that it intended to submit observations regarding the Initiative. By an Order dated 10 September 2001, the President of the Court placed on record the withdrawal by the FRY of the counter-claims submitted in its Counter-Memorial.

28. By a letter dated 3 December 2001, Bosnia and Herzegovina provided the Court with its views regarding the Initiative and transmitted a memorandum on "differences between the Application for Revision of 23 April 2001 and the 'Initiative' of 4 May 2001" as well as a copy of the written observations and annexes filed by Bosnia and Herzegovina on 3 December 2001 in the *Application for Revision* case. In that letter, Bosnia and Herzegovina submitted that "there [was] no basis in fact nor in law to honour this so-called 'Initiative'" and requested the Court *inter alia* to "respond in the negative to the request embodied in the 'Initiative'".

29. By a letter dated 22 February 2002 to the President of the Court, Judge *ad hoc* Lauterpacht resigned from the case.

30. Under cover of a letter of 18 April 2002, the Registrar, referring to Article 34, paragraph 3, of the Statute, transmitted copies of the written proceedings to the Secretary-General of the United Nations.

31. In its Judgment of 3 February 2003 in the *Application for Revision* case, the Court found that the FRY's Application for revision, under Article 61 of the Statute of the Court, of the Judgment of 11 July 1996 on preliminary objections was inadmissible.

32. By a letter dated 5 February 2003, the FRY informed the Court that, following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the FRY on 4 February 2003, the name of the State had been changed from the "Federal Republic of Yugoslavia" to "Serbia and Montenegro". The title of the case was duly changed and the name "Serbia and Montenegro" was used thereafter for all official purposes of the Court.

33. By a letter of 17 February 2003, Bosnia and Herzegovina reaffirmed its position with respect to the Initiative, as stated in the letter of 3 December 2001, and expressed its desire to proceed with the case. By a letter dated 8 April 2003, Serbia and Montenegro submitted that, due to major new developments since the filing of the last written pleading, additional written pleadings were necessary in order to make the oral proceedings more effective and less time-consuming. On 24 April 2003, the President of the Court held a meeting with the Agents of the Parties to discuss questions of procedure. Serbia and Montenegro stated that it maintained its request for the Court to rule on its Initiative while Bosnia and Herzegovina considered that there was no need for additional written pleadings. The possible dates and duration of the oral proceedings were also discussed.

34. By a letter dated 25 April 2003, Bosnia and Herzegovina chose Mr. Ahmed Mahiou to sit as judge *ad hoc* in the case.

35. By a letter of 12 June 2003, the Registrar informed Serbia and Montenegro that the Court could not accede to its request that the proceedings be suspended until a decision was rendered on the jurisdictional issues raised in the Initiative; however, should it wish to do so, Serbia and Montenegro would be free to present further argument on jurisdictional questions during the oral proceedings on the merits. In further letters of the same date, the Parties were informed that the Court, having considered Serbia and Montenegro's request, had decided not to authorize the filing of further written pleadings in the case.

36. In an exchange of letters in October and November 2003, the Agents of the Parties made submissions as to the scheduling of the oral proceedings.

37. Following a further exchange of letters between the Parties in March and April 2004, the President held a meeting with the Agents of the Parties on 25 June 2004, at which the Parties presented their views on, *inter alia*, the scheduling of the hearings and the calling of witnesses and experts.

38. By letters dated 26 October 2004, the Parties were informed that, after examining the list of cases before it ready for hearing and considering all the relevant circumstances, the Court had decided to fix Monday 27 February 2006 for the opening of the oral proceedings in the case.

39. On 14 March 2005, the President met with the Agents of the Parties in order to ascertain their views with regard to the organization of the oral proceedings. At this meeting, both Parties indicated that they intended to call witnesses and experts.

40. By letters dated 19 March 2005, the Registrar, referring to Articles 57 and 58 of the Rules of Court, requested the Parties to provide, by 9 September 2005, details of the witnesses, experts and witness-experts whom they intended to call and indications of the specific point or points to which the evidence of the witness, expert or witness-expert would be directed. By a letter of 8 September 2005, the Agent of Serbia and Montenegro transmitted to the Court a list of eight witnesses and two witness-experts whom his Government wished to call during the oral proceedings. By a further letter of the same date, the Agent of Serbia and Montenegro communicated a list of five witnesses whose attendance his Government requested the Court to arrange pursuant to Article 62, paragraph 2, of the Rules of Court. By a letter dated 9 September 2005, Bosnia and Herzegovina transmitted to the Court a list of three experts whom it wished to call at the hearings.

41. By a letter dated 5 October 2005, the Deputy Agent of Bosnia and Herzegovina informed the Registry of Bosnia and Herzegovina's views with regard to the time that it considered necessary for the hearing of the experts it wished to call and made certain submissions, *inter alia*, with respect to the request made by Serbia and Montenegro pursuant to Article 62, paragraph 2, of the Rules of Court. By letters of 4 and 11 October 2005, the Agent and the Co-Agent of Serbia and Montenegro, respectively, informed the Registry of the views of their Government with respect to the time necessary for the hearing of the witnesses and witness-experts whom it wished to call.

42. By letters of 15 November 2005, the Registrar informed the Parties, *inter alia*, that the Court had decided that it would hear the three experts and ten witnesses and witness-experts that Bosnia and Herzegovina and Serbia and Montenegro respectively wished to call and, moreover, that it had decided not to arrange for the attendance, pursuant to Article 62, paragraph 2, of the Rules

of Court, of the five witnesses proposed by Serbia and Montenegro. However, the Court reserved the right to exercise subsequently, if necessary, its powers under that provision to call persons of its choosing on its own initiative. The Registrar also requested the Parties to provide certain information related to the hearing of the witnesses, experts and witness-experts including, *inter alia*, the language in which each witness, expert or witness-expert would speak and, in respect of those speaking in a language other than English or French, the arrangements which the Party intended to make, pursuant to Article 70, paragraph 2, of the Rules of Court, for interpretation into one of the official languages of the Court. Finally the Registrar transmitted to the Parties the calendar for the oral proceedings as adopted by the Court.

43. By a letter dated 12 December 2005, the Agent of Serbia and Montenegro informed the Court, *inter alia*, that eight of the ten witnesses and witness-experts it wished to call would speak in Serbian and outlined the arrangements that Serbia and Montenegro would make for interpretation from Serbian to one of the official languages of the Court. By a letter dated 15 December 2005, the Deputy Agent of Bosnia and Herzegovina informed the Court, *inter alia,* that the three experts called by Bosnia and Herzegovina would speak in one of the official languages of the Court.

44. By a letter dated 28 December 2005, the Deputy Agent of Bosnia and Herzegovina, on behalf of the Government, requested that the Court call upon Serbia and Montenegro, under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to produce a certain number of documents. By a letter dated 16 January 2006, the Agent of Serbia and Montenegro informed the Court of his Government's views on this request. By a letter dated 19 January 2006, the Registrar, acting on the instructions of the Court, asked Bosnia and Herzegovina to provide certain further information relating to its request under Article 49 of the Statute and Article 62, paragraph 2, of the Rules of Court. By letters dated 19 and 24 January 2006, the Deputy Agent of Bosnia and Herzegovina submitted additional information and informed the Court that Bosnia and Herzegovina had decided, for the time being, to restrict its request to the redacted sections of certain documents. By a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro communicated his Government's views regarding this modified request. By letters dated 2 February 2006, the Registrar informed the Parties that the Court had decided, at this stage of the proceedings, not to call upon Serbia and Montenegro to produce the documents in question. However, the Court reserved the right to exercise subsequently, if necessary, its powers under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to request, *proprio motu*, the production by Serbia and Montenegro of the documents in question.

45. By a letter dated 16 January 2006, the Deputy Agent of Bosnia and Herzegovina transmitted to the Registry copies of new documents that Bosnia and Herzegovina wished to produce pursuant to Article 56 of the Rules of Court. Under cover of the same letter and of a letter dated 23 January 2006, the Deputy Agent of Bosnia and Herzegovina also transmitted to the Registry copies of video material, extracts of which Bosnia and Herzegovina intended to present at the oral proceedings. By a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro informed the Court that his Government did not object to the production of the new documents by Bosnia and Herzegovina. Nor did it object to the video material being shown at the oral proceedings. By

letters of 2 February 2006, the Registrar informed the Parties that, in view of the fact that no objections had been raised by Serbia and Montenegro, the Court had decided to authorize the production of the new documents by Bosnia and Herzegovina pursuant to Article 56 of the Rules of Court and that it had further decided that Bosnia and Herzegovina could show extracts of the video material at the hearings.

46. Under cover of a letter dated 18 January 2006 and received on 20 January 2006, the Agent of Serbia and Montenegro provided the Registry with copies of new documents which his Government wished to produce pursuant to Article 56 of the Rules of Court. By a letter of 1 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina did not object to the production of the said documents by Serbia and Montenegro. By a letter dated 2 February 2006, the Registrar informed the Parties that, in view of the fact that no objection had been raised by Bosnia and Herzegovina, the Court had decided to authorize the production of the new documents by Serbia and Montenegro. By a letter dated 9 February 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court certain missing elements of the new documents submitted on 20 January 2006 and made a number of observations concerning the new documents produced by Bosnia and Herzegovina. By a letter dated 20 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina did not intend to make any observations regarding the new documents produced by Serbia and Montenegro.

47. Under cover of a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court a list of public documents that his Government would refer to in its first round of oral argument. By a further letter dated 14 February 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court copies of folders containing the public documents referred to in the list submitted on 31 January 2006 and informed the Court that Serbia and Montenegro had decided not to submit the video materials included in that list. By a letter dated 20 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina had no observations to make regarding the list of public documents submitted by Serbia and Montenegro on 31 January 2006. He also stated that Bosnia and Herzegovina would refer to similar sources during its pleadings and was planning to provide the Court and the Respondent, at the end of the first round of its oral argument, with a CD-ROM containing materials it had quoted (see below, paragraph 54).

48. By a letter dated 26 January 2006, the Registrar informed the Parties of certain decisions taken by the Court with regard to the hearing of the witnesses, experts and witness-experts called by the Parties including, *inter alia*, that, exceptionally, the verbatim records of the sittings at which the witnesses, experts and witness-experts were heard would not be made available to the public or posted on the website of the Court until the end of the oral proceedings.

49. By a letter dated 13 February 2006, the Agent of Serbia and Montenegro informed the Court that his Government had decided not to call two of the witnesses and witness-experts included in the list transmitted to the Court on 8 September 2005 and that the order in which the remaining witnesses and witness-expert would be heard had been modified. By a letter dated 21 February 2006, the Agent of Serbia and Montenegro requested the Court's per-

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mission for the examination of three of the witnesses called by his Government to be conducted in Serbian (namely, Mr. Dušan Mihajlović, Mr. Vladimir Milićević, Mr. Dragoljub Mićunović). By a letter dated 22 February 2006, the Registrar informed the Agent of Serbia and Montenegro that there was no objection to such a procedure being followed, pursuant to the provisions of Article 39, paragraph 3, of the Statute and Article 70 of the Rules of Court.

50. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

51. Public sittings were held from 27 February to 9 May 2006, at which the Court heard the oral arguments and replies of:

*For Bosnia and Herzegovina:* Mr. Sakib Softić,
Mr. Phon van den Biesen,
Mr. Alain Pellet,
Mr. Thomas M. Franck,
Ms Brigitte Stern,
Mr. Luigi Condorelli,
Ms Magda Karagiannakis,
Ms Joanna Korner,
Ms Laura Dauban,
Mr. Antoine Ollivier,
Mr. Morten Torkildsen.

*For Serbia and Montenegro:* H.E. Mr. Radoslav Stojanović,
Mr. Saša Obradović,
Mr. Vladimir Cvetković,
Mr. Tibor Varady,
Mr. Ian Brownlie,
Mr. Xavier de Roux,
Ms Nataša Fauveau-Ivanović,
Mr. Andreas Zimmerman,
Mr. Vladimir Djerić,
Mr. Igor Olujić.

52. On 1 March 2006, the Registrar, on the instructions of the Court, requested Bosnia and Herzegovina to specify the precise origin of each of the extracts of video material and of the graphics, charts and photographs shown or to be shown at the oral proceedings. On 2 March 2006 Bosnia and Herzegovina provided the Court with certain information regarding the extracts of video material shown at the sitting on 1 March 2006 and those to be shown at the sittings on 2 March 2006 including the source of such video material. Under cover of a letter dated 5 March 2006, the Agent of Bosnia and Herzegovina transmitted to the Court a list detailing the origin of the extracts of video material, graphics, charts and photographs shown or to be shown by it during its first round of oral argument, as well as transcripts, in English and in French, of the above-mentioned extracts of video material.

53. By a letter dated 5 March 2006, the Agent of Bosnia and Herzegovina informed the Court that it wished to withdraw one of the experts it had intended to call. In that letter, the Agent of Bosnia and Herzegovina also asked the Court to request each of the Parties to provide a one-page outline per wit-

ness, expert or witness-expert detailing the topics which would be covered in his evidence or statement. By letters dated 7 March 2006, the Parties were informed that the Court requested them to provide, at least three days before the hearing of each witness, expert or witness-expert, a one-page summary of the latter's evidence or statement.

54. On 7 March 2006, Bosnia and Herzegovina provided the Court and the Respondent with a CD-ROM containing "ICTY Public Exhibits and other Documents cited by Bosnia and Herzegovina during its Oral Pleadings (07/03/2006)". By a letter dated 10 March 2006, Serbia and Montenegro informed the Court that it objected to the production of the CD-ROM on the grounds that the submission at such a late stage of so many documents "raise[d] serious concerns related to the respect for the Rules of Court and the principles of fairness and equality of the parties". It also pointed out that the documents included on the CD-ROM "appear[ed] questionable from the point of [view of] Article 56, paragraph 4, of the Rules [of Court]". By a letter dated 13 March 2006, the Agent of Bosnia and Herzegovina informed the Court of his Government's views regarding the above-mentioned objections raised by Serbia and Montenegro. In that letter, the Agent submitted, *inter alia*, that all the documents on the CD-ROM had been referred to by Bosnia and Herzegovina in its oral argument and were documents which were in the public domain and were readily available within the terms of Article 56, paragraph 4, of the Rules of Court. The Agent added that Bosnia and Herzegovina was prepared to withdraw the CD-ROM if the Court found it advisable. By a letter of 14 March 2006, the Registrar informed Bosnia and Herzegovina that, given that Article 56, paragraph 4, of the Rules of Court did not require or authorize the submission to the Court of the full text of a document to which reference was made during the oral proceedings pursuant to that provision and since it was difficult for the other Party and the Court to come to terms, at the late stage of the proceedings, with such an immense mass of documents, which in any case were in the public domain and could thus be consulted if necessary, the Court had decided that it was in the interests of the good administration of justice that the CD-ROM be withdrawn. By a letter dated 16 March 2006, the Agent of Bosnia and Herzegovina withdrew the CD-ROM which it had submitted on 7 March 2006.

55. On 17 March 2006, Bosnia and Herzegovina submitted a map for use during the statement to be made by one of its experts on the morning of 20 March 2006. On 20 March 2006, Bosnia and Herzegovina produced a folder of further documents to be used in the examination of that expert. Serbia and Montenegro objected strongly to the production of the documents at such a late stage since its counsel would not have time to prepare for cross-examination. On 20 March 2006, the Court decided that the map submitted on 17 March 2006 could not be used during the statement of the expert. Moreover, having consulted both Parties, the Court decided to cancel the morning sitting and instead hear the expert during an afternoon sitting in order to allow Serbia and Montenegro to be ready for cross-examination.

56. On 20 March 2006, Serbia and Montenegro informed the Court that one of the witnesses it had intended to call finally would not be giving evidence.

57. The following experts were called by Bosnia and Herzegovina and made their statements at public sittings on 17 and 20 March 2006: Mr. András J. Riedlmayer and General Sir Richard Dannatt. The experts were examined by

counsel for Bosnia and Herzegovina and cross-examined by counsel for Serbia and Montenegro. The experts were subsequently re-examined by counsel for Bosnia and Herzegovina. Questions were put to Mr. Riedlmayer by Judges Kreća, Tomka, Simma and the Vice-President and replies were given orally. Questions were put to General Dannatt by the President, Judge Koroma and Judge Tomka and replies were given orally.

58. The following witnesses and witness-expert were called by Serbia and Montenegro and gave evidence at public sittings on 23, 24, 27 and 28 March 2006: Mr. Vladimir Lukić; Mr. Vitomir Popović; General Sir Michael Rose; Mr. Jean-Paul Sardon (witness-expert); Mr. Dušan Mihajlović; Mr. Vladimir Milićević; Mr. Dragoljub Mićunović. The witnesses and witness-expert were examined by counsel for Serbia and Montenegro and cross-examined by counsel for Bosnia and Herzegovina. General Rose, Mr. Mihajlović and Mr. Milićević were subsequently re-examined by counsel for Serbia and Montenegro. Questions were put to Mr. Lukić by Judges Ranjeva, Simma, Tomka and Bennouna and replies were given orally. Questions were put to General Rose by the Vice-President and Judges Owada and Simma and replies were given orally.

59. With the exception of General Rose and Mr. Jean-Paul Sardon, the above-mentioned witnesses called by Serbia and Montenegro gave their evidence in Serbian and, in accordance with Article 39, paragraph 3, of the Statute and Article 70, paragraph 2, of the Rules of Court, Serbia and Montenegro made the necessary arrangements for interpretation into one of the official languages of the Court and the Registry verified this interpretation. Mr. Stojanović conducted his examination of Mr. Dragoljub Mićunović in Serbian in accordance with the exchange of correspondence between Serbia and Montenegro and the Court on 21 and 22 February 2006 (see paragraph 49 above).

60. In the course of the hearings, questions were put by Members of the Court, to which replies were given orally and in writing, pursuant to Article 61, paragraph 4, of the Rules of Court.

61. By a letter of 8 May 2006, the Agent of Bosnia and Herzegovina requested the Court to allow the Deputy Agent to take the floor briefly on 9 May 2006, in order to correct an assertion about one of the counsel of and one of the experts called by Bosnia and Herzegovina which had been made by Serbia and Montenegro in its oral argument. By a letter dated 9 May 2006, the Agent of Serbia and Montenegro communicated the views of his Government on that matter. On 9 May 2006, the Court decided, in the particular circumstances of the case, to authorize the Deputy Agent of Bosnia and Herzegovina to make a very brief statement regarding the assertion made about its counsel.

62. By a letter dated 3 May 2006, the Agent of Bosnia and Herzegovina informed the Court that there had been a number of errors in references included in its oral argument presented on 2 March 2006 and provided the Court with the corrected references. By a letter dated 8 May 2006, the Agent of Serbia and Montenegro, "in light of the belated corrections by the Applicant, and for the sake of the equality between the parties", requested the Court to accept a paragraph of its draft oral argument of 2 May 2006 which responded to one of the corrections made by Bosnia and Herzegovina but had been left out of the final version of its oral argument "in order to fit the schedule of [Serbia and Montenegro's] presentations". By a letter dated 7 June 2006, the Parties were informed that the Court had taken due note of both the explana-

tion given by the Agent of Bosnia and Herzegovina and the observations made in response by the Agent of Serbia and Montenegro.

63. In January 2007, Judge Parra-Aranguren, who had attended the oral proceedings in the case, and had participated in part of the deliberation, but had for medical reasons been prevented from participating in the later stages thereof, informed the President of the Court, pursuant to Article 24, paragraph 1, of the Statute, that he considered that he should not take part in the decision of the case. The President took the view that the Court should respect and accept Judge Parra-Aranguren's position, and so informed the Court.

*

64. In its Application, the following requests were made by Bosnia and Herzegovina:

> "Accordingly, while reserving the right to revise, supplement or amend this Application, and subject to the presentation to the Court of the relevant evidence and legal arguments, Bosnia and Herzegovina requests the Court to adjudge and declare as follows:
>
> *(a)* that Yugoslavia (Serbia and Montenegro) has breached, and is continuing to breach, its legal obligations toward the People and State of Bosnia and Herzegovina under Articles I, II *(a)*, II *(b)*, II *(c)*, II *(d)*, III *(a)*, III *(b)*, III *(c)*, III *(d)*, III *(e)*, IV and V of the Genocide Convention;
>
> *(b)* that Yugoslavia (Serbia and Montenegro) has violated and is continuing to violate its legal obligations toward the People and State of Bosnia and Herzegovina under the four Geneva Conventions of 1949, their Additional Protocol I of 1977, the customary international laws of war including the Hague Regulations on Land Warfare of 1907, and other fundamental principles of international humanitarian law;
>
> *(c)* that Yugoslavia (Serbia and Montenegro) has violated and continues to violate Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 28 of the Universal Declaration of Human Rights with respect to the citizens of Bosnia and Herzegovina;
>
> *(d)* that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained, and exterminated the citizens of Bosnia and Herzegovina, and is continuing to do so;
>
> *(e)* that in its treatment of the citizens of Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) has violated, and is continuing to violate, its solemn obligations under Articles 1 (3), 55 and 56 of the United Nations Charter;
>
> *(f)* that Yugoslavia (Serbia and Montenegro) has used and is continuing to use force and the threat of force against Bosnia and Herzegovina in violation of Articles 2 (1), 2 (2), 2 (3), 2 (4) and 33 (1), of the United Nations Charter;
>
> *(g)* that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has used and is using force and the threat of force against Bosnia and Herzegovina;

*(h)* that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has violated and is violating the sovereignty of Bosnia and Herzegovina by:

— armed attacks against Bosnia and Herzegovina by air and land;

— aerial trespass into Bosnian airspace;
— efforts by direct and indirect means to coerce and intimidate the Government of Bosnia and Herzegovina;

*(i)* that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has intervened and is intervening in the internal affairs of Bosnia and Herzegovina;

*(j)* that Yugoslavia (Serbia and Montenegro), in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Bosnia and Herzegovina by means of its agents and surrogates, has violated and is violating its express charter and treaty obligations to Bosnia and Herzegovina and, in particular, its charter and treaty obligations under Article 2 (4), of the United Nations Charter, as well as its obligations under general and customary international law;

*(k)* that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right to defend Itself and its People under United Nations Charter Article 51 and customary international law, including by means of immediately obtaining military weapons, equipment, supplies and troops from other States;

*(l)* that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right under United Nations Charter Article 51 and customary international law to request the immediate assistance of any State to come to its defence, including by military means (weapons, equipment, supplies, troops, etc.);

*(m)* that Security Council resolution 713 (1991), imposing a weapons embargo upon the former Yugoslavia, must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;

*(n)* that all subsequent Security Council resolutions that refer to or reaffirm resolution 713 (1991) must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;

*(o)* that Security Council resolution 713 (1991) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must not be construed to impose an arms embargo upon Bosnia and Herzegovina, as required by Articles 24 (1) and 51 of the United

Nations Charter and in accordance with the customary doctrine of *ultra vires*;

*(p)* that pursuant to the right of collective self-defence recognized by United Nations Charter Article 51, all other States parties to the Charter have the right to come to the immediate defence of Bosnia and Herzegovina — at its request — including by means of immediately providing It with weapons, military equipment and supplies, and armed forces (soldiers, sailors, air-people, etc.);

*(q)* that Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from its breaches of the foregoing legal obligations, and is under a particular duty to cease and desist immediately:

— from its systematic practice of so-called 'ethnic cleansing' of the citizens and sovereign territory of Bosnia and Herzegovina;
— from the murder, summary execution, torture, rape, kidnapping, mayhem, wounding, physical and mental abuse, and detention of the citizens of Bosnia and Herzegovina;

— from the wanton devastation of villages, towns, districts, cities, and religious institutions in Bosnia and Herzegovina;

— from the bombardment of civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
— from continuing the siege of any civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
— from the starvation of the civilian population in Bosnia and Herzegovina;
— from the interruption of, interference with, or harassment of humanitarian relief supplies to the citizens of Bosnia and Herzegovina by the international community;
— from all use of force — whether direct or indirect, overt or covert — against Bosnia and Herzegovina, and from all threats of force against Bosnia and Herzegovina;
— from all violations of the sovereignty, territorial integrity or political independence of Bosnia and Herzegovina, including all intervention, direct or indirect, in the internal affairs of Bosnia and Herzegovina;
— from all support of any kind — including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support — to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Bosnia and Herzegovina;

*(r)* that Yugoslavia (Serbia and Montenegro) has an obligation to pay Bosnia and Herzegovina, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court. Bosnia and Herzegovina reserves the right to introduce to the Court a precise evaluation of the damages caused by Yugoslavia (Serbia and Montenegro)."

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65. In the written proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of Bosnia and Herzegovina,*

in the Memorial:

"On the basis of the evidence and legal arguments presented in this Memorial, the Republic of Bosnia and Herzegovina,

Requests the International Court of Justice to adjudge and declare,

1. That the Federal Republic of Yugoslavia (Serbia and Montenegro), directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of the Republic of Bosnia and Herzegovina, including in particular the Muslim population, by

— killing members of the group;
— causing deliberate bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
— imposing measures intended to prevent births within the group;

2. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide;

3. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;

4. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide;

5. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must immediately cease the above conduct and take immediate and effective steps to ensure full compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

6. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must wipe out the consequences of its international wrongful acts and must restore the situation existing before the violations of the Convention on the Prevention and Punishment of the Crime of Genocide were committed;

7. That, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, the Federal Republic of Yugoslavia (Serbia and Montenegro) is required to pay, and the Republic of Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused, in the

amount to be determined by the Court in a subsequent phase of the proceedings in this case.

The Republic of Bosnia and Herzegovina reserves its right to supplement or amend its submissions in the light of further pleadings.

The Republic of Bosnia and Herzegovina also respectfully draws the attention of the Court to the fact that it has not reiterated, at this point, several of the requests it made in its Application, on the formal assumption that the Federal Republic of Yugoslavia (Serbia and Montenegro) has accepted the jurisdiction of this Court under the terms of the Convention on the Prevention and Punishment of the Crime of Genocide. If the Respondent were to reconsider its acceptance of the jurisdiction of the Court under the terms of that Convention — which it is, in any event, not entitled to do — the Government of Bosnia and Herzegovina reserves its right to invoke also all or some of the other existing titles of jurisdiction and to revive all or some of its previous submissions and requests."

*On behalf of the Government of Serbia and Montenegro,*

in the Counter-Memorial[1]:

"The Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

1. In view of the fact that no obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide have been violated with regard to Muslims and Croats,

— since the acts alleged by the Applicant have not been committed at all, or not to the extent and in the way alleged by the Applicant, or

— if some have been committed, there was absolutely no intention of committing genocide, and/or
— they have not been directed specifically against the members of one ethnic or religious group, i.e. they have not been committed against individuals just because they belong to some ethnic or religious group, consequently, they cannot be qualified as acts of genocide or other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; and/or

2. In view of the fact that the acts alleged by the Applicant in its submissions cannot be attributed to the Federal Republic of Yugoslavia,

— since they have not been committed by the organs of the Federal Republic of Yugoslavia,
— since they have not been committed on the territory of the Federal Republic of Yugoslavia,
— since they have not been committed by the order or under control of the organs of the Federal Republic of Yugoslavia,
— since there is no other grounds based on the rules of international law to consider them as acts of the Federal Republic of Yugoslavia,

[1] Submissions 3 to 6 relate to counter-claims which were subsequently withdrawn (see paragraphs 26 and 27 above).

therefore the Court rejects all claims of the Applicant; and

3. Bosnia and Herzegovina is responsible for the acts of genocide committed against the Serbs in Bosnia and Herzegovina and for other violations of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,

— because it has incited acts of genocide by the 'Islamic Declaration', and in particular by the position contained in it that 'there can be no peace or coexistence between "Islamic faith" and "non-Islamic" social and political institutions',

— because it has incited acts of genocide by the *Novi Vox*, paper of the Muslim youth, and in particular by the verses of a 'Patriotic Song' which read as follows:

'Dear mother, I'm going to plant willows,
We'll hang Serbs from them.
Dear mother, I'm going to sharpen knives,
We'll soon fill pits again';

— because it has incited acts of genocide by the paper *Zmaj od Bosne*, and in particular by the sentence in an article published in it that 'Each Muslim must name a Serb and take oath to kill him';

— because public calls for the execution of Serbs were broadcast on radio 'Hajat' and thereby acts of genocide were incited;

— because the armed forces of Bosnia and Herzegovina, as well as other organs of Bosnia and Herzegovina have committed acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs in Bosnia and Herzegovina, which have been stated in Chapter Seven of the Counter-Memorial;

— because Bosnia and Herzegovina has not prevented the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs on its territory, which have been stated in Chapter Seven of the Counter-Memorial;

4. Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;

5. Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated in the future;

6. Bosnia and Herzegovina is bound to eliminate all consequences of the violation of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and provide adequate compensation."

*On behalf of the Government of Bosnia and Herzegovina,*

in the Reply:

"Therefore the Applicant persists in its claims as presented to this Court on 14 April 1994, and recapitulates its Submissions in their entirety.

Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare,

1. That the Federal Republic of Yugoslavia, directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of Bosnia and Herzegovina, including in particular the Muslim population, by

— killing members of the group;
— causing deliberate bodily or mental harm to members of the group;
— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
— imposing measures intended to prevent births within the group;

2. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide;

3. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;

4. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide;

5. That the Federal Republic of Yugoslavia must immediately cease the above conduct and take immediate and effective steps to ensure full compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

6. That the Federal Republic of Yugoslavia must wipe out the consequences of its international wrongful acts and must restore the situation existing before the violations of the Convention on the Prevention and Punishment of the Crime of Genocide were committed;

7. That, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, the Federal Republic of Yugoslavia is required to pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused, in the amount to be determined by the Court in a subsequent phase of the proceedings in this case.

Bosnia and Herzegovina reserves its right to supplement or amend its submissions in the light of further pleadings;

8. On the very same grounds the conclusions and submissions of the Federal Republic of Yugoslavia with regard to the submissions of Bosnia and Herzegovina need to be rejected;

9. With regard to the Respondent's counter-claims the Applicant comes to the following conclusion. There is no basis in fact and no basis in law

for the proposition that genocidal acts have been committed against Serbs in Bosnia and Herzegovina. There is no basis in fact and no basis in law for the proposition that any such acts, if proven, would have been committed under the responsibility of Bosnia and Herzegovina or that such acts, if proven, would be attributable to Bosnia and Herzegovina. Also, there is no basis in fact and no basis in law for the proposition that Bosnia and Herzegovina has violated any of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide. On the contrary, Bosnia and Herzegovina has continuously done everything within its possibilities to adhere to its obligations under the Convention, and will continue to do so;

10. For these reasons, Bosnia and Herzegovina requests the International Court of Justice to reject the counter-claims submitted by the Respondent in its Counter-Memorial of 23 July 1997."

*On behalf of the Government of Serbia and Montenegro,*

in the Rejoinder[2] :

"The Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

1. In view of the fact that no obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide have been violated with regard to Muslims and Croats,

— since the acts alleged by the Applicant have not been committed at all, or not to the extent and in the way alleged by the Applicant, or

— if some have been committed, there was absolutely no intention of committing genocide, and/or
— they have not been directed specifically against the members of one ethnic or religious group, i.e. they have not been committed against individuals just because they belong to some ethnic or religious group,

consequently they cannot be qualified as acts of genocide or other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and/or

2. In view of the fact that the acts alleged by the Applicant in its submissions cannot be attributed to the Federal Republic of Yugoslavia,

— since they have not been committed by the organs of the Federal Republic of Yugoslavia,
— since they have not been committed on the territory of the Federal Republic of Yugoslavia,
— since they have not been committed by the order or under control of the organs of the Federal Republic of Yugoslavia,
— since there are no other grounds based on the rules of international law to consider them as acts of the Federal Republic of Yugoslavia,

[2] Submissions 3 to 6 relate to counter-claims which were subsequently withdrawn (see paragraphs 26 and 27 above).

therefore the Court rejects all the claims of the Applicant, and

3. Bosnia and Herzegovina is responsible for the acts of genocide committed against Serbs in Bosnia and Herzegovina and for other violations of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,

— because it has incited acts of genocide by the 'Islamic Declaration', and in particular by the position contained in it that *'there can be no peace or coexistence between "Islamic faith" and "non-Islamic" social and political institutions'*,

— because it has incited acts of genocide by the *Novi Vox*, paper of the Muslim youth, and in particular by the verses of a 'Patriotic Song' which read as follows:

'Dear mother, I'm going to plant willows,
We'll hang Serbs from them.
Dear mother, I'm going to sharpen knives,
We'll soon fill pits again';

— because it has incited acts of genocide by the paper *Zmaj od Bosne*, and in particular by the sentence in an article published in it that 'Each Muslim' must name a Serb and take oath to kill him;

— because public calls for the execution of Serbs were broadcast on radio 'Hajat' and thereby acts of genocide were incited;

— because the armed forces of Bosnia and Herzegovina, as well as other organs of Bosnia and Herzegovina have committed acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (enumerated in Article III), against Serbs in Bosnia and Herzegovina, which have been stated in Chapter Seven of the Counter-Memorial;

— because Bosnia and Herzegovina has not prevented the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (enumerated in Article III), against Serbs on its territory, which have been stated in Chapter Seven of the Counter-Memorial;

4. Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;

5. Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated in the future;

6. Bosnia and Herzegovina is bound to eliminate all the consequences of violation of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and to provide adequate compensation."

66. At the oral proceedings, the following final submissions were presented by the Parties:

*On behalf of the Government of Bosnia and Herzegovina,*

at the hearing of 24 April 2006:

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"Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare:

1. That Serbia and Montenegro, through its organs or entities under its control, has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by intentionally destroying in part the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population, by

— killing members of the group;
— causing serious bodily or mental harm to members of the group;
— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
— imposing measures intended to prevent births within the group;
— forcibly transferring children of the group to another group;

2. Subsidiarily:

(i) that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by complicity in genocide as defined in paragraph 1, above; and/or

(ii) that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals, groups and entities engaged in acts of genocide, as defined in paragraph 1 above;

3. That Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide and by inciting to commit genocide, as defined in paragraph 1 above;

4. That Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed to prevent genocide;

5. That Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;

6. That the violations of international law set out in submissions 1 to 5 constitute wrongful acts attributable to Serbia and Montenegro which entail its international responsibility, and, accordingly,

*(a)* that Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act pro-

hibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;

*(b)* that Serbia and Montenegro must redress the consequences of its international wrongful acts and, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, must pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused. That, in particular, the compensation shall cover any financially assessable damage which corresponds to:

(i) damage caused to natural persons by the acts enumerated in Article III of the Convention, including non-material damage suffered by the victims or the surviving heirs or successors and their dependants;

(ii) material damage caused to properties of natural or legal persons, public or private, by the acts enumerated in Article III of the Convention;

(iii) material damage suffered by Bosnia and Herzegovina in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from the acts enumerated in Article III of the Convention;

*(c)* that the nature, form and amount of the compensation shall be determined by the Court, failing agreement thereon between the Parties one year after the Judgment of the Court, and that the Court shall reserve the subsequent procedure for that purpose;

*(d)* that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court;

7. That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court."

*On behalf of the Government of Serbia and Montenegro,*

at the hearing of 9 May 2006:

"Serbia and Montenegro asks the Court to adjudge and declare:

— that this Court has no jurisdiction because the Respondent had no access to the Court at the relevant moment; or, in the alternative;

— that this Court has no jurisdiction over the Respondent because the Respondent never remained or became bound by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, and because there is no other ground on which jurisdiction over the Respondent could be based.

In case the Court determines that jurisdiction exists Serbia and Montenegro asks the Court to adjudge and declare:

— That the requests in paragraphs 1 to 6 of the Submissions of Bosnia

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and Herzegovina relating to alleged violations of the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide be rejected as lacking a basis either in law or in fact.

— In any event, that the acts and/or omissions for which the respondent State is alleged to be responsible are not attributable to the respondent State. Such attribution would necessarily involve breaches of the law applicable in these proceedings.
— Without prejudice to the foregoing, that the relief available to the applicant State in these proceedings, in accordance with the appropriate interpretation of the Convention on the Prevention and Punishment of the Crime of Genocide, is limited to the rendering of a declaratory judgment.
— Further, without prejudice to the foregoing, that any question of legal responsibility for alleged breaches of the Orders for the indication of provisional measures, rendered by the Court on 8 April 1993 and 13 September 1993, does not fall within the competence of the Court to provide appropriate remedies to an applicant State in the context of contentious proceedings, and, accordingly, the request in paragraph 7 of the Submissions of Bosnia and Herzegovina should be rejected."

* * *

## II. Identification of the Respondent Party

67. The Court has first to consider a question concerning the identification of the Respondent Party before it in these proceedings. After the close of the oral proceedings, by a letter dated 3 June 2006, the President of the Republic of Serbia informed the Secretary-General of the United Nations that, following the Declaration of Independence adopted by the National Assembly of Montenegro on 3 June 2006, "the membership of the state union Serbia and Montenegro in the United Nations, including all organs and organisations of the United Nations system, [would be] continued by the Republic of Serbia on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro". He further stated that "in the United Nations the name 'Republic of Serbia' [was] to be henceforth used instead of the name 'Serbia and Montenegro' " and added that the Republic of Serbia "remain[ed] responsible in full for all the rights and obligations of the state union of Serbia and Montenegro under the UN Charter".

68. By a letter of 16 June 2006, the Minister for Foreign Affairs of the Republic of Serbia informed the Secretary-General, *inter alia*, that "[t]he Republic of Serbia continue[d] to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro" and requested that "the Republic of Serbia be considered a party to all international agreements in force, instead of Serbia and Montenegro". By a letter addressed to the Secretary-General dated 30 June

2006, the Minister for Foreign Affairs confirmed the intention of the Republic of Serbia to continue to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro. He specified that "all treaty actions undertaken by Serbia and Montenegro w[ould] continue in force with respect to the Republic of Serbia with effect from 3 June 2006", and that, "all declarations, reservations and notifications made by Serbia and Montenegro w[ould] be maintained by the Republic of Serbia until the Secretary-General, as depositary, [were] duly notified otherwise".

69. On 28 June 2006, by its resolution 60/264, the General Assembly admitted the Republic of Montenegro (hereinafter "Montenegro") as a new Member of the United Nations.

70. By letters dated 19 July 2006, the Registrar requested the Agent of Bosnia and Herzegovina, the Agent of Serbia and Montenegro and the Foreign Minister of Montenegro to communicate to the Court the views of their Governments on the consequences to be attached to the above-mentioned developments in the context of the case. By a letter dated 26 July 2006, the Agent of Serbia and Montenegro explained that, in his Government's opinion, "there [was] continuity between Serbia and Montenegro and the Republic of Serbia (on the grounds of Article 60 of the Constitutional Charter of Serbia and Montenegro)". He noted that the entity which had been Serbia and Montenegro "ha[d] been replaced by two distinct States, one of them [was] Serbia, the other [was] Montenegro". In those circumstances, the view of his Government was that "the Applicant ha[d] first to take a position, and to decide whether it wishe[d] to maintain its original claim encompassing both Serbia and Montenegro, or whether it [chose] to do otherwise".

71. By a letter to the Registrar dated 16 October 2006, the Agent of Bosnia and Herzegovina referred to the letter of 26 July 2006 from the Agent of Serbia and Montenegro, and observed that Serbia's definition of itself as the continuator of the former Serbia and Montenegro had been accepted both by Montenegro and the international community. He continued however as follows:

> "this acceptance cannot have, and does not have, any effect on the applicable rules of state responsibility. Obviously, these cannot be altered bilaterally or retroactively. At the time when genocide was committed and at the time of the initiation of this case, Serbia and Montenegro constituted a single state. Therefore, Bosnia and Herzegovina is of the opinion that both Serbia and Montenegro, jointly and severally, are responsible for the unlawful conduct that constitute the cause of action in this case."

72. By a letter dated 29 November 2006, the Chief State Prosecutor of Montenegro, after indicating her capacity to act as legal representative of the Republic of Montenegro, referred to the letter from the Agent of

Bosnia and Herzegovina dated 16 October 2006, quoted in the previous paragraph, expressing the view that "both Serbia and Montenegro, jointly and severally, are responsible for the unlawful conduct that constitute[s] the cause of action in this case". The Chief State Prosecutor stated that the allegation concerned the liability in international law of the sovereign State of Montenegro, and that Montenegro regarded it as an attempt to have it become a participant in this way, without its consent, "i.e. to become a respondent in this procedure". The Chief State Prosecutor drew attention to the fact that, following the referendum held in Montenegro on 21 May 2006, the National Assembly of Montenegro had adopted a decision pronouncing the independence of the Republic of Montenegro. In the view of the Chief State Prosecutor, the Republic of Montenegro had become "an independent state with full international legal personality within its existing administrative borders", and she continued:

> "The issue of international-law succession of [the] State union of Serbia and Montenegro is regulated in Article 60 of [the] Constitutional Charter, and according to [that] Article the legal successor of [the] State union of Serbia and Montenegro is the Republic of Serbia, which, as a sovereign state, [has] become [the] follower of all international obligations and successor in international organizations."

The Chief State Prosecutor concluded that in the dispute before the Court, "the Republic of Montenegro may not have [the] capacity of respondent, [for the] above mentioned reasons".

73. By a letter dated 11 December 2006, the Agent of Serbia referred to the letters from the Applicant and from Montenegro described in paragraphs 71 and 72 above, and observed that there was "an obvious contradiction between the position of the Applicant on the one hand and the position of Montenegro on the other regarding the question whether these proceedings may or may not yield a decision which would result in the international responsibility of Montenegro" for the unlawful conduct invoked by the Applicant. The Agent stated that "Serbia is of the opinion that this issue needs to be resolved by the Court".

74. The Court observes that the facts and events on which the final submissions of Bosnia and Herzegovina are based occurred at a period of time when Serbia and Montenegro constituted a single State.

75. The Court notes that Serbia has accepted "continuity between Serbia and Montenegro and the Republic of Serbia" (paragraph 70 above), and has assumed responsibility for "its commitments deriving from international treaties concluded by Serbia and Montenegro" (paragraph 68 above), thus including commitments under the Genocide Convention. Montenegro, on the other hand, does not claim to be the continuator of Serbia and Montenegro.

76. The Court recalls a fundamental principle that no State may be subject to its jurisdiction without its consent; as the Court observed in the case of *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, the Court's "jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it . . ." (*Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 260, para. 53). In its Judgment of 11 July 1996 (see paragraph 12 above), the significance of which will be explained below, the Court found that such consent existed, for the purposes of the present case, on the part of the FRY, which subsequently assumed the name of Serbia and Montenegro, without however any change in its legal personality. The events related in paragraphs 67 to 69 above clearly show that the Republic of Montenegro does not continue the legal personality of Serbia and Montenegro; it cannot therefore have acquired, on that basis, the status of Respondent in the present case. It is also clear from the letter of 29 November 2006 quoted in paragraph 72 above that it does not give its consent to the jurisdiction of the Court over it for the purposes of the present dispute. Furthermore, the Applicant did not in its letter of 16 October 2006 assert that Montenegro is still a party to the present case; it merely emphasized its views as to the joint and several liability of Serbia and of Montenegro.

77. The Court thus notes that the Republic of Serbia remains a respondent in the case, and at the date of the present Judgment is indeed the only Respondent. Accordingly, any findings that the Court may make in the operative part of the present Judgment are to be addressed to Serbia.

78. That being said, it has to be borne in mind that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro.

79. The Court observes that the Republic of Montenegro is a party to the Genocide Convention. Parties to that Convention have undertaken the obligations flowing from it, in particular the obligation to co-operate in order to punish the perpetrators of genocide.

* * *

## III. The Court's Jurisdiction

### *(1) Introduction: The Jurisdictional Objection of Serbia and Montenegro*

80. Notwithstanding the fact that in this case the stage of oral proceedings on the merits has been reached, and the fact that in 1996 the Court gave a judgment on preliminary objections to its jurisdiction (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II),* p. 595, hereinafter "the 1996 Judgment"), an important issue of a jurisdictional character has

since been raised by the Initiative, and the Court has been asked to rule upon it (see paragraphs 26-28 above). The basis of jurisdiction asserted by the Applicant, and found applicable by the Court by the 1996 Judgment, is Article IX of the Genocide Convention. The Socialist Federal Republic of Yugoslavia (hereinafter "the SFRY") became a party to that Convention on 29 August 1950. In substance, the central question now raised by the Respondent is whether at the time of the filing of the Application instituting the present proceedings the Respondent was or was not the continuator of the SFRY. The Respondent now contends that it was not a continuator State, and that therefore not only was it not a party to the Genocide Convention when the present proceedings were instituted, but it was not then a party to the Statute of the Court by virtue of membership in the United Nations; and that, not being such a party, it did not have access to the Court, with the consequence that the Court had no jurisdiction *ratione personae* over it.

81. This contention was first raised, in the context of the present case, by the "Initiative to the Court to Reconsider *ex officio* Jurisdiction over Yugoslavia" filed by the Respondent on 4 May 2001 (paragraph 26 above). The circumstances underlying that Initiative will be examined in more detail below (paragraphs 88-99). Briefly stated, the situation was that the Respondent, after claiming that since the break-up of the SFRY in 1992 it was the continuator of that State, and as such maintained the membership of the SFRY in the United Nations, had on 27 October 2000 applied, "in light of the implementation of the Security Council resolution 777 (1992)", to be admitted to the Organization as a new Member, thereby in effect relinquishing its previous claim. The Respondent contended that it had in 2000 become apparent that it had not been a Member of the United Nations in the period 1992-2000, and was thus not a party to the Statute at the date of the filing of the Application in this case; and that it was not a party to the Genocide Convention on that date. The Respondent concluded that "the Court has no jurisdiction over [the Respondent] *ratione personae*". It requested the Court "to suspend proceedings regarding the merits of the Case until a decision on this Initiative is rendered".

82. By a letter of 12 June 2003, the Registrar, acting on the instructions of the Court, informed the Respondent that the Court could not accede to the request made in that document, that the proceedings be suspended until a decision was rendered on the jurisdictional issues raised therein. The Respondent was informed, nevertheless, that the Court "w[ould] not give judgment on the merits in the present case unless it [was] satisfied that it ha[d] jurisdiction" and that, "[s]hould Serbia and Montenegro wish to present further argument to the Court on jurisdictional questions during the oral proceedings on the merits, it w[ould] be free to do so". The Respondent accordingly raised, as an "issue of procedure", the question whether the Respondent had access to the Court at the date of the Application, and each of the parties has now addressed

argument to the Court on that question. It has however at the same time been argued by the Applicant that the Court may not deal with the question, or that the Respondent is debarred from raising it at this stage of the proceedings. These contentions will be examined below.

83. Subsequently, on 15 December 2004, the Court delivered judgment in eight cases brought by Serbia and Montenegro against Member States of NATO (cases concerning the *Legality of Use of Force*). The Applications instituting proceedings in those cases had been filed on 29 April 1999, that is to say prior to the admission of Serbia and Montenegro (then known as the Federal Republic of Yugoslavia) to the United Nations on 1 November 2000. In each of these cases, the Court held that it had no jurisdiction to entertain the claims made in the Application (see, for example, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 328, para. 129), on the grounds that "Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute" (*ibid.*, p. 327, para. 127). It held, "in light of the legal consequences of the new development since 1 November 2000", that "Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application . . ." (*ibid.*, p. 311, para. 79). No finding was made in those judgments on the question whether or not the Respondent was a party to the Genocide Convention at the relevant time.

84. Both Parties recognize that each of these Judgments has the force of *res judicata* in the specific case for the parties thereto; but they also recognize that these Judgments, not having been rendered in the present case, and involving as parties States not parties to the present case, do not constitute *res judicata* for the purposes of the present proceedings. In view however of the findings in the cases concerning the *Legality of Use of Force* as to the status of the FRY vis-à-vis the United Nations and the Court in 1999, the Respondent has invoked those decisions as supportive of its contentions in the present case.

85. The grounds upon which, according to Bosnia and Herzegovina, the Court should, at this late stage of the proceedings, decline to examine the questions raised by the Respondent as to the status of Serbia and Montenegro in relation to Article 35 of the Statute, and its status as a party to the Genocide Convention, are because the conduct of the Respondent in relation to the case has been such as to create a sort of *forum prorogatum,* or an estoppel, or to debar it, as a matter of good faith, from asserting at this stage of the proceedings that it had no access to the Court at the date the proceedings were instituted; and because the questions raised by the Respondent had already been resolved by the 1996 Judgment, with the authority of *res judicata*.

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86. As a result of the Initiative of the Respondent (paragraph 81 above), and its subsequent argument on what it has referred to as an "issue of procedure", the Court has before it what is essentially an objection by the Respondent to its jurisdiction, which is preliminary in the sense that, if it is upheld, the Court will not proceed to determine the merits. The Applicant objects in turn to the Court examining further the Respondent's jurisdictional objection. These matters evidently require to be examined as preliminary points, and it was for this reason that the Court instructed the Registrar to write to the Parties the letter of 12 June 2003, referred to in paragraph 82 above. The letter was intended to convey that the Court would listen to any argument raised by the Initiative which might be put to it, but not as an indication of what its ruling might be on any such arguments.

87. In order to make clear the background to these issues, the Court will first briefly review the history of the relationship between the Respondent and the United Nations during the period from the break-up of the SFRY in 1992 to the admission of Serbia and Montenegro (then called the Federal Republic of Yugoslavia) to the United Nations on 1 November 2000. The previous decisions of the Court in this case, and in the *Application for Revision* case, have been briefly recalled above (paragraphs 4, 8, 12 and 31). They will be referred to more fully below (paragraphs 105-113) for the purpose of (in particular) an examination of the contentions of Bosnia and Herzegovina on the question of *res judicata*.

* *

### *(2) History of the Status of the FRY with Regard to the United Nations*

88. In the early 1990s the SFRY, a founding Member State of the United Nations, made up of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, began to disintegrate. On 25 June 1991 Croatia and Slovenia both declared independence, followed by Macedonia on 17 September 1991 and Bosnia and Herzegovina on 6 March 1992. On 22 May 1992, Bosnia and Herzegovina, Croatia and Slovenia were admitted as Members to the United Nations; as was the former Yugoslav Republic of Macedonia on 8 April 1993.

89. On 27 April 1992 the "participants of the joint session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro" had adopted a declaration, stating in pertinent parts:

> ". . . . . .
>
> 1. The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally,
>
> . . . . . .
>
> Remaining bound by all obligations to international organizations and institutions whose member it is . . ." (United Nations doc. A/46/915, Ann. II).

90. An official Note dated 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General of the United Nations, stated *inter alia* that:

> "The Assembly of the Socialist Federal Republic of Yugoslavia, at its session held on 27 April 1992, promulgated the Constitution of the Federal Republic of Yugoslavia. Under the Constitution, on the basis of the continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro.
>
> Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia." (United Nations doc. A/46/915, Ann. I.)

91. On 30 May 1992, the Security Council adopted resolution 757 (1992), in which, *inter alia*, it noted that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted".

92. On 19 September 1992, the Security Council adopted resolution 777 (1992) which read as follows:

> "*The Security Council,*
>
> *Reaffirming* its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

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*Considering* that the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,

*Recalling* in particular resolution 757 (1992) which notes that 'the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted',

1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *recommends* to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. *Decides* to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly."

The resolution was adopted by 12 votes in favour, none against, and 3 abstentions.

93. On 22 September 1992 the General Assembly adopted resolution 47/1, according to which:

"*The General Assembly,*

*Having received* the recommendation of the Security Council of 19 September 1992 that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly,

1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *decides* that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. *Takes note* of the intention of the Security Council to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly."

The resolution was adopted by 127 votes to 6, with 26 abstentions.

94. On 25 September 1992, the Permanent Representatives of Bosnia and Herzegovina and Croatia addressed a letter to the Secretary-General, in which, with reference to Security Council resolution 777 (1992) and

General Assembly resolution 47/1, they stated their understanding as follows: "At this moment, there is no doubt that the Socialist Federal Republic of Yugoslavia is not a member of the United Nations any more. At the same time, the Federal Republic of Yugoslavia is clearly not yet a member." They concluded that "[t]he flag flying in front of the United Nations and the name-plaque bearing the name 'Yugoslavia' do not represent anything or anybody any more" and "kindly request[ed] that [the Secretary-General] provide a legal explanatory statement concerning the questions raised" (United Nations doc. A/47/474).

95. In response, on 29 September 1992, the Under-Secretary-General and Legal Counsel of the United Nations addressed a letter to the Permanent Representatives of Bosnia and Herzegovina and Croatia, in which he stated that the "considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1" was as follows:

> "While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer *participate* in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.
>
> On the other hand, the resolution neither terminates nor suspends Yugoslavia's *membership* in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign 'Yugoslavia'. Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1." (United Nations doc. A/47/485; emphasis in the original.)

96. On 29 April 1993, the General Assembly, upon the recommendation contained in Security Council resolution 821 (1993) (couched in terms similar to those of Security Council resolution 777 (1992)), adopted resolution 47/229 in which it decided that "the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council".

97. In its Judgments in the cases concerning the *Legality of Use of Force* (paragraph 83 above), the Court commented on this sequence of events by observing that "all these events testify to the rather confused and complex state of affairs that obtained within the United Nations surrounding the issue of the legal status of the Federal Republic of Yugoslavia in the Organization during this period" (*Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 308, para. 73), and earlier the Court, in another context, had referred to the "*sui generis* position which the FRY found itself in" during the period between 1992 to 2000 (*loc. cit.*, citing *I.C.J. Reports 2003*, p. 31, para. 71).

98. This situation, however, came to an end with a new development in 2000. On 24 September 2000, Mr. Koštunica was elected President of the FRY. In that capacity, on 27 October 2000 he sent a letter to the Secretary-General requesting admission of the FRY to membership in the United Nations, in the following terms:

> "In the wake of fundamental democratic changes that took place in the Federal Republic of Yugoslavia, in the capacity of President, I have the honour to request the admission of the Federal Republic of Yugoslavia to the United Nations *in light of the implementation of the Security Council resolution 777 (1992)*." (United Nations doc. A/55/528-S/2000/1043; emphasis added.)

99. Acting upon this application by the FRY for membership in the United Nations, the Security Council on 31 October 2000 "*recommend[ed]* to the General Assembly that the Federal Republic of Yugoslavia be admitted to membership in the United Nations" (United Nations doc. S/RES/1326). On 1 November 2000, the General Assembly, by resolution 55/12, "*[h]aving received* the recommendation of the Security Council of 31 October 2000" and "*[h]aving considered* the application for membership of the Federal Republic of Yugoslavia", decided to "admit the Federal Republic of Yugoslavia to membership in the United Nations".

* *

*(3) The Response of Bosnia and Herzegovina*

100. The Court will now consider the Applicant's response to the jurisdictional objection raised by the Respondent, that is to say the conten-

tion of Bosnia and Herzegovina that the Court should not examine the question, raised by the Respondent in its Initiative (paragraph 81 above), of the status of the Respondent at the date of the filing of the Application instituting proceedings. It is first submitted by Bosnia and Herzegovina that the Respondent was under a duty to raise the issue of whether the FRY (Serbia and Montenegro) was a Member of the United Nations at the time of the proceedings on the preliminary objections, in 1996, and that since it did not do so, the principle of *res judicata*, attaching to the Court's 1996 Judgment on those objections, prevents it from reopening the issue. Secondly, the Applicant argues that the Court itself, having decided in 1996 that it had jurisdiction in the case, would be in breach of the principle of *res judicata* if it were now to decide otherwise, and that the Court cannot call in question the authority of its decisions as *res judicata*.

101. The first contention, as to the alleged consequences of the fact that Serbia did not raise the question of access to the Court under Article 35 at the preliminary objection stage, can be dealt with succinctly. Bosnia and Herzegovina has argued that to uphold the Respondent's objection "would mean that a respondent, after having asserted one or more preliminary objections, could still raise others, to the detriment of the effective administration of justice, the smooth conduct of proceedings, and, in the present case, the doctrine of *res judicata*". It should however be noted that if a party to proceedings before the Court chooses not to raise an issue of jurisdiction by way of the preliminary objection procedure under Article 79 of the Rules, that party is not necessarily thereby debarred from raising such issue during the proceedings on the merits of the case. As the Court stated in the case of *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*,

> "There are of course circumstances in which the party failing to put forward an objection to jurisdiction might be held to have acquiesced in jurisdiction (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 52, para. 13). However, apart from such circumstances, a party failing to avail itself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings on the merits, but can still argue the objection along with the merits." (*Judgment, I.C.J. Reports 2004*, p. 29, para. 24).

This first contention of Bosnia and Herzegovina must thus be understood as a claim that the Respondent, by its conduct in relation to the case, including the failure to raise the issue of the application of Article 35 of the Statute, by way of preliminary objection or otherwise, at an earlier stage of the proceedings, should be held to have acquiesced in jurisdiction. This contention is thus parallel to the argument mentioned above (paragraph 85), also advanced by Bosnia and Herzegovina, that the Respondent is debarred from asking the Court to examine that issue for

reasons of good faith, including estoppel and the principle *allegans contraria nemo audietur.*

102. The Court does not however find it necessary to consider here whether the conduct of the Respondent could be held to constitute an acquiescence in the jurisdiction of the Court. Such acquiescence, if established, might be relevant to questions of consensual jurisdiction, and in particular jurisdiction *ratione materiae* under Article IX of the Genocide Convention, but not to the question whether a State has the capacity under the Statute to be a party to proceedings before the Court.

The latter question may be regarded as an issue prior to that of jurisdiction *ratione personae*, or as one constitutive element within the concept of jurisdiction *ratione personae*. Either way, unlike the majority of questions of jurisdiction, it is not a matter of the consent of the parties. As the Court observed in the cases concerning the *Legality of Use of Force*,

> "a distinction has to be made between a question of jurisdiction that relates to the consent of a party and the question of the right of a party to appear before the Court under the requirements of the Statute, which is not a matter of consent. The question is whether *as a matter of law* Serbia and Montenegro was entitled to seise the Court as a party to the Statute at the time when it instituted proceedings in these cases. Since that question is independent of the views or wishes of the Parties, even if they were now to have arrived at a shared view on the point, the Court would not have to accept that view as necessarily the correct one. The function of the Court to enquire into the matter and reach its own conclusion is thus mandatory upon the Court irrespective of the consent of the parties and is in no way incompatible with the principle that the jurisdiction of the Court depends on consent." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 295, para. 36; emphasis in the original.)

103. It follows that, whether or not the Respondent should be held to have acquiesced in the jurisdiction of the Court in this case, such acquiescence would in no way debar the Court from examining and ruling upon the question stated above. The same reasoning applies to the argument that the Respondent is estopped from raising the matter at this stage, or debarred from doing so by considerations of good faith. All such considerations can, at the end of the day, only amount to attributing to the Respondent an implied acceptance, or deemed consent, in relation to the jurisdiction of the Court; but, as explained above, *ad hoc* consent of a party is distinct from the question of its capacity to be a party to proceedings before the Court.

104. However Bosnia and Herzegovina's second contention is that,

objectively and apart from any effect of the conduct of the Respondent, the question of the application of Article 35 of the Statute in this case has already been resolved as a matter of *res judicata,* and that if the Court were to go back on its 1996 decision on jurisdiction, it would disregard fundamental rules of law. In order to assess the validity of this contention, the Court will first review its previous decisions in the present case in which its jurisdiction, or specifically the question whether Serbia and Montenegro could properly appear before the Court, has been in issue.

* *

*(4) Relevant Past Decisions of the Court*

105. On 8 April 1993, the Court made an Order in this case indicating certain provisional measures. In that Order the Court briefly examined the circumstances of the break-up of the SFRY, and the claim of the Respondent (then known as "Yugoslavia (Serbia and Montenegro)") to continuity with that State, and consequent entitlement to continued membership in the United Nations. It noted that "the solution adopted" within the United Nations was "not free from legal difficulties", but concluded that "the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993,* p. 14 para. 18). This conclusion was based in part on a provisional view taken by the Court as to the effect of the proviso to Article 35, paragraph 2, of the Statute (*ibid.*, para. 19). The Order contained the reservation, normally included in orders on requests for provisional measures, that "the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case . . . and leaves unaffected the right of the Governments of Bosnia-Herzegovina and Yugoslavia to submit arguments in respect of [that question]" (*ibid.*, p. 23, para. 51). It is therefore evident that no question of *res judicata* arises in connection with the Order of 8 April 1993. A further Order on provisional measures was made on 13 September 1993, but contained nothing material to the question now being considered.

106. In 1995 the Respondent raised seven preliminary objections (one of which was later withdrawn), three of which invited the Court to find that it had no jurisdiction in the case. None of these objections were however founded on a contention that the FRY was not a party to the Statute at the relevant time; that was not a contention specifically advanced in the proceedings on the preliminary objections. At the time of those

proceedings, the FRY was persisting in the claim, that it was continuing the membership of the former SFRY in the United Nations; and while that claim was opposed by a number of States, the position taken by the various organs gave rise to a "confused and complex state of affairs . . . within the United Nations" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004,* p. 308, para. 73). Neither party raised the matter before the Court: Bosnia and Herzegovina as Applicant, while denying that the FRY was a Member of the United Nations as a continuator of the SFRY, was asserting before this Court that the FRY was nevertheless a party to the Statute, either under Article 35, paragraph 2, thereof, or on the basis of the declaration of 27 April 1992 (see paragraphs 89 to 90 above); and for the FRY to raise the issue would have involved undermining or abandoning its claim to be the continuator of the SFRY as the basis for continuing membership of the United Nations.

107. By the 1996 Judgment, the Court rejected the preliminary objections of the Respondent, and found that, "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 623, para. 47 (2) *(a)*). It also found that the Application was admissible, and stated that "the Court may now proceed to consider the merits of the case . . ." (*ibid.*, p. 622, para. 46).

108. However, on 24 April 2001 Serbia and Montenegro (then known as the Federal Republic of Yugoslavia) filed an Application instituting proceedings seeking revision, under Article 61 of the Statute, of the 1996 Judgment on jurisdiction in this case. That Article requires that there exist "some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court . . .". The FRY claimed in its Application that:

> "The admission of the FRY to the United Nations as a new Member on 1 November 2000 is certainly a new fact . . .
>
> . . . . . .
>
> The admission of the FRY to the United Nations as a new Member clears ambiguities and sheds a different light on the issue of the membership of the FRY in the United Nations, in the Statute and in the Genocide Convention." (*Application for Revision, I.C.J. Reports 2003,* p. 12, para. 18.)

Essentially the contention of the FRY was that its admission to membership in 2000 necessarily implied that it was not a Member of the United Nations and thus not a party to the Statute in 1993, when the proceed-

ings in the present case were instituted, so that the Court would have had no jurisdiction in the case.

109. The history of the relationship between the FRY and the United Nations, from the break-up of the SFRY in 1991-1992 up to the admission of the FRY as a new Member in 2000, has been briefly recalled in paragraphs 88 to 99 above. That history has been examined in detail on more than one occasion, both in the context of the Application for revision referred to in paragraph 108 and in the Court's Judgments in 2004 in the cases concerning the *Legality of Use of Force*. In its Judgment of 3 February 2003 on the Application for revision, the Court carefully studied that relationship; it also recalled the terms of its 1996 Judgment finding in favour of jurisdiction. The Court noted that

> "the FRY claims that the facts which existed at the time of the 1996 Judgment and upon the discovery of which its request for revision of that Judgment is based 'are that the FRY was *not* a party to the Statute, and that it did *not* remain bound by the Genocide Convention continuing the personality of the former Yugoslavia'. It argues that these 'facts' were 'revealed' by its admission to the United Nations on 1 November 2000 and by [a letter from the United Nations Legal Counsel] of 8 December 2000.
>
> . . . . . .
>
> In the final version of its argument, the FRY claims that its admission to the United Nations and the Legal Counsel's letter of 8 December 2000 simply 'revealed' two facts which had existed in 1996 but had been unknown at the time: that it was not then a party to the Statute of the Court and that it was not bound by the Genocide Convention." (*I.C.J. Reports 2003*, p. 30, paras. 66 and 69.)

110. The Court did not consider that the admission of the FRY to membership was itself a "new fact", since it occurred after the date of the Judgment of which the revision was sought (*ibid.*, para. 68). As to the argument that facts on which an application for revision could be based were "revealed" by the events of 2000, the Court ruled as follows:

> "In advancing this argument, the FRY does not rely on facts that existed in 1996. In reality, it bases its Application for revision on the legal consequences which it seeks to draw from facts subsequent to the Judgment which it is asking to have revised. Those consequences, even supposing them to be established, cannot be regarded as facts within the meaning of Article 61. The FRY's argument cannot accordingly be upheld." (*Ibid.*, pp. 30-31, para. 69.)

111. The Court therefore found the Application for revision inadmissible. However, as the Court has observed in the cases concerning *Legal-*

*ity of Use of Force*, it did not, in its Judgment on the Application for revision,

> "regard the alleged 'decisive facts' specified by Serbia and Montenegro as 'facts that existed in 1996' for the purpose of Article 61. The Court therefore did not have to rule on the question whether 'the legal consequences' could indeed legitimately be deduced from the later facts; in other words, it did not have to say whether it was correct that Serbia and Montenegro had not been a party to the Statute or to the Genocide Convention in 1996." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 313, para. 87.)

112. In a subsequent paragraph of the 2003 Judgment on the Application for revision of the 1996 Judgment, the Court had stated:

> "It follows from the foregoing that it has not been established that the request of the FRY is based upon the discovery of 'some fact' which was 'when the judgment was given, unknown to the Court and also to the party claiming revision'. The Court therefore concludes that one of the conditions for the admissibility of an application for revision prescribed by paragraph 1 of Article 61 of the Statute has not been satisfied." (*I.C.J. Reports 2003*, p. 31, para. 72.)

In its 2004 decisions in the *Legality of Use of Force* cases the Court further commented on this finding:

> "The Court thus made its position clear that there could have been no retroactive modification of the situation in 2000, which would amount to a new fact, and that therefore the conditions of Article 61 were not satisfied. This, however, did not entail any finding by the Court, in the revision proceedings, as to what that situation actually was." (*Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 314, para. 89.)

113. For the purposes of the present case, it is thus clear that the Judgment of 2003 on the Application by the FRY for revision, while binding between the parties, and final and without appeal, did not contain any finding on the question whether or not that State had actually been a Member of the United Nations in 1993. The question of the status of the FRY in 1993 formed no part of the issues upon which the Court pronounced judgment when dismissing that Application.

* *

### *(5) The Principle of* Res Judicata

114. The Court will now consider the principle of *res judicata*, and its application to the 1996 Judgment in this case. The Applicant asserts that the 1996 Judgment, whereby the Court found that it had jurisdiction

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under the Genocide Convention, "enjoys the authority of *res judicata* and is not susceptible of appeal" and that "any ruling whereby the Court reversed the 1996 Judgment . . . would be incompatible both with the *res judicata* principle and with Articles 59, 60 and 61 of the Statute". The Applicant submits that, like its judgments on the merits, "the Court's decisions on jurisdiction are *res judicata*". It further observes that, pursuant to Article 60 of the Statute, the Court's 1996 Judgment is "final and without appeal" subject only to the possibility of a request for interpretation and revision; and the FRY's request for revision was rejected by the Court in its Judgment of 3 February 2003. The Respondent contends that jurisdiction once upheld may be challenged by new objections; and considers that this does not contravene the principle of *res judicata* or the wording of Article 79 of the Rules of Court. It emphasizes "the right and duty of the Court to act *proprio motu*" to examine its jurisdiction, mentioned in the case of the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)* (see paragraph 118 below), and contends that the Court cannot "forfeit" that right by not having itself raised the issue in the preliminary objections phase.

115. There is no dispute between the Parties as to the existence of the principle of *res judicata* even if they interpret it differently as regards judgments deciding questions of jurisdiction. The fundamental character of that principle appears from the terms of the Statute of the Court and the Charter of the United Nations. The underlying character and purposes of the principle are reflected in the judicial practice of the Court. That principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose. Article 59 of the Statute, notwithstanding its negative wording, has at its core the positive statement that the parties are bound by the decision of the Court in respect of the particular case. Article 60 of the Statute provides that the judgment is final and without appeal; Article 61 places close limits of time and substance on the ability of the parties to seek the revision of the judgment. The Court stressed those limits in 2003 when it found inadmissible the Application made by Serbia and Montenegro for revision of the 1996 Judgment in the *Application for Revision* case (*I.C.J. Reports 2003*, p. 12, para. 17).

116. Two purposes, one general, the other specific, underlie the principle of *res judicata*, internationally as nationally. First, the stability of legal relations requires that litigation come to an end. The Court's function, according to Article 38 of its Statute, is to "decide", that is, to bring to an end, "such disputes as are submitted to it". Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again. Article 60 of the Statute articu-

lates this finality of judgments. Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.

117. It has however been suggested by the Respondent that a distinction may be drawn between the application of the principle of *res judicata* to judgments given on the merits of a case, and judgments determining the Court's jurisdiction, in response to preliminary objections; specifically, the Respondent contends that "decisions on preliminary objections do not and cannot have the same consequences as decisions on the merits". The Court will however observe that the decision on questions of jurisdiction, pursuant to Article 36, paragraph 6, of the Statute, is given by a judgment, and Article 60 of the Statute provides that "[t]he judgment is final and without appeal", without distinguishing between judgments on jurisdiction and admissibility, and judgments on the merits. In its Judgment of 25 March 1999 on the request for interpretation of the Judgment of 11 June 1998 in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court expressly recognized that the 1998 Judgment, given on a number of preliminary objections to jurisdiction and admissibility, constituted *res judicata*, so that the Court could not consider a submission inconsistent with that judgment (*Judgment, I.C.J. Reports 1999 (I)*, p. 39, para. 16). Similarly, in its Judgment of 3 February 2003 in the *Application for Revision* case, the Court, when it began by examining whether the conditions for the opening of the revision procedure, laid down by Article 61 of the Statute, were satisfied, undoubtedly recognized that an application could be made for revision of a judgment on preliminary objections; this could in turn only derive from a recognition that such a judgment is "final and without appeal". Furthermore, the contention put forward by the Respondent would signify that the principle of *res judicata* would not prevent a judgment dismissing a preliminary objection from remaining open to further challenge indefinitely, while a judgment upholding such an objection, and putting an end to the case, would in the nature of things be final and determinative as regards that specific case.

118. The Court recalls that, as it has stated in the case of the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)*, it "must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*" (*Judgment, I.C.J. Reports 1972*, p. 52, para. 13). That decision in its context (in a case in which there was no question of reopening a previous decision of the Court) does not support the Respondent's contention. It does not signify that jurisdictional decisions remain reviewable indefinitely, nor that the Court may, *proprio motu* or otherwise, reopen matters already decided with the force of *res judicata*. The Respondent has argued that there is a principle that "an international court may consider or reconsider the issue of juris-

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diction at any stage of the proceedings". It has referred in this connection both to the dictum just cited from the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)*, and to the *Corfu Channel (United Kingdom* v. *Albania)* case. It is correct that the Court, having in the first phase of that case rejected Albania's preliminary objection to jurisdiction, and having decided that proceedings on the merits were to continue (*Preliminary Objection, Judgment, I.C.J. Reports 1947-1948*, p. 15), did at the merits stage consider and rule on a challenge to its jurisdiction, in particular whether it had jurisdiction to assess compensation (*I.C.J. Reports 1949*, pp. 23-26; 171). But no reconsideration at all by the Court of its earlier Judgment was entailed in this because, following that earlier Judgment, the Parties had concluded a special agreement submitting to the Court, *inter alia*, the question of compensation. The later challenge to jurisdiction concerned only the scope of the jurisdiction conferred by that subsequent agreement.

119. The Respondent also invokes certain international conventions and the rules of other international tribunals. It is true that the European Court of Human Rights may reject, at any stage of the proceedings, an application which it considers inadmissible; and the International Criminal Court may, in exceptional circumstances, permit the admissibility of a case or the jurisdiction of the Court to be challenged after the commencement of the trial. However, these specific authorizations in the instruments governing certain other tribunals reflect their particular admissibility procedures, which are not identical with the procedures of the Court in the field of jurisdiction. They thus do not support the view that there exists a general principle which would apply to the Court, whose Statute not merely contains no such provision, but declares, in Article 60, the *res judicata* principle without exception. The Respondent has also cited certain jurisprudence of the European Court of Human Rights, and an arbitral decision of the German-Polish Mixed Arbitral Tribunal (*von Tiedemann* case); but, in the view of the Court, these too, being based on their particular facts, and the nature of the jurisdictions involved, do not indicate the existence of a principle of sufficient generality and weight to override the clear provisions of the Court's Statute, and the principle of *res judicata*.

120. This does not however mean that, should a party to a case believe that elements have come to light subsequent to the decision of the Court which tend to show that the Court's conclusions may have been based on incorrect or insufficient facts, the decision must remain final, even if it is in apparent contradiction to reality. The Statute provides for only one procedure in such an event: the procedure under Article 61, which offers the possibility for the revision of judgments, subject to the restrictions stated in that Article. In the interests of the stability of legal relations, those restrictions must be rigorously applied. As noted above (para-

graph 110) the FRY's Application for revision of the 1996 Judgment in this case was dismissed, as not meeting the conditions of Article 61. Subject only to this possibility of revision, the applicable principle is *res judicata pro veritate habetur*, that is to say that the findings of a judgment are, for the purposes of the case and between the parties, to be taken as correct, and may not be reopened on the basis of claims that doubt has been thrown on them by subsequent events.

* *

*(6) Application of the Principle of* Res Judicata *to the 1996 Judgment*

121. In the light of these considerations, the Court reverts to the effect and significance of the 1996 Judgment. That Judgment was essentially addressed, so far as questions of jurisdiction were concerned, to the question of the Court's jurisdiction under the Genocide Convention. It resolved in particular certain questions that had been raised as to the status of Bosnia and Herzegovina in relation to the Convention; as regards the FRY, the Judgment stated simply as follows:

> "the former Socialist Federal Republic of Yugoslavia . . . signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950. At the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a formal declaration was adopted on its behalf to the effect that:
>
> > 'The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.'
>
> This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General. The Court observes, furthermore, that it has not been contested that Yugoslavia was party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely, on 20 March 1993." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia) Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17.)

122. Nothing was stated in the 1996 Judgment about the status of the FRY in relation to the United Nations, or the question whether it could participate in proceedings before the Court; for the reasons already mentioned above (paragraph 106), both Parties had chosen to refrain from asking for a decision on these matters. The Court however considers it necessary to emphasize that the question whether a State may properly come before the Court, on the basis of the provisions of the Statute, whether it be classified as a matter of capacity to be a party to the proceedings or as an aspect of jurisdiction *ratione personae*, is a matter which precedes that of jurisdiction *ratione materiae*, that is, whether that State has consented to the settlement by the Court of the specific dispute brought before it. The question is in fact one which the Court is bound to raise and examine, if necessary, ex officio, and if appropriate after notification to the parties. Thus if the Court considers that, in a particular case, the conditions concerning the capacity of the parties to appear before it are not satisfied, while the conditions of its jurisdiction *ratione materiae* are, it should, even if the question has not been raised by the parties, find that the former conditions are not met, and conclude that, for that reason, it could not have jurisdiction to decide the merits.

123. The operative part of a judgment of the Court possesses the force of *res judicata*. The operative part of the 1996 Judgment stated, in paragraph 47 (2) *(a)*, that the Court found "that, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to decide upon the dispute". That jurisdiction is thus established with the full weight of the Court's judicial authority. For a party to assert today that, at the date the 1996 Judgment was given, the Court had no power to give it, because one of the parties can now be seen to have been unable to come before the Court is, for the reason given in the preceding paragraph, to call in question the force as *res judicata* of the operative clause of the Judgment. At first sight, therefore, the Court need not examine the Respondent's objection to jurisdiction based on its contention as to its lack of status in 1993.

124. The Respondent has however advanced a number of arguments tending to show that the 1996 Judgment is not conclusive on the matter, and the Court will now examine these. The passage just quoted from the 1996 Judgment is of course not the sole provision of the operative clause of that Judgment: as, the Applicant has noted, the Court first dismissed *seriatim* the specific preliminary objections raised (and not withdrawn) by the Respondent; it then made the finding quoted in paragraph 123 above; and finally it dismissed certain additional bases of jurisdiction invoked by the Applicant. The Respondent suggests that, for the purposes of applying the principle of *res judicata* to a judgment of this kind on preliminary objections, the operative clause *(dispositif)* to be taken into account and given the force of *res judicata* is the decision rejecting specified preliminary objections, rather than "the broad ascertainment

upholding jurisdiction". The Respondent has drawn attention to the provisions of Article 79, paragraph 7, of the 1978 Rules of Court, which provides that the judgment on preliminary objections shall, in respect of each objection "either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character". The Respondent suggests therefore that only the clauses of a judgment on preliminary objections that are directed to these ends have the force of *res judicata*, which is, it contends, consistent with the view that new objections may be raised subsequently.

125. The Court does not however consider that it was the purpose of Article 79 of the Rules of Court to limit the extent of the force of *res judicata* attaching to a judgment on preliminary objections, nor that, in the case of such judgment, such force is necessarily limited to the clauses of the *dispositif* specifically rejecting particular objections. There are many examples in the Court's jurisprudence of decisions on preliminary objections which contain a general finding that the Court has jurisdiction, or that the application is admissible, as the case may be; and it would be going too far to suppose that all of these are necessarily superfluous conclusions. In the view of the Court, if any question arises as to the scope of *res judicata* attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given (cf. *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, pp. 218-219, para. 48).

126. For this purpose, in respect of a particular judgment it may be necessary to distinguish between, first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or *obiter dicta*; and finally matters which have not been ruled upon at all. Thus an application for interpretation of a judgment under Article 60 of the Statute may well require the Court to settle "[a] difference of opinion [between the parties] as to whether a particular point has or has not been decided with binding force" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J. Series A, No. 13*, pp. 11-12). If a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it.

127. In particular, the fact that a judgment may, in addition to rejecting specific preliminary objections, contain a finding that "the Court has jurisdiction" in the case does not necessarily prevent subsequent examination of any jurisdictional issues later arising that have not been resolved, with the force of *res judicata*, by such judgment. The Parties have each referred in this connection to the successive decisions in the *Corfu Chan-*

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*nel* case, which the Court has already considered above (paragraph 118). Mention may also be made of the judgments on the merits in the two cases concerning *Fisheries Jurisdiction (United Kingdom* v. *Iceland) (Federal Republic of Germany* v. *Iceland)* (*I.C.J. Reports 1974*, p. 20, para. 42; pp. 203-204, para. 74), which dealt with minor issues of jurisdiction despite an express finding of jurisdiction in previous judgments (*I.C.J. Reports 1973*, p. 22, para. 46; p. 66, para. 46). Even where the Court has, in a preliminary judgment, specifically reserved certain matters of jurisdiction for later decision, the judgment may nevertheless contain a finding that "the Court has jurisdiction" in the case, this being understood as being subject to the matters reserved (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 442, para. 113 (1) *(c)*, and pp. 425-426, para. 76; cf. also, in connection with an objection to admissibility, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom) (Libyan Arab Jamahiriya* v. *United States of America), I.C.J. Reports 1998*, p. 29, para. 51, and pp. 30-31, paras. 53 (2) *(b)* and 53 (3); p. 134, para. 50, and p. 156, paras. 53 (2) *(b)* and 53 (3)).

128. On the other hand, the fact that the Court has in these past cases dealt with jurisdictional issues after having delivered a judgment on jurisdiction does not support the contention that such a judgment can be reopened at any time, so as to permit reconsideration of issues already settled with the force of *res judicata*. The essential difference between the cases mentioned in the previous paragraph and the present case is this: the jurisdictional issues examined at a late stage in those cases were such that the decision on them would not contradict the finding of jurisdiction made in the earlier judgment. In the *Fisheries Jurisdiction* cases, the issues raised related to the extent of the jurisdiction already established in principle with the force of *res judicata*; in the *Military and Paramilitary Activities* case, the Court had clearly indicated in the 1984 Judgment that its finding in favour of jurisdiction did not extend to a definitive ruling on the interpretation of the United States reservation to its optional clause declaration. By contrast, the contentions of the Respondent in the present case would, if upheld, effectively reverse the 1996 Judgment; that indeed is their purpose.

129. The Respondent has contended that the issue whether the FRY had access to the Court under Article 35 of the Statute has in fact never been decided in the present case, so that no barrier of *res judicata* would prevent the Court from examining that issue at the present stage of the

proceedings. It has drawn attention to the fact that when commenting on the 1996 Judgment, in its 2004 Judgments in the cases concerning the *Legality of Use of Force*, the Court observed that "[t]he question of the status of the Federal Republic of Yugoslavia in relation to Article 35 of the Statute was not raised and the Court saw no reason to examine it" (see, for example, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), I.C.J. Reports 2004*, p. 311, para. 82), and that "in its pronouncements in incidental proceedings" in the present case, the Court "did not commit itself to a definitive position on the issue of the legal status of the Federal Republic of Yugoslavia in relation to the Charter and the Statute" (*ibid.*, pp. 308-309, para. 74).

130. That does not however signify that in 1996 the Court was unaware of the fact that the solution adopted in the United Nations to the question of continuation of the membership of the SFRY "[was] not free from legal difficulties", as the Court had noted in its Order of 8 April 1993 indicating provisional measures in the case (*I.C.J. Reports 1993*, p. 14, para. 18; above, paragraph 105). The FRY was, at the time of the proceedings on its preliminary objections culminating in the 1996 Judgment, maintaining that it was the continuator State of the SFRY. As the Court indicated in its Judgments in the cases concerning the *Legality of Use of Force*,

> "No specific assertion was made in the Application [of 1993, in the present case] that the Court was open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute of the Court, but it was later made clear that the Applicant claimed to be a Member of the United Nations and thus a party to the Statute of the Court, by virtue of Article 93, paragraph 1, of the Charter, at the time of filing of the Application . . . [T]his position was expressly stated in the Memorial filed by Serbia and Montenegro on 4 January 2000 . . ." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004,* p. 299, para. 47.)

The question whether the FRY was a continuator or a successor State of the SFRY was mentioned in the Memorial of Bosnia and Herzegovina. The view of Bosnia and Herzegovina was that, while the FRY was not a Member of the United Nations, as a successor State of the SFRY which had expressly declared that it would abide by the international commitments of the SFRY, it was nevertheless a party to the Statute. It is also essential, when examining the text of the 1996 Judgment, to take note of the context in which it was delivered, in particular as regards the contemporary state of relations between the Respondent and the United Nations, as recounted in paragraphs 88 to 99 above.

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131. The "legal difficulties" referred to were finally dissipated when in 2000 the FRY abandoned its former insistence that it was the continuator of the SFRY, and applied for membership in the United Nations (paragraph 98 above). As the Court observed in its 2004 Judgments in the cases concerning the *Legality of Use of Force*,

> "the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations. It is in that sense that the situation that the Court now faces in relation to Serbia and Montenegro is manifestly different from that which it faced in 1999. If, at that time, the Court had had to determine definitively the status of the Applicant vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status. However, from the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, pp. 310-311, para. 79.)

As the Court here recognized, in 1999 — and even more so in 1996 — it was by no means so clear as the Court found it to be in 2004 that the Respondent was not a Member of the United Nations at the relevant time. The inconsistencies of approach expressed by the various United Nations organs are apparent from the passages quoted in paragraphs 91 to 96 above.

132. As already noted, the legal complications of the position of the Respondent in relation to the United Nations were not specifically mentioned in the 1996 Judgment. The Court stated, as mentioned in paragraph 121 above, that "Yugoslavia was bound by the provisions of the [Genocide] Convention on the date of the filing of the Application in the present case" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17), and found that "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute" (*ibid.*, p. 623, para. 47 (2) *(a)*). Since, as observed above, the question of a State's capacity to be a party to proceedings is a matter which precedes that of jurisdiction *ratione materiae*, and one which the Court must, if necessary, raise ex officio (see

paragraph 122 above), this finding must as a matter of construction be understood, by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court. On that basis, it proceeded to make a finding on jurisdiction which would have the force of *res judicata*. The Court does not need, for the purpose of the present proceedings, to go behind that finding and consider on what basis the Court was able to satisfy itself on the point. Whether the Parties classify the matter as one of "access to the Court" or of "jurisdiction *ratione personae*", the fact remains that the Court could not have proceeded to determine the merits unless the Respondent had had the capacity under the Statute to be a party to proceedings before the Court.

133. In the view of the Court, the express finding in the 1996 Judgment that the Court had jurisdiction in the case *ratione materiae*, on the basis of Article IX of the Genocide Convention, seen in its context, is a finding which is only consistent, in law and logic, with the proposition that, in relation to both Parties, it had jurisdiction *ratione personae* in its comprehensive sense, that is to say, that the status of each of them was such as to comply with the provisions of the Statute concerning the capacity of States to be parties before the Court. As regards Bosnia and Herzegovina, there was no question but that it was a party to the Statute at the date of filing its Application instituting proceedings; and in relation to the Convention, the Court found that it "could . . . become a party to the Convention" from the time of its admission to the United Nations (*I.C.J. Reports 1996 (II)*, p. 611, para. 19), and had in fact done so. As regards the FRY, the Court found that it "was bound by the provisions of the Convention", i.e. was a party thereto, "on the date of the filing of the Application" (*ibid.*, p. 610, para. 17); in this respect the Court took note of the declaration made by the FRY on 27 April 1992, set out in paragraph 89 above, whereby the FRY "continuing the State, international legal and political personality" of the SFRY, declared that it would "strictly abide by" the international commitments of the SFRY. The determination by the Court that it had jurisdiction under the Genocide Convention is thus to be interpreted as incorporating a determination that all the conditions relating to the capacity of the Parties to appear before it had been met.

134. It has been suggested by the Respondent that the Court's finding of jurisdiction in the 1996 Judgment was based merely upon an assumption: an assumption of continuity between the SFRY and the FRY. It has drawn attention to passages, already referred to above (paragraph 129), in the Judgments in the *Legality of Use of Force* cases, to the effect that in 1996 the Court saw no reason to examine the question of access, and that, in its pronouncements in incidental proceedings, the Court did not commit itself to a definitive position on the issue of the legal status of the Respondent.

135. That the FRY had the capacity to appear before the Court in

accordance with the Statute was an element in the reasoning of the 1996 Judgment which can — and indeed must — be read into the Judgment as a matter of logical construction. That element is not one which can at any time be reopened and re-examined, for the reasons already stated above. As regards the passages in the 2004 Judgments relied on by the Respondent, it should be borne in mind that the concern of the Court was not then with the scope of *res judicata* of the 1996 Judgment, since in any event such *res judicata* could not extend to the proceedings in the cases that were then before it, between different parties. It was simply appropriate in 2004 for the Court to consider whether there was an expressly stated finding in another case that would throw light on the matters before it. No such express finding having been shown to exist, the Court in 2004 did not, as it has in the present case, have to go on to consider what might be the unstated foundations of a judgment given in another case, between different parties.

136. The Court thus considers that the 1996 Judgment contained a finding, whether it be regarded as one of jurisdiction *ratione personae*, or as one anterior to questions of jurisdiction, which was necessary as a matter of logical construction, and related to the question of the FRY's capacity to appear before the Court under the Statute. The force of *res judicata* attaching to that judgment thus extends to that particular finding.

137. However it has been argued by the Respondent that even were that so,

> "the fundamental nature of access as a precondition for the exercise of the Court's judicial function means that positive findings on access cannot be taken as definitive and final until the final judgment is rendered in proceedings, because otherwise it would be possible that the Court renders its final decision with respect to a party over which it cannot exercise [its] judicial function. In other words, access is so fundamental that, until the final judgment, it overrides the principle of *res judicata*. Thus, even if the 1996 Judgment had made a finding on access, *quod non*, that would not be a bar for the Court to re-examine this issue until the end of the proceedings."

A similar argument advanced by the Respondent is based on the principle that the jurisdiction of the Court derives from a treaty, namely the Statute of the Court; the Respondent questions whether the Statute could have endowed the 1996 Judgment with any effects at all, since the Respondent was, it alleges, not a party to the Statute. Counsel for the Respondent argued that

> "Today it is known that in 1996 when the decision on preliminary objections was rendered, the Respondent was not a party to the Statute. Thus, there was no foothold, Articles 36 (6), 59, and 60 did

not represent a binding treaty provision providing a possible basis for deciding on jurisdiction with *res judicata* effects."

138. It appears to the Court that these contentions are inconsistent with the nature of the principle of *res judicata*. That principle signifies that once the Court has made a determination, whether on a matter of the merits of a dispute brought before it, or on a question of its own jurisdiction, that determination is definitive both for the parties to the case, in respect of the case (Article 59 of the Statute), and for the Court itself in the context of that case. However fundamental the question of the capacity of States to be parties in cases before the Court may be, it remains a question to be determined by the Court, in accordance with Article 36, paragraph 6, of the Statute, and once a finding in favour of jurisdiction has been pronounced with the force of *res judicata*, it is not open to question or re-examination, except by way of revision under Article 61 of the Statute. There is thus, *as a matter of law*, no possibility that the Court might render "its final decision with respect to a party over which it cannot exercise its judicial function", because the question whether a State is or is not a party subject to the jurisdiction of the Court is one which is reserved for the sole and authoritative decision of the Court.

139. Counsel for the Respondent contended further that, in the circumstances of the present case, reliance on the *res judicata* principle "would justify the Court's *ultra vires* exercise of its judicial functions contrary to the mandatory requirements of the Statute". However, the operation of the "mandatory requirements of the Statute" falls to be determined by the Court in each case before it; and once the Court has determined, with the force of *res judicata*, that it has jurisdiction, then for the purposes of that case no question of *ultra vires* action can arise, the Court having sole competence to determine such matters under the Statute. For the Court *res judicata pro veritate habetur*, and the judicial truth within the context of a case is as the Court has determined it, subject only to the provision in the Statute for revision of judgments. This result is required by the nature of the judicial function, and the universally recognized need for stability of legal relations.

* *

*(7) Conclusion: Jurisdiction Affirmed*

140. The Court accordingly concludes that, in respect of the contention that the Respondent was not, on the date of filing of the Application instituting proceedings, a State having the capacity to come before the Court under the Statute, the principle of *res judicata* precludes any reopening of the decision embodied in the 1996 Judgment. The Respondent

has however also argued that the 1996 Judgment is not *res judicata* as to the further question whether the FRY was, at the time of institution of proceedings, a party to the Genocide Convention, and has sought to show that at that time it was not, and could not have been, such a party. The Court however considers that the reasons given above for holding that the 1996 Judgment settles the question of jurisdiction in this case with the force of *res judicata* are applicable *a fortiori* as regards this contention, since on this point the 1996 Judgment was quite specific, as it was not on the question of capacity to come before the Court. The Court does not therefore find it necessary to examine the argument of the Applicant that the failure of the Respondent to advance at the time the reasons why it now contends that it was not a party to the Genocide Convention might raise considerations of estoppel, or *forum prorogatum* (cf. paragraphs 85 and 101 above). The Court thus concludes that, as stated in the 1996 Judgment, it has jurisdiction, under Article IX of the Genocide Convention, to adjudicate upon the dispute brought before it by the Application filed on 20 March 1993. It follows from the above that the Court does not find it necessary to consider the questions, extensively addressed by the Parties, of the status of the Respondent under the Charter of the United Nations and the Statute of the Court, and its position in relation to the Genocide Convention at the time of the filing of the Application.

*

141. There has been some reference in the Parties' arguments before the Court to the question whether Article 35, paragraphs 1 and 2, of the Statute apply equally to applicants and to respondents. This matter, being one of interpretation of the Statute, would be one for the Court to determine. However, in the light of the conclusion that the Court has reached as to the *res judicata* status of the 1996 decision, it does not find at present the necessity to do so.

* * *

## IV. The Applicable Law: The Convention on the Prevention and Punishment of the Crime of Genocide

### *(1) The Convention in Brief*

142. The Contracting Parties to the Convention, adopted on 9 December 1948, offer the following reasons for agreeing to its text:

> "The Contracting Parties,
>
> Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary

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to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided . . .”

143. Under Article I “[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”. Article II defines genocide in these terms:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

*(a)* Killing members of the group;
*(b)* Causing serious bodily or mental harm to members of the group;
*(c)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
*(d)* Imposing measures intended to prevent births within the group;
*(e)* Forcibly transferring children of the group to another group.”

Article III provides as follows:

“The following acts shall be punishable:

*(a)* Genocide;
*(b)* Conspiracy to commit genocide;
*(c)* Direct and public incitement to commit genocide;
*(d)* Attempt to commit genocide;
*(e)* Complicity in genocide.”

144. According to Article IV, persons committing any of those acts shall be punished whether they are constitutionally responsible rulers, public officials or private individuals. Article V requires the parties to enact the necessary legislation to give effect to the Convention, and, in particular, to provide effective penalties for persons guilty of genocide or other acts enumerated in Article III. Article VI provides that

“[p]ersons 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”.

Article VII provides for extradition.

145. Under Article VIII

> "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."

146. Article IX provides for certain disputes to be submitted to the Court:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

The remaining ten Articles are final clauses dealing with such matters as parties to the Convention and its entry into force.

147. The jurisdiction of the Court in this case is based solely on Article IX of the Convention. All the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction (*I.C.J. Reports 1996 (II)*, pp. 617-621, paras. 35-41). It follows that the Court may rule only on the disputes between the Parties to which that provision refers. The Parties disagree on whether the Court finally decided the scope and meaning of that provision in its 1996 Judgment and, if it did not, on the matters over which the Court has jurisdiction under that provision. The Court rules on those two matters in following sections of this Judgment. It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.

148. As it has in other cases, the Court recalls the fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law, including international humanitarian law, and they remain responsible for acts contrary to international law which are attributable to them (e.g. case concerning *Armed Activities on the Territory of the Congo (New Appli-*

*cation: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 2006*, pp. 52-53, para. 127).

149. The jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those "relating to the interpretation, application or fulfilment" of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts.

* *

*(2) The Court's 1996 Decision about the Scope and Meaning of Article IX*

150. According to the Applicant, the Court in 1996 at the preliminary objections stage decided that it had jurisdiction under Article IX of the Convention to adjudicate upon the responsibility of the respondent State, as indicated in that Article, "for genocide or any of the other acts enumerated in article III", and that that reference "does not exclude any form of State responsibility". The issue, it says, is *res judicata*. The Respondent supports a narrower interpretation of the Convention: the Court's jurisdiction is confined to giving a declaratory judgment relating to breaches of the duties to prevent and punish the commission of genocide by individuals.

151. The Respondent accepts that the first, wider, interpretation "was preferred by the majority of the Court in the preliminary objections phase" and quotes the following passage in the Judgment:

> "The Court now comes to the second proposition advanced by Yugoslavia [in support of one of its preliminary objections], regarding the type of State responsibility envisaged in Article IX of the Convention. According to Yugoslavia, that Article would only cover the responsibility flowing from the failure of a State to fulfil its obligations of prevention and punishment as contemplated by Articles V, VI and VII; on the other hand, the responsibility of a State for an act of genocide perpetrated by the State itself would be excluded from the scope of the Convention.
>
> *The Court would observe that the reference to Article IX to 'the responsibility of a State for genocide or for any of the other acts enumerated in Article III', does not exclude any form of State responsibility.*
>
> *Nor is the responsibility of a State for acts of its organs excluded*

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> *by Article IV of the Convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officials'.*
>
> In the light of the foregoing, the Court considers that it must reject the fifth preliminary objection of Yugoslavia. It would moreover observe that it is sufficiently apparent from the very terms of that objection that the Parties not only differ with respect to the facts of the case, their imputability and the applicability to them of the provisions of the Genocide Convention, but are moreover in disagreement with respect to the meaning and legal scope of several of those provisions, including Article IX. For the Court, there is accordingly no doubt that there exists a dispute between them relating to 'the interpretation, application or fulfilment of the . . . Convention, including . . . the responsibility of a State for genocide . . .', according to the form of words employed by that latter provision (cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988,* pp. 27-32)." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 616-617, paras. 32-33; emphasis now added to 1996 text.)

The Applicant relies in particular on the sentences in paragraph 32 which have been emphasized in the above quotation. The Respondent submits that

> "this expression of opinion is of marked brevity and is contingent upon the dismissal of the preliminary objection based upon the existence or otherwise of a dispute relating to the interpretation of the Genocide Convention. The interpretation adopted in this provisional mode by the Court is not buttressed by any reference to the substantial preparatory work of the Convention.
>
> In the circumstances, there is no reason of principle or consideration of common sense indicating that the issue of interpretation is no longer open."

While submitting that the Court determined the issue and spoke emphatically on the matter in 1996 the Applicant also says that this present phase of the case

> "will provide an additional opportunity for this Court to rule on [the] important matter, not only for the guidance of the Parties here before you, but for the benefit of future generations that should not have to fear the immunity of States from responsibility for their genocidal acts".

152. The Court has already examined above the question of the authority of *res judicata* attaching to the 1996 Judgment, and indicated that it cannot reopen issues decided with that authority. Whether or not the issue now raised by the Respondent falls in that category, the Court

observes that the final part of paragraph 33 of that Judgment, quoted above, must be taken as indicating that "the meaning and legal scope" of Article IX and of other provisions of the Convention remain in dispute. In particular a dispute "exists" about whether the only obligations of the Contracting Parties for the breach of which they may be held responsible under the Convention are to legislate, and to prosecute or extradite, or whether the obligations extend to the obligation not to commit genocide and the other acts enumerated in Article III. That dispute "exists" and was left by the Court for resolution at the merits stage. In these circumstances, and taking into account the positions of the Parties, the Court will determine at this stage whether the obligations of the Parties under the Convention do so extend. That is to say, the Court will decide "the meaning and legal scope" of several provisions of the Convention, including Article IX with its reference to "the responsibility of a State for genocide or any of the other acts enumerated in Article III".

* *

*(3) The Court's 1996 Decision about the Territorial Scope of the Convention*

153. A second issue about the *res judicata* effect of the 1996 Judgment concerns the territorial limits, if any, on the obligations of the States parties to prevent and punish genocide. In support of one of its preliminary objections the Respondent argued that it did not exercise jurisdiction over the Applicant's territory at the relevant time. In the final sentence of its reasons for rejecting this argument the Court said this: "[t]he Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention" (*I.C.J. Reports 1996 (II)*, p. 616, para. 31).

154. The Applicant suggests that the Court in that sentence ruled that the obligation extends without territorial limit. The Court does not state the obligation in that positive way. The Court does not say that the obligation is "territorially unlimited by the Convention". Further, earlier in the paragraph, it had quoted from Article VI (about the obligation of any State in the territory of which the act was committed to prosecute) as "the only provision relevant to" territorial "problems" related to the application of the Convention. The quoted sentence is therefore to be understood as relating to the undertaking stated in Article I. The Court did not in 1996 rule on the territorial scope of each particular obligation arising under the Convention. Accordingly the Court has still to rule on that matter. It is not *res judicata*.

* *

*(4) The Obligations Imposed by the Convention on the Contracting Parties*

155. The Applicant, in the words of its Agent, contends that "[t]his case is about State responsibility and seeks to establish the responsibilities of a State which, through its leadership, through its organs, committed the most brutal violations of one of the most sacred instruments of international law". The Applicant has emphasized that in its view, the Genocide Convention "created a universal, treaty-based concept of State responsibility", and that "[i]t is State responsibility for genocide that this legal proceeding is all about". It relies in this respect on Article IX of the Convention, which, it argues, "quite explicitly impose[s] on States a direct responsibility themselves not to commit genocide or to aid in the commission of genocide". As to the obligation of prevention under Article I, a breach of that obligation, according to the Applicant, "is established — it might be said is 'eclipsed' — by the fact that [the Respondent] is *itself* responsible for the genocide committed; . . . a State which commits genocide has not fulfilled its commitment to prevent it" (emphasis in the original). The argument moves on from alleged breaches of Article I to "violations [by the Respondent] of its obligations under Article III . . . to which express reference is made in Article IX, violations which stand at the heart of our case. This fundamental provision establishes the obligations whose violation engages the responsibility of States parties." It follows that, in the contention of the Applicant, the Court has jurisdiction under Article IX over alleged violations by a Contracting Party of those obligations.

156. The Respondent contends to the contrary that

> "the Genocide Convention does not provide for the responsibility of States for acts of genocide as such. The duties prescribed by the Convention relate to 'the prevention and punishment of the crime of genocide' when this crime is committed by individuals: and the provisions of Articles V and VI [about enforcement and prescription] . . . make this abundantly clear."

It argues that the Court therefore does not have jurisdiction *ratione materiae* under Article IX; and continues:

> "[t]hese provisions [Articles I, V, VI and IX] do not extend to the responsibility of a Contracting Party as such for acts of genocide but [only] to responsibility for failure to prevent or to punish acts of genocide committed by individuals within its territory or . . . its control".

The sole remedy in respect of that failure would, in the Respondent's view, be a declaratory judgment.

157. As a subsidiary argument, the Respondent also contended that

> "for a State to be responsible under the Genocide Convention, the facts must first be established. As genocide is a crime, it can only be established in accordance with the rules of criminal law, under which the first requirement to be met is that of individual responsibility. The State can incur responsibility only when the existence of genocide has been established beyond all reasonable doubt. In addition, it must then be shown that the person who committed the genocide can engage the responsibility of the State . . ."

(This contention went on to mention responsibility based on breach of the obligation to prevent and punish, matters considered later in this Judgment.)

158. The Respondent has in addition presented what it refers to as "alternative arguments concerning solely State responsibility for breaches of Articles II and III". Those arguments addressed the necessary conditions, especially of intent, as well as of attribution. When presenting those alternative arguments, counsel for the Respondent repeated the principal submission set out above that "the Convention does not suggest in any way that States themselves can commit genocide".

159. The Court notes that there is no disagreement between the Parties that the reference in Article IX to disputes about "the responsibility of a State" as being among the disputes relating to the interpretation, application or fulfilment of the Convention which come within the Court's jurisdiction, indicates that provisions of the Convention do impose obligations on States in respect of which they may, in the event of breach, incur responsibility. Articles V, VI and VII requiring legislation, in particular providing effective penalties for persons guilty of genocide and the other acts enumerated in Article III, and for the prosecution and extradition of alleged offenders are plainly among them. Because those provisions regulating punishment also have a deterrent and therefore a preventive effect or purpose, they could be regarded as meeting and indeed exhausting the undertaking to prevent the crime of genocide stated in Article I and mentioned in the title. On that basis, in support of the Respondent's principal position, that Article would rank as merely hortatory, introductory or purposive and as preambular to those specific obligations. The remaining specific provision, Article VIII about competent organs of the United Nations taking action, may be seen as completing the system by supporting both prevention and suppression, in this case at the political level rather than as a matter of legal responsibility.

160. The Court observes that what obligations the Convention imposes upon the parties to it depends on the ordinary meaning of the terms of

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the Convention read in their context and in the light of its object and purpose. To confirm the meaning resulting from that process or to remove ambiguity or obscurity or a manifestly absurd or unreasonable result, the supplementary means of interpretation to which recourse may be had include the preparatory work of the Convention and the circumstances of its conclusion. Those propositions, reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, are well recognized as part of customary international law: see *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,* p. 174, para. 94; case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004,* p. 48, para. 83; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001,* p. 501, para. 99; and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002,* p. 645, para. 37, and the other cases referred to in those decisions.

161. To determine what are the obligations of the Contracting Parties under the Genocide Convention, the Court will begin with the terms of its Article I. It contains two propositions. The first is the affirmation that genocide is a crime under international law. That affirmation is to be read in conjunction with the declaration that genocide is a crime under international law, unanimously adopted by the General Assembly two years earlier in its resolution 96 (I), and referred to in the Preamble to the Convention (paragraph 142, above). The affirmation recognizes the existing requirements of customary international law, a matter emphasized by the Court in 1951:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention) . . .
>
> The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human

> groups and on the other to confirm and endorse the most elementary principles of morality." (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.)

Later in that Opinion, the Court referred to "the moral and humanitarian principles which are its basis" (*ibid.,* p. 24). In earlier phases of the present case the Court has also recalled resolution 96 (I) (*I.C.J. Reports 1993*, p. 23; see also pp. 348 and 440) and has quoted the 1951 statement (*I.C.J. Reports 1996 (II)*, p. 616). The Court reaffirmed the 1951 and 1996 statements in its Judgment of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo* v. *Rwanda)*, paragraph 64, when it added that the norm prohibiting genocide was assuredly a peremptory norm of international law *(jus cogens)*.

162. Those characterizations of the prohibition on genocide and the purpose of the Convention are significant for the interpretation of the second proposition stated in Article I — the undertaking by the Contracting Parties to prevent and punish the crime of genocide, and particularly in this context the undertaking to prevent. Several features of that undertaking are significant. The ordinary meaning of the word "undertake" is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties (cf., for example, International Convention on the Elimination of All Forms of Racial Discrimination (7 March 1966), Art. 2, para. 1; International Covenant on Civil and Political Rights (16 December 1966), Art. 2, para. 1, and 3, for example). It is not merely hortatory or purposive. The undertaking is unqualified (a matter considered later in relation to the scope of the obligation of prevention); and it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention.

163. The conclusion is confirmed by two aspects of the preparatory work of the Convention and the circumstances of its conclusion as referred to in Article 32 of the Vienna Convention. In 1947 the United Nations General Assembly, in requesting the Economic and Social Council to submit a report and a draft convention on genocide to the Third Session of the Assembly, declared "that genocide is an international crime entailing national and international responsibility on the part of individuals and States" (A/RES/180 (II)). That duality of responsibilities

is also to be seen in two other associated resolutions adopted on the same day, both directed to the newly established International Law Commission (hereinafter "the ILC"): the first on the formulation of the Nuremberg principles, concerned with the rights (Principle V) and duties of individuals, and the second on the draft declaration on the rights and duties of States (A/RES/177 and A/RES/178 (II)). The duality of responsibilities is further considered later in this Judgment (paragraphs 173-174).

164. The second feature of the drafting history emphasizes the operative and non-preambular character of Article I. The Preamble to the draft Convention, prepared by the *Ad Hoc* Committee on Genocide for the Third Session of the General Assembly and considered by its Sixth Committee, read in part as follows:

> "The High Contracting Parties
>
> . . . . . .
>
> Being convinced that the prevention and punishment of genocide requires international co-operation,
>
> *Hereby agree to prevent and punish the crime as hereinafter provided*."

The first Article would have provided "[g]enocide is a crime under international law whether committed in time of peace or in time of war" (report of the *Ad Hoc* Committee on Genocide, 5 April to 10 May 1948, United Nations, *Official Records of the Economic and Social Council, Seventh Session, Supplement No. 6*, doc. E/794, pp. 2, 18).

Belgium was of the view that the undertaking to prevent and punish should be made more effective by being contained in the operative part of the Convention rather than in the Preamble and proposed the following Article I to the Sixth Committee of the General Assembly: "The High Contracting Parties undertake to prevent and punish the crime of genocide." (United Nations doc. A/C.6/217.) The Netherlands then proposed a new text of Article I combining the *Ad Hoc* Committee draft and the Belgian proposal with some changes: "The High Contracting Parties reaffirm that genocide is a crime under international law, which they undertake to prevent and to punish, in accordance with the following articles." (United Nations docs. A/C.6/220; United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, Summary Records of the 68th meeting, p. 45.) The Danish representative thought that Article I should be worded more effectively and proposed the deletion of the final phrase — "in accordance with the following articles" (*ibid.*, p. 47). The Netherlands representative agreed with that suggestion (*ibid.*, pp. 49-50). After the USSR's proposal to delete Article I was rejected by 36 votes to 8 with 5 abstentions and its proposal to transfer its various points to the Preamble was rejected by 40 votes to 8, and the phrase "whether committed in time of peace or of

war" was inserted by 30 votes to 7 with 6 abstentions, the amended text of Article I was adopted by 37 votes to 3 with 2 abstentions (*ibid.*, pp. 51 and 53).

165. For the Court both changes — the movement of the undertaking from the Preamble to the first operative Article and the removal of the linking clause ("in accordance with the following articles") — confirm that Article I does impose distinct obligations over and above those imposed by other Articles of the Convention. In particular, the Contracting Parties have a direct obligation to prevent genocide.

166. The Court next considers whether the Parties are also under an obligation, by virtue of the Convention, not to commit genocide themselves. It must be observed at the outset that such an obligation is not expressly imposed by the actual terms of the Convention. The Applicant has however advanced as its main argument that such an obligation is imposed by Article IX, which confers on the Court jurisdiction over disputes "including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III". Since Article IX is essentially a jurisdictional provision, the Court considers that it should first ascertain whether the substantive obligation on States not to commit genocide may flow from the other provisions of the Convention. Under Article I the States parties are bound to prevent such an act, which it describes as "a crime under international law", being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as "a crime under international law": by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.

167. The Court accordingly concludes that Contracting Parties to the Convention are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them. That conclusion must also apply to the other acts enumerated in Article III. Those acts are forbidden along with genocide itself in the list included in Article III. They are referred to equally with genocide in Article IX and without being characterized as "punishable"; and the "purely humanitarian and civilizing purpose" of the Convention may be seen as being promoted by the fact that States are subject to that full set of obligations, supporting their undertaking to prevent genocide. It is true that the concepts used in paragraphs *(b)* to *(e)* of Article III, and particularly that of "complicity", refer to well known categories of criminal law and, as such, appear particularly well adapted to the exercise of penal sanctions against individuals. It would however not be in keeping with the object and purpose of the Convention to deny that the international responsibility of a State — even though quite different in nature from criminal responsibility — can be engaged through one of the acts, other than genocide itself, enumerated in Article III.

168. The conclusion that the Contracting Parties are bound in this way by the Convention not to commit genocide and the other acts enumerated in Article III is confirmed by one unusual feature of the wording of Article IX. But for that unusual feature and the addition of the word "fulfilment" to the provision conferring on the Court jurisdiction over disputes as to the "interpretation and application" of the Convention (an addition which does not appear to be significant in this case), Article IX would be a standard dispute settlement provision.

169. The unusual feature of Article IX is the phrase "including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III". The word "including" tends to confirm that disputes relating to the responsibility of Contracting Parties for genocide, and the other acts enumerated in Article III to which it refers, are comprised within a broader group of disputes relating to the interpretation, application or fulfilment of the Convention. The responsibility of a party for genocide and the other acts enumerated in Article III arises from its failure to comply with the obligations imposed by the other provisions of the Convention, and in particular, in the present context, with Article III read with Articles I and II. According to the English text of the Convention, the responsibility contemplated is responsibility "for genocide" (in French, "responsabilité . . . en matière de génocide"), not merely responsibility "for failing to prevent or punish genocide". The particular terms of the phrase as a whole confirm that Contracting Parties may be responsible for genocide and the other acts enumerated in Article III of the Convention.

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170. The Court now considers three arguments, advanced by the Respondent which may be seen as contradicting the proposition that the Convention imposes a duty on the Contracting Parties not to commit genocide and the other acts enumerated in Article III. The first is that, as a matter of general principle, international law does not recognize the criminal responsibility of the State, and the Genocide Convention does not provide a vehicle for the imposition of such criminal responsibility. On the matter of principle the Respondent calls attention to the rejection by the ILC of the concept of international crimes when it prepared the final draft of its Articles on State Responsibility, a decision reflecting the strongly negative reactions of a number of States to any such concept. The Applicant accepts that general international law does not recognize the criminal responsibility of States. It contends, on the specific issue, that the obligation for which the Respondent may be held responsible, in the event of breach, in proceedings under Article IX, is simply an obligation arising under international law, in this case the provisions of the Convention. The Court observes that the obligations in question in this case, arising from the terms of the Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature. This argument accordingly cannot be accepted.

171. The second argument of the Respondent is that the nature of the Convention is such as to exclude from its scope State responsibility for genocide and the other enumerated acts. The Convention, it is said, is a standard international criminal law convention focused essentially on the criminal prosecution and punishment of individuals and not on the responsibility of States. The emphasis of the Convention on the obligations and responsibility of individuals excludes any possibility of States being liable and responsible in the event of breach of the obligations reflected in Article III. In particular, it is said, that possibility cannot stand in the face of the references, in Article III to punishment (of individuals), and in Article IV to individuals being punished, and the requirement, in Article V for legislation in particular for effective penalties for persons guilty of genocide, the provision in Article VI for the prosecution of persons charged with genocide, and requirement in Article VII for extradition.

172. The Court is mindful of the fact that the famous sentence in the Nuremberg Judgment that "[c]rimes against international law are committed by men, not by abstract entities . . ." (Judgment of the International Military Tribunal, Trial of the Major War Criminals, 1947, *Official Documents*, Vol. 1, p. 223) might be invoked in support of the proposition that only individuals can breach the obligations set out in Article III. But the Court notes that that Tribunal was answering the argument that "international law is concerned with the actions of sov-

ereign States, and provides no punishment for individuals" (Judgment of the International Military Tribunal, *op. cit.*, p. 222), and that thus States alone were responsible under international law. The Tribunal rejected that argument in the following terms: "[t]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized" (*ibid.*, p. 223; the phrase "as well as upon States" is missing in the French text of the Judgment).

173. The Court observes that that duality of responsibility continues to be a constant feature of international law. This feature is reflected in Article 25, paragraph 4, of the Rome Statute for the International Criminal Court, now accepted by 104 States: "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." The Court notes also that the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (Annex to General Assembly resolution 56/83, 12 December 2001), to be referred to hereinafter as "the ILC Articles on State Responsibility", affirm in Article 58 the other side of the coin: "These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State." In its Commentary on this provision, the Commission said:

> "Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out." (ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10, 2001, Commentary on Article 58, para. 3.)

The Commission quoted Article 25, paragraph 4, of the Rome Statute, and concluded as follows:

> "Article 58 . . . [makes] it clear that the Articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term 'individual responsibility' has acquired an accepted meaning in light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity."

174. The Court sees nothing in the wording or the structure of the provisions of the Convention relating to individual criminal liability which would displace the meaning of Article I, read with paragraphs *(a)* to *(e)* of Article III, so far as these provisions impose obligations on States distinct from the obligations which the Convention requires them to place on individuals. Furthermore, the fact that Articles V, VI and VII focus on individuals cannot itself establish that the Contracting Parties may not be subject to obligations not to commit genocide and the other acts enumerated in Article III.

175. The third and final argument of the Respondent against the proposition that the Contracting Parties are bound by the Convention not to commit genocide is based on the preparatory work of the Convention and particularly of Article IX. The Court has already used part of that work to confirm the operative significance of the undertaking in Article I (see paragraphs 164 and 165 above), an interpretation already determined from the terms of the Convention, its context and purpose.

176. The Respondent, claiming that the Convention and in particular Article IX is ambiguous, submits that the drafting history of the Convention, in the Sixth Committee of the General Assembly, shows that "there was no question of direct responsibility of the State for acts of genocide". It claims that the responsibility of the State was related to the "key provisions" of Articles IV-VI: the Convention is about the criminal responsibility of individuals supported by the civil responsibility of States to prevent and punish. This argument against any wider responsibility for the Contracting Parties is based on the records of the discussion in the Sixth Committee, and is, it is contended, supported by the rejection of United Kingdom amendments to what became Articles IV and VI. Had the first amendment been adopted, Article IV, concerning the punishment of individuals committing genocide or any of the acts enumerated in Article III, would have been extended by the following additional sentence: "[Acts of genocide] committed by or on behalf of States or governments constitute a breach of the present Convention."(A/C.6/236 and Corr. 1.) That amendment was defeated (United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 96th Meeting*, p. 355). What became Article VI would have been replaced by a provision conferring jurisdiction on the Court if an act of genocide is or is alleged to be the act of a State or government or its organs. The United Kingdom in response to objections that the proposal was out of order (because it meant going back on a decision already taken) withdrew the amendment in favour of the joint amendment to what became Article IX, submitted by the United Kingdom and Belgium (*ibid., 100th Meeting*, p. 394). In speaking to that joint amendment the United Kingdom delegate acknowledged that the debate had clearly shown the Committee's decision to confine what is now Article VI to the responsibility of individuals (*ibid., 100th Meeting*, p. 430). The United Kingdom/Belgium amendment would have added

the words "including disputes relating to the responsibility of a State for any of the acts enumerated in Articles II and IV [as the Convention was then drafted]". The United Kingdom delegate explained that what was involved was civil responsibility, not criminal responsibility (United Nations, *Official Records of the General Assembly, op. cit.*, *103rd Meeting*, p. 440). A proposal to delete those words failed and the provision was adopted (*ibid., 104th Meeting*, p. 447), with style changes being made by the Drafting Committee.

177. At a later stage a Belgium/United Kingdom/United States proposal which would have replaced the disputed phrase by including "disputes arising from a charge by a Contracting Party that the crime of genocide or any other of the acts enumerated in article III has been committed within the jurisdiction of another Contracting Party" was ruled by the Chairman of the Sixth Committee as a change of substance and the Committee did not adopt the motion (which required a two-thirds majority) for reconsideration (A/C.6/305). The Chairman gave the following reason for his ruling which was not challenged:

> "it was provided in article IX that those disputes, among others, which concerned the responsibility of a State for genocide or for any of the acts enumerated in article III, should be submitted to the International Court of Justice. According to the joint amendment, on the other hand, the disputes would not be those which concerned the responsibility of the State but those which resulted from an accusation to the effect that the crime had been committed in the territory of one of the contracting parties." (United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 131st Meeting*, p. 690.)

By that time in the deliberations of the Sixth Committee it was clear that only individuals could be held criminally responsible under the draft Convention for genocide. The Chairman was plainly of the view that the Article IX, as it had been modified, provided for State responsibility for genocide.

178. In the view of the Court, two points may be drawn from the drafting history just reviewed. The first is that much of it was concerned with proposals supporting the criminal responsibility of States; but those proposals were *not* adopted. The second is that the amendment which was adopted — to Article IX — is about jurisdiction in respect of the responsibility of States *simpliciter*. Consequently, the drafting history may be seen as supporting the conclusion reached by the Court in paragraph 167 above.

179. Accordingly, having considered the various arguments, the Court

affirms that the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred.

* *

*(5) Question Whether the Court May Make a Finding of Genocide by a State in the Absence of a Prior Conviction of an Individual for Genocide by a Competent Court*

180. The Court observes that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed. That will also be the case with conspiracy under Article III, paragraph *(b),* and complicity under Article III, paragraph *(e)*; and, as explained below (paragraph 431) for purposes of the obligation to prevent genocide. The Respondent has raised the question whether it is necessary, as a matter of law, for the Court to be able to uphold a claim of the responsibility of a State for an act of genocide, or any other act enumerated in Article III, that there should have been a finding of genocide by a court or tribunal exercising criminal jurisdiction. According to the Respondent, the condition *sine qua non* for establishing State responsibility is the prior establishment, according to the rules of criminal law, of the individual responsibility of a perpetrator engaging the State's responsibility.

181. The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed. Under its Statute the Court has the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity (paragraphs 209-210 below). Turning to the terms of the Convention itself, the Court has already held that it has jurisdiction under Article IX to find a State responsible if genocide or other acts enumerated in Article III are committed by its organs, or persons or groups whose acts are attributable to it.

182. Any other interpretation could entail that there would be no legal recourse available under the Convention in some readily conceivable circumstances: genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the

police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes; or the responsible State may have acknowledged the breach. The Court accordingly concludes that State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.

* *

*(6) The Possible Territorial Limits of the Obligations*

183. The substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question. The extent of that ability in law and fact is considered, so far as the obligation to prevent the crime of genocide is concerned, in the section of the Judgment concerned with that obligation (cf. paragraph 430 below). The significant relevant condition concerning the obligation not to commit genocide and the other acts enumerated in Article III is provided by the rules on attribution (paragraphs 379 ff. below).

184. The obligation to prosecute imposed by Article VI is by contrast subject to an express territorial limit. The trial of persons charged with genocide is to be in a competent tribunal of the State in the territory of which the act was committed (cf. paragraph 442 below), or by an international penal tribunal with jurisdiction (paragraphs 443 ff. below).

* *

*(7) The Applicant's Claims in Respect of Alleged Genocide Committed Outside Its Territory against Non-Nationals*

185. In its final submissions the Applicant requests the Court to make rulings about acts of genocide and other unlawful acts allegedly committed against "non-Serbs" outside its own territory (as well as within it) by the Respondent. Insofar as that request might relate to non-Bosnian victims, it could raise questions about the legal interest or standing of the Applicant in respect of such matters and the significance of the *jus cogens* character of the relevant norms, and the *erga omnes* character of the relevant obligations. For the reasons explained in paragraphs 368 and 369 below, the Court will not however need to address those questions of law.

* *

*(8) The Question of Intent to Commit Genocide*

186. The Court notes that genocide as defined in Article II of the Convention comprises "acts" and an "intent". It is well established that the acts —

> "*(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; [and]
> *(e)* Forcibly transferring children of the group to another group" —

themselves include mental elements. "Killing" must be intentional, as must "causing serious bodily or mental harm". Mental elements are made explicit in paragraphs *(c)* and *(d)* of Article II by the words "deliberately" and "intended", quite apart from the implications of the words "inflicting" and "imposing"; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts (Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 44, para. 5).

187. In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the "intent to destroy, in whole or in part, . . . [the protected] group, as such". It is not enough to establish, for instance in terms of paragraph *(a)*, that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis*; in the present Judgment it will usually be referred to as the "specific intent *(dolus specialis)*". It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group.

188. The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution, as the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY" or "the Tribunal") did in the *Kupreškić et al.* case:

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> "the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide." (IT-95-16-T, Judgment, 14 January 2000, para. 636.)

189. The specific intent is also to be distinguished from other reasons or motives the perpetrator may have. Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent.

* *

*(9) Intent and "Ethnic Cleansing"*

190. The term "ethnic cleansing" has frequently been employed to refer to the events in Bosnia and Herzegovina which are the subject of this case; see, for example, Security Council resolution 787 (1992), para. 2; resolution 827 (1993), Preamble; and the Report with that title attached as Annex IV to the Final Report of the United Nations Commission of Experts (S/1994/674/Add.2) (hereinafter "Report of the Commission of Experts"). General Assembly resolution 47/121 referred in its Preamble to "the abhorrent policy of 'ethnic cleansing', which is a form of genocide", as being carried on in Bosnia and Herzegovina. It will be convenient at this point to consider what legal significance the expression may have. It is in practice used, by reference to a specific region or area, to mean "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area" (S/35374 (1993), para. 55, Interim Report by the Commission of Experts). It does not appear in the Genocide Convention; indeed, a proposal

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during the drafting of the Convention to include in the definition "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" was not accepted (A/C.6/234). It can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as "ethnic cleansing" may never constitute genocide, if they are such as to be characterized as, for example, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", contrary to Article II, paragraph *(c)*, of the Convention, provided such action is carried out with the necessary specific intent *(dolus specialis)*, that is to say with a view to the destruction of the group, as distinct from its removal from the region. As the ICTY has observed, while "there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing'" (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet "[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide." (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.) In other words, whether a particular operation described as "ethnic cleansing" amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term "ethnic cleansing" has no legal significance of its own. That said, it is clear that acts of "ethnic cleansing" may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent *(dolus specialis)* inspiring those acts.

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*(10) Definition of the Protected Group*

191. When examining the facts brought before the Court in support of the accusations of the commission of acts of genocide, it is necessary to have in mind the identity of the group against which genocide may be considered to have been committed. The Court will therefore next consider the application in this case of the requirement of Article II of the Genocide Convention, as an element of genocide, that the proscribed acts be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The Parties disagreed on aspects of the definition of the "group". The Applicant in its final submission refers to "the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population" (paragraph 66 above). It thus follows what is termed the negative approach to the definition of the group in question. The Respondent sees two legal problems with that formulation:

> "First, the group targeted is not sufficiently well defined as such, since, according to the Applicant's allegation, that group consists of the non-Serbs, thus an admixture of all the individuals living in Bosnia and Herzegovina except the Serbs, but more particularly the Muslim population, which accounts for only a part of the non-Serb population. Second, the intent to destroy concerned only a part of the non-Serb population, but the Applicant failed to specify which part of the group was targeted."

In addition to those issues of the negative definition of the group and its geographic limits (or their lack), the Parties also discussed the choice between subjective and objective approaches to the definition. The Parties essentially agree that international jurisprudence accepts a combined subjective-objective approach. The issue is not in any event significant on the facts of this case and the Court takes it no further.

192. While the Applicant has employed the negative approach to the definition of a protected group, it places major, for the most part exclusive, emphasis on the Bosnian Muslims as the group being targeted. The Respondent, for instance, makes the point that the Applicant did not mention the Croats in its oral arguments relating to sexual violence, Srebrenica and Sarajevo, and that other groups including "the Jews, Roma and Yugoslavs" were not mentioned. The Applicant does however maintain the negative approach to the definition of the group in its final submissions and the Court accordingly needs to consider it.

193. The Court recalls first that the essence of the intent is to destroy the protected group, in whole or in part, as such. It is a group which must have particular positive characteristics — national, ethnical, racial or religious — and not the lack of them. The intent must also relate to the group "as such". That means that the crime requires an intent to destroy

a collection of people who have a particular group identity. It is a matter of who those people are, not who they are not. The etymology of the word — killing a group — also indicates a positive definition; and Raphael Lemkin has explained that he created the word from the Greek *genos*, meaning race or tribe, and the termination "-cide", from the Latin *caedere*, to kill (*Axis Rule in Occupied Europe* (1944), p. 79). In 1945 the word was used in the Nuremberg indictment which stated that the defendants "conducted deliberate and systematic genocide, viz., the extermination of racial and national groups . . . in order to destroy particular races and classes of people and national, racial or religious groups . . ." (Indictment, Trial of the Major War Criminals before the International Military Tribunal, *Official Documents*, Vol. 1, pp. 43 and 44). As the Court explains below (paragraph 198), when part of the group is targeted, that part must be significant enough for its destruction to have an impact on the group as a whole. Further, each of the acts listed in Article II require that the proscribed action be against members of the "group".

194. The drafting history of the Convention confirms that a positive definition must be used. Genocide as "the denial of the existence of entire human groups" was contrasted with homicide, "the denial of the right to live of individual human beings" by the General Assembly in its 1946 resolution 96 (I) cited in the Preamble to the Convention. The drafters of the Convention also gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude. The Court spoke to the same effect in 1951 in declaring as an object of the Convention the safeguarding of "the very existence of certain human groups" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23). Such an understanding of genocide requires a positive identification of the group. The rejection of proposals to include within the Convention political groups and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics. A negatively defined group cannot be seen in that way.

195. The Court observes that the ICTY Appeals Chamber in the *Stakić* case (IT-97-24-A, Judgment, 22 March 2006, paras. 20-28) also came to the conclusion that the group must be defined positively, essentially for the same reasons as the Court has given.

196. Accordingly, the Court concludes that it should deal with the matter on the basis that the targeted group must in law be defined posi-

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tively, and thus not negatively as the "non-Serb" population. The Applicant has made only very limited reference to the non-Serb populations of Bosnia and Herzegovina other than the Bosnian Muslims, e.g. the Croats. The Court will therefore examine the facts of the case on the basis that genocide may be found to have been committed if an intent to destroy the Bosnian Muslims, as a group, in whole or in part, can be established.

197. The Parties also addressed a specific question relating to the impact of geographic criteria on the group as identified positively. The question concerns in particular the atrocities committed in and around Srebrenica in July 1995, and the question whether in the circumstances of that situation the definition of genocide in Article II was satisfied so far as the intent of destruction of the "group" "in whole or in part" requirement is concerned. This question arises because of a critical finding in the *Krstić* case. In that case the Trial Chamber was "ultimately satisfied that murders and infliction of serious bodily or mental harm were committed with the intent to kill all the Bosnian Muslim men of military age at Srebrenica" (IT-98-33, Judgment, 2 August 2001, para. 546). Those men were systematically targeted whether they were civilians or soldiers *(ibid.)*. The Court addresses the facts of that particular situation later (paragraphs 278-297). For the moment, it considers how as a matter of law the "group" is to be defined, in territorial and other respects.

198. In terms of that question of law, the Court refers to three matters relevant to the determination of "part" of the "group" for the purposes of Article II. In the first place, the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and by the Commentary of the ILC to its Articles in the draft Code of Crimes against the Peace and Security of Mankind (e.g. *Krstić*, IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 8-11 and the cases of *Kayishema*, *Byilishema*, and *Semanza* there referred to; and *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 45, para. 8 of the Commentary to Article 17).

199. Second, the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the ILC, "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe" *(ibid.)*. The area of the perpetrator's activity and control are to be considered. As the ICTY Appeals

Chamber has said, and indeed as the Respondent accepts, the opportunity available to the perpetrators is significant (*Krstić*, IT-98-33-A, Judgment, 19 April 2004, para. 13). This criterion of opportunity must however be weighed against the first and essential factor of substantiality. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber has indeed indicated the need for caution, lest this approach might distort the definition of genocide (*Stakić*, IT-97-24-T, Judgment, 31 July 2003, para. 523). The Respondent, while not challenging this criterion, does contend that the limit militates against the existence of the specific intent *(dolus specialis)* at the national or State level as opposed to the local level — a submission which, in the view of the Court, relates to attribution rather than to the "group" requirement.

200. A third suggested criterion is qualitative rather than quantitative. The Appeals Chamber in the *Krstić* case put the matter in these carefully measured terms:

> "The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the Statute which exactly reproduces Article II of the Convention]." (IT-98-33-A, Judgment, 19 April 2004, para. 12; footnote omitted.)

Establishing the "group" requirement will not always depend on the substantiality requirement alone although it is an essential starting point. It follows in the Court's opinion that the qualitative approach cannot stand alone. The Appeals Chamber in *Krstić* also expresses that view.

201. The above list of criteria is not exhaustive, but, as just indicated, the substantiality criterion is critical. They are essentially those stated by the Appeals Chamber in the *Krstić* case, although the Court does give this first criterion priority. Much will depend on the Court's assessment of those and all other relevant factors in any particular case.

* * *

## V. Questions of Proof: Burden of Proof, the Standard of Proof, Methods of Proof

202. When turning to the facts of the dispute, the Court must note that many allegations of fact made by the Applicant are disputed by the

Respondent. That is so notwithstanding increasing agreement between the Parties on certain matters through the course of the proceedings. The disputes relate to issues about the facts, for instance the number of rapes committed by Serbs against Bosnian Muslims, and the day-to-day relationships between the authorities in Belgrade and the authorities in Pale, and the inferences to be drawn from, or the evaluations to be made of, facts, for instance about the existence or otherwise of the necessary specific intent *(dolus specialis)* and about the attributability of the acts of the organs of Republika Srpska and various paramilitary groups to the Respondent. The allegations also cover a very wide range of activity affecting many communities and individuals over an extensive area and over a long period. They have already been the subject of many accounts, official and non-official, by many individuals and bodies. The Parties drew on many of those accounts in their pleadings and oral argument.

203. Accordingly, before proceeding to an examination of the alleged facts underlying the claim in this case, the Court first considers, in this section of the Judgment, in turn the burden or onus of proof, the standard of proof, and the methods of proof.

204. On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, "it is the litigant seeking to establish a fact who bears the burden of proving it" (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). While the Applicant accepts that approach as a general proposition, it contends that in certain respects the onus should be reversed, especially in respect of the attributability of alleged acts of genocide to the Respondent, given the refusal of the Respondent to produce the full text of certain documents.

205. The particular issue concerns the "redacted" sections of documents of the Supreme Defence Council of the Respondent, i.e. sections in which parts of the text had been blacked out so as to be illegible. The documents had been classified, according to the Co-Agent of the Respondent, by decision of the Council as a military secret, and by a confidential decision of the Council of Ministers of Serbia and Montenegro as a matter of national security interest. The Applicant contends that the Court should draw its own conclusions from the failure of the Respondent to produce complete copies of the documents. It refers to the power of the Court, which it had invoked earlier (paragraph 44 above), to call for documents under Article 49 of the Statute, which provides that "[f]ormal note shall be taken of any refusal". In the second round of oral argument the Applicant's Deputy Agent submitted that

> "Serbia and Montenegro should not be allowed to respond to our quoting the redacted SDC reports if it does not provide at the very same time the Applicant and the Court with copies of entirely

> unredacted versions of *all* the SDC shorthand records and of *all* of the minutes of the same. Otherwise, Serbia and Montenegro would have an overriding advantage over Bosnia and Herzegovina with respect to documents, which are apparently, and not in the last place in the Respondent's eyes, of direct relevance to winning or losing the present case. We explicitly, Madam President, request the Court to instruct the Respondent accordingly." (Emphasis in the original.)

206. On this matter, the Court observes that the Applicant has extensive documentation and other evidence available to it, especially from the readily accessible ICTY records. It has made very ample use of it. In the month before the hearings it submitted what must be taken to have been a careful selection of documents from the very many available from the ICTY. The Applicant called General Sir Richard Dannatt, who, drawing on a number of those documents, gave evidence on the relationship between the authorities in the Federal Republic of Yugoslavia and those in the Republika Srpska and on the matter of control and instruction. Although the Court has not agreed to either of the Applicant's requests to be provided with unedited copies of the documents, it has not failed to note the Applicant's suggestion that the Court may be free to draw its own conclusions.

207. On a final matter relating to the burden of proof, the Applicant contends that the Court should draw inferences, notably about specific intent *(dolus specialis)*, from established facts, i.e., from what the Applicant refers to as a "pattern of acts" that "speaks for itself". The Court considers that matter later in the Judgment (paragraphs 370-376 below).

208. The Parties also differ on the second matter, the standard of proof. The Applicant, emphasizing that the matter is not one of criminal law, says that the standard is the balance of evidence or the balance of probabilities, inasmuch as what is alleged is breach of treaty obligations. According to the Respondent, the proceedings "concern the most serious issues of State responsibility and . . . a charge of such exceptional gravity against a State requires a proper degree of certainty. The proofs should be such as to leave no room for reasonable doubt."

209. The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. *Corfu Channel (United Kingdom* v. *Albania), Judgment, I.C.J. Reports 1949*, p. 17). The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.

210. In respect of the Applicant's claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.

211. The Court now turns to the third matter — the method of proof. The Parties submitted a vast array of material, from different sources, to the Court. It included reports, resolutions and findings by various United Nations organs, including the Secretary-General, the General Assembly, the Security Council and its Commission of Experts, and the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the Special Rapporteur on Human Rights in the former Yugoslavia; documents from other intergovernmental organizations such as the Conference for Security and Cooperation in Europe; documents, evidence and decisions from the ICTY; publications from governments; documents from non-governmental organizations; media reports, articles and books. They also called witnesses, experts and witness-experts (paragraphs 57-58 above).

212. The Court must itself make its own determination of the facts which are relevant to the law which the Applicant claims the Respondent has breached. This case does however have an unusual feature. Many of the allegations before this Court have already been the subject of the processes and decisions of the ICTY. The Court considers their significance later in this section of the Judgment.

213. The assessment made by the Court of the weight to be given to a particular item of evidence may lead to the Court rejecting the item as unreliable, or finding it probative, as appears from the practice followed for instance in the case concerning *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, pp. 9-10, paras. 11-13; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 39-41, paras. 59-73; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, pp. 200-201, paras. 57-61. In the most recent case the Court said this:

> "The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (*Military and Paramilitary Activi-*

> *ties in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention. The Court thus will give appropriate consideration to the Report of the Porter Commission, which gathered evidence in this manner. The Court further notes that, since its publication, there has been no challenge to the credibility of this Report, which has been accepted by both Parties." (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 35, para. 61. See also paras. 78-79, 114 and 237-242.)

214. The fact-finding process of the ICTY falls within this formulation, as "evidence obtained by examination of persons directly involved", tested by cross-examination, the credibility of which has not been challenged subsequently. The Court has been referred to extensive documentation arising from the Tribunal's processes, including indictments by the Prosecutor, various interlocutory decisions by judges and Trial Chambers, oral and written evidence, decisions of the Trial Chambers on guilt or innocence, sentencing judgments following a plea agreement and decisions of the Appeals Chamber.

215. By the end of the oral proceedings the Parties were in a broad measure of agreement on the significance of the ICTY material. The Applicant throughout has given and gives major weight to that material. At the written stage the Respondent had challenged the reliability of the Tribunal's findings, the adequacy of the legal framework under which it operates, the adequacy of its procedures and its neutrality. At the stage of the oral proceedings, its position had changed in a major way. In its Agent's words, the Respondent now based itself on the jurisprudence of the Tribunal and had "in effect" distanced itself from the opinions about the Tribunal expressed in its Rejoinder. The Agent was however careful to distinguish between different categories of material:

> "[W]e do not regard all the material of the Tribunal for the former Yugoslavia as having the same relevance or probative value. We have primarily based ourselves upon the judgments of the Tribunal's Trial and Appeals Chambers, given that only the judgments can be

regarded as establishing the facts about the crimes in a credible way."

And he went on to point out that the Tribunal has not so far, with the exception of Srebrenica, held that genocide was committed in any of the situations cited by the Applicant. He also called attention to the criticisms already made by Respondent's counsel of the relevant judgment concerning General Krstić who was found guilty of aiding and abetting genocide at Srebrenica.

216. The Court was referred to actions and decisions taken at various stages of the ICTY processes:

(1) The Prosecutor's decision to include or not certain changes in an indictment;
(2) The decision of a judge on reviewing the indictment to confirm it and issue an arrest warrant or not;
(3) If such warrant is not executed, a decision of a Trial Chamber (of three judges) to issue an international arrest warrant, provided the Chamber is satisfied that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged;

(4) The decision of a Trial Chamber on the accused's motion for acquittal at the end of the prosecution case;

(5) The judgment of a Trial Chamber following the full hearings;

(6) The sentencing judgment of a Trial Chamber following a guilty plea.

The Court was also referred to certain decisions of the Appeals Chamber.

217. The Court will consider these stages in turn. The Applicant placed some weight on indictments filed by the Prosecutor. But the claims made by the Prosecutor in the indictments are just that — allegations made by one party. They have still to proceed through the various phases outlined earlier. The Prosecutor may, instead, decide to withdraw charges of genocide or they may be dismissed at trial. Accordingly, as a general proposition the inclusion of charges in an indictment cannot be given weight. What may however be significant is the decision of the Prosecutor, either initially or in an amendment to an indictment, not to include or to exclude a charge of genocide.

218. The second and third stages, relating to the confirmation of the indictment, issues of arrest warrants and charges, are the responsibility of the judges (one in the second stage and three in the third) rather than the Prosecutor, and witnesses may also be called in the third, but the accused is generally not involved. Moreover, the grounds for a judge to act are, at the second stage, that a prima facie case has been established, and at the

third, that reasonable grounds exist for belief that the accused has committed crimes charged.

219. The accused does have a role at the fourth stage — motions for acquittal made by the defence at the end of the prosecution's case and after the defence has had the opportunity to cross-examine the prosecution's witnesses, on the basis that "there is no evidence capable of supporting a conviction". This stage is understood to require a decision, not that the Chamber trying the facts *would* be satisfied beyond reasonable doubt by the prosecution's evidence (if accepted), but rather that it *could* be so satisfied (*Jelisić*, IT-95-10-A, Appeals Chamber Judgment, 5 July 2001, para. 37). The significance of that lesser standard for present purposes appears from one case on which the Applicant relied. The Trial Chamber in August 2005 in *Krajišnik* dismissed the defence motion that the accused who was charged with genocide and other crimes had no case to answer (IT-00-39-T, transcript of 19 August 2005, pp. 17112-17132). But following the full hearing the accused was found not guilty of genocide nor of complicity in genocide. While the *actus reus* of genocide was established, the specific intent *(dolus specialis)* was not (Trial Chamber Judgment, 27 September 2006, paras. 867-869). Because the judge or the Chamber does not make definitive findings at any of the four stages described, the Court does not consider that it can give weight to those rulings. The standard of proof which the Court requires in this case would not be met.

220. The processes of the Tribunal at the fifth stage, leading to a judgment of the Trial Chamber following the full hearing are to be contrasted with those earlier stages. The processes of the Tribunal leading to final findings are rigorous. Accused are presumed innocent until proved guilty beyond reasonable doubt. They are entitled to listed minimum guarantees (taken from the International Covenant on Civil and Political Rights), including the right to counsel, to examine witness against them, to obtain the examination of witness on their behalf, and not to be compelled to testify against themselves or to confess guilt. The Tribunal has powers to require Member States of the United Nations to co-operate with it, among other things, in the taking of testimony and the production of evidence. Accused are provided with extensive pre-trial disclosure including materials gathered by the prosecution and supporting the indictment, relevant witness statements and the pre-trial brief summarizing the evidence against them. The prosecutor is also to disclose exculpatory material to the accused and to make available in electronic form the collections of relevant material which the prosecution holds.

221. In practice, now extending over ten years, the trials, many of important military or political figures for alleged crimes committed over long periods and involving complex allegations, usually last for months, even years, and can involve thousands of documents and numerous witnesses. The Trial Chamber may admit any relevant evidence which has probative value. The Chamber is to give its reasons in writing and separate and dissenting opinions may be appended.

222. Each party has a right of appeal from the judgment of the Trial Chamber to the Appeals Chamber on the grounds of error of law invalidating the decision or error of fact occasioning a miscarriage of justice. The Appeals Chamber of five judges does not rehear the evidence, but it does have power to hear additional evidence if it finds that it was not available at trial, is relevant and credible and could have been a decisive factor in the trial. It too is to give a reasoned opinion in writing to which separate or dissenting opinions may be appended.

223. In view of the above, the Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight.

224. There remains for consideration the sixth stage, that of sentencing judgments given following a guilty plea. The process involves a statement of agreed facts and a sentencing judgment. Notwithstanding the guilty plea the Trial Chamber must be satisfied that there is sufficient factual basis for the crime and the accused's participation in it. It must also be satisfied that the guilty plea has been made voluntarily, is informed and is not equivocal. Accordingly the agreed statement and the sentencing judgment may when relevant be given a certain weight.

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225. The Court will now comment in a general way on some of the other evidence submitted to it. Some of that evidence has been produced to prove that a particular statement was made so that the Party may make use of its content. In many of these cases the accuracy of the document as a record is not in doubt; rather its significance is. That is often the case for instance with official documents, such as the record of parliamentary bodies and budget and financial statements. Another instance is when the statement was recorded contemporaneously on audio or videotape. Yet another is the evidence recorded by the ICTY.

226. In some cases the account represents the speaker's own knowledge of the fact to be determined or evaluated. In other cases the account may set out the speaker's opinion or understanding of events after they have occurred and in some cases the account will not be based on direct observation but may be hearsay. In fact the Parties rarely disagreed about the authenticity of such material but rather about whether it was being accurately presented (for instance with contention that passages were being taken out of context) and what weight or significance should be given to it.

227. The Court was also referred to a number of reports from official or independent bodies, giving accounts of relevant events. Their value depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).

228. One particular instance is the comprehensive report, "The Fall of Srebrenica", which the United Nations Secretary-General submitted in November 1999 to the General Assembly (United Nations doc. A/54/549). It was prepared at the request of the General Assembly, and covered the events from the establishing by the Security Council of the "safe area" on 16 April 1993 (Security Council resolution 819 (1993)) until the endorsement by the Security Council on 15 December 1995 of the Dayton Agreement. Member States and others concerned had been encouraged to provide relevant information. The Secretary-General was in a very good position to prepare a comprehensive report, some years after the events, as appears in part from this description of the method of preparation:

> "This report has been prepared on the basis of archival research within the United Nations system, as well as on the basis of interviews with individuals who, in one capacity or another, participated in or had knowledge of the events in question. In the interest of gaining a clearer understanding of these events, I have taken the exceptional step of entering into the public record information from the classified files of the United Nations. In addition, I would like to record my thanks to those Member States, organizations and individuals who provided information for this report. A list of persons interviewed in this connection is attached as annex 1. While that list is fairly extensive, time, as well as budgetary and other constraints, precluded interviewing many other individuals who would be in a position to offer important perspectives on the subject at hand. In most cases, the interviews were conducted on a non-attribution basis to encourage as candid a disclosure as possible. I have also honoured the request of those individuals who provided informa-

tion for this report on the condition that they not be identified." (A/54/549, para. 8.)

229. The chapter, "Fall of Srebrenica: 6-11 July 1995", is preceded by this note:

> "The United Nations has hitherto not publicly disclosed the full details of the attack carried out on Srebrenica from 6 to 11 July 1995. The account which follows has now been reconstructed mainly from reports filed at that time by Dutchbat and the United Nations military observers. The accounts provided have also been supplemented with information contained in the Netherlands report on the debriefing of Dutchbat, completed in October 1995, and by information provided by Bosniac, Bosnian Serb and international sources. In order to independently examine the information contained in various secondary sources published over the past four years, as well to corroborate key information contained in the Netherlands debriefing report, interviews were conducted during the preparation of this report with a number of key personnel who were either in Srebrenica at the time, or who were involved in decision-making at higher levels in the United Nations chain of command." (A/54/549, Chap. VII, p. 57.)

The introductory note to the next chapter, "The Aftermath of the fall of Srebrenica: 12-20 July 1995", contains this description of the sources:

> "The following section attempts to describe in a coherent narrative how thousands of men and boys were summarily executed and buried in mass graves within a matter of days while the international community attempted to negotiate access to them. It details how evidence of atrocities taking place gradually came to light, but too late to prevent the tragedy which was unfolding. In 1995, the details of the tragedy were told in piecemeal fashion, as survivors of the mass executions began to provide accounts of the horrors they had witnessed; satellite photos later gave credence to their accounts.
>
> The first official United Nations report which signalled the possibility of mass executions having taken place was the report of the Special Rapporteur of the Commission on Human Rights, dated 22 August 1995 (E/CN.4/1996/9). It was followed by the Secretary-General's reports to the Security Council, pursuant to resolution 1010 (1995), of 30 August (S/1995/755) and 27 November 1995 (S/1995/988). Those reports included information obtained from governmental and non-governmental organizations, as well as information that had appeared in the international and local press. By the end of 1995, however, the International Tribunal for the Former

Yugoslavia had still not been granted access to the area to corroborate the allegations of mass executions with forensic evidence.

The Tribunal first gained access to the crime scenes in January 1996. The details of many of their findings were made public in July 1996, during testimony under rule 60 of the Tribunal's rules of procedure, in the case against Ratio [*sic:* Ratko] Mladić and Radovan Karadžić. Between that time and the present, the Tribunal has been able to conduct further investigations in the areas where the executions were reported to have taken place and where the primary and secondary mass graves were reported to have been located. On the basis of the forensic evidence obtained during those investigations, the Tribunal has now been able to further corroborate much of the testimony of the survivors of the massacres. On 30 October 1998, the Tribunal indicted Radislav Krstić, Commander of the BSA's Drina Corps, for his alleged involvement in those massacres. The text of the indictment provides a succinct summary of the information obtained to date on where and when the mass executions took place.

The aforementioned sources of information, coupled with certain additional confidential information that was obtained during the preparation of this report, form the basis of the account which follows. Sources are purposely not cited in those instances where such disclosure could potentially compromise the Tribunal's ongoing work." (A/54/549, Chap. VIII, p. 77.)

230. The care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it. As will appear later in this Judgment, the Court has gained substantial assistance from this report.

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## VI. The Facts Invoked by the Applicant, in Relation to Article II

### *(1) The Background*

231. In this case the Court is seised of a dispute between two sovereign States, each of which is established in part of the territory of the former State known as the Socialist Federal Republic of Yugoslavia, concerning the application and fulfilment of an international convention to which they are parties, the Convention on the Prevention and Punishment of the Crime of Genocide. The task of the Court is to deal with the legal claims and factual allegations advanced by Bosnia and Herzegovina against Serbia and Montenegro; the counter-claim advanced earlier in the proceedings by Serbia and Montenegro against Bosnia and Herzegovina has been withdrawn.

232. Following the death on 4 May 1980 of President Tito, a rotating presidency was implemented in accordance with the 1974 Constitution of the SFRY. After almost ten years of economic crisis and the rise of nationalism within the republics and growing tension between different ethnic and national groups, the SFRY began to break up. On 25 June 1991, Slovenia and Croatia declared independence, followed by Macedonia on 17 September 1991. (Slovenia and Macedonia are not concerned in the present proceedings; Croatia has brought a separate case against Serbia and Montenegro, which is still pending on the General List.) On the eve of the war in Bosnia and Herzegovina which then broke out, according to the last census (31 March 1991), some 44 per cent of the population of the country described themselves as Muslims, some 31 per cent as Serbs and some 17 per cent as Croats (*Krajišnik*, IT-00-39-T and 40-T, Trial Chamber Judgment, 27 September 2006, para. 15).

233. By a "sovereignty" resolution adopted on 14 October 1991, the Parliament of Bosnia and Herzegovina declared the independence of the Republic. The validity of this resolution was contested at the time by the Serbian community of Bosnia and Herzegovina (Opinion No. 1 of the Arbitration Commission of the Conference on Yugoslavia (the Badinter Commission), p. 3). On 24 October 1991, the Serb Members of the Bosnian Parliament proclaimed a separate Assembly of the Serb Nation/Assembly of the Serb People of Bosnia and Herzegovina. On 9 January 1992, the Republic of the Serb People of Bosnia and Herzegovina (subsequently renamed the Republika Srpska on 12 August 1992) was declared with the proviso that the declaration would come into force upon international recognition of the Republic of Bosnia and Herzegovina. On 28 February 1992, the Constitution of the Republic of the Serb People of Bosnia and Herzegovina was adopted. The Republic of the Serb People of Bosnia and Herzegovina (and subsequently the Republika Srpska) was not and has not been recognized internationally as a State; it has however enjoyed some *de facto* independence.

234. On 29 February and 1 March 1992, a referendum was held on the question of independence in Bosnia and Herzegovina. On 6 March 1992, Bosnia and Herzegovina officially declared its independence. With effect from 7 April 1992, Bosnia and Herzegovina was recognized by the European Community. On 7 April 1992, Bosnia and Herzegovina was recognized by the United States. On 27 April 1992, the Constitution of the Federal Republic of Yugoslavia was adopted consisting of the Republic of Serbia and the Republic of Montenegro. As explained above (paragraph 67), Montenegro declared its independence on 3 June 2006. All three States have been admitted to membership of the United Nations: Bosnia and Herzegovina on 22 May 1992; Serbia and Montenegro, under the name of the Federal Republic of Yugoslavia on 1 November 2000; and the Republic of Montenegro on 28 June 2006.

* *

*(2) The Entities Involved in the Events Complained of*

235. It will be convenient next to define the institutions, organizations or groups that were the actors in the tragic events that were to unfold in Bosnia and Herzegovina. Of the independent sovereign States that had emerged from the break-up of the SFRY, two are concerned in the present proceedings: on the one side, the FRY (later to be called Serbia and Montenegro), which was composed of the two constituent republics of Serbia and Montenegro; on the other, the Republic of Bosnia and Herzegovina. At the time when the latter State declared its independence (15 October 1991), the independence of two other entities had already been declared: in Croatia, the Republika Srpska Krajina, on 26 April 1991, and the Republic of the Serb People of Bosnia and Herzegovina, later to be called the Republika Srpska, on 9 January 1992 (paragraph 233 above). The Republika Srpska never attained international recognition as a sovereign State, but it had *de facto* control of substantial territory, and the loyalty of large numbers of Bosnian Serbs.

236. The Parties both recognize that there were a number of entities at a lower level the activities of which have formed part of the factual issues in the case, though they disagree as to the significance of those activities. Of the military and paramilitary units active in the hostilities, there were in April 1992 five types of armed formations involved in Bosnia: first, the Yugoslav People's Army (JNA), subsequently the Yugoslav Army (VJ); second, volunteer units supported by the JNA and later by the VJ, and the Ministry of the Interior (MUP) of the FRY; third, municipal Bosnian Serb Territorial Defence (TO) detachments; and, fourth, police forces of the Bosnian Serb Ministry of the Interior. The MUP of the Republika Srpska controlled the police and the security services, and operated, according to the Applicant, in close co-operation and co-ordination with the MUP of the FRY. On 15 April 1992, the Bosnian Government established a military force, based on the former Territorial Defence of the Republic, the Army of the Republic of Bosnia and Herzegovina (ARBiH), merging several non-official forces, including a number of paramilitary defence groups, such as the Green Berets, and the Patriotic League, being the military wing of the Muslim Party of Democratic Action. The Court does not overlook the evidence suggesting the existence of Muslim organizations involved in the conflict, such as foreign Mujahideen, although as a result of the withdrawal of the Respondent's counter-claims, the activities of these bodies are not the subject of specific claims before the Court.

237. The Applicant has asserted the existence of close ties between the Government of the Respondent and the authorities of the Republika Srpska, of a political and financial nature, and also as regards administra-

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tion and control of the army of the Republika Srpska (VRS). The Court observes that insofar as the political sympathies of the Respondent lay with the Bosnian Serbs, this is not contrary to any legal rule. It is however argued by the Applicant that the Respondent, under the guise of protecting the Serb population of Bosnia and Herzegovina, in fact conceived and shared with them the vision of a "Greater Serbia", in pursuit of which it gave its support to those persons and groups responsible for the activities which allegedly constitute the genocidal acts complained of. The Applicant bases this contention first on the "Strategic Goals" articulated by President Karadžić at the 16th Session of the FRY Assembly on 12 May 1992, and subsequently published in the *Official Gazette* of the Republika Srpska (paragraph 371), and secondly on the consistent conduct of the Serb military and paramilitary forces vis-à-vis the non-Serb Bosnians showing, it is suggested, an overall specific intent *(dolus specialis)*. These activities will be examined below.

238. As regards the relationship between the armies of the FRY and the Republika Srpska, the Yugoslav Peoples' Army (JNA) of the SFRY had, during the greater part of the period of existence of the SFRY, been effectively a federal army, composed of soldiers from all the constituent republics of the Federation, with no distinction between different ethnic and religious groups. It is however contended by the Applicant that even before the break-up of the SFRY arrangements were being made to transform the JNA into an effectively Serb army. The Court notes that on 8 May 1992, all JNA troops who were not of Bosnian origin were withdrawn from Bosnia-Herzegovina. However, JNA troops of Bosnian Serb origin who were serving in Bosnia and Herzegovina were transformed into, or joined, the army of the Republika Srpska (the VRS) which was established on 12 May 1992, or the VRS Territorial Defence. Moreover, Bosnian Serb soldiers serving in JNA units elsewhere were transferred to Bosnia and Herzegovina and subsequently joined the VRS. The remainder of the JNA was transformed into the Yugoslav army (VJ) and became the army of the Federal Republic of Yugoslavia. On 15 May 1992 the Security Council, by resolution 752, demanded that units of the JNA in Bosnia and Herzegovina "be withdrawn, or be subject to the authority of the Government of Bosnia and Herzegovina, or be disbanded and disarmed". On 19 May 1992, the Yugoslav army was officially withdrawn from Bosnia and Herzegovina. The Applicant contended that from 1993 onwards, around 1,800 VRS officers were "administered" by the 30th Personnel Centre of the VJ in Belgrade; this meant that matters like their payment, promotions, pensions, etc., were handled, not by the Republika Srpska, but by the army of the Respondent. According to the Respondent, the importance of this fact was greatly exaggerated by the Applicant: the VRS had around 14,000 officers and thus only a small number of them were dealt with by the 30th Personnel Centre; this Centre only gave a certain degree of assistance to the VRS. The Applicant maintains that all VRS officers remained members of the

FRY army — only the label changed; according to the Respondent, there is no evidence for this last allegation. The Court takes note however of the comprehensive description of the processes involved set out in paragraphs 113 to 117 of the Judgment of 7 May 1997 of the ICTY Trial Chamber in the *Tadić* case (IT-94-1-T) quoted by the Applicant which mainly corroborate the account given by the latter. Insofar as the Respondent does not deny the fact of these developments, it insists that they were normal reactions to the threat of civil war, and there was no premeditated plan behind them.

239. The Court further notes the submission of the Applicant that the VRS was armed and equipped by the Respondent. The Applicant contends that when the JNA formally withdrew on 19 May 1992, it left behind all its military equipment which was subsequently taken over by the VRS. This claim is supported by the Secretary-General's report of 3 December 1992 in which he concluded that "[t]hough the JNA has completely withdrawn from Bosnia and Herzegovina, former members of Bosnian Serb origin have been left behind with their equipment and constitute the Army of the 'Serb Republic' " (A/47/747, para. 11). Moreover, the Applicant submits that Belgrade actively supplied the VRS with arms and equipment throughout the war in Bosnia and Herzegovina. On the basis of evidence produced before the ICTY, the Applicant contended that up to 90 per cent of the material needs of the VRS were supplied by Belgrade. General Dannatt, one of the experts called by the Applicant (paragraph 57 above), testified that, according to a "consumption review" given by General Mladić at the Bosnian Serb Assembly on 16 April 1995, 42.2 per cent of VRS supplies of infantry ammunition were inherited from the former JNA and 47 per cent of VRS requirements were supplied by the VJ. For its part, the Respondent generally denies that it supplied and equipped the VRS but maintains that, even if that were the case, such assistance "is very familiar and is an aspect of numerous treaties of mutual security, both bilateral and regional". The Respondent adds that moreover it is a matter of public knowledge that the armed forces of Bosnia and Herzegovina received external assistance from friendly sources. However, one of the witnesses called by the Respondent, Mr. Vladimir Lukić, who was the Prime Minister of the Republika Srpska from 20 January 1993 to 18 August 1994 testified that the army of the Republika Srpska was supplied from different sources "including but not limited to the Federal Republic of Yugoslavia" but asserted that the Republika Srpska "mainly paid for the military materiel which it obtained" from the States that supplied it.

240. As regards effective links between the two Governments in the financial sphere, the Applicant maintains that the economies of the FRY, the Republika Srpska, and the Republika Srpska Krajina were integrated through the creation of a single economic entity, thus enabling the FRY Government to finance the armies of the two other bodies in addition to its own. The Applicant argued that the National Banks of the

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Republika Srpska and of the Republika Srpska Krajina were set up as under the control of, and directly subordinate to, the National Bank of Yugoslavia in Belgrade. The national budget of the FRY was to a large extent financed through primary issues from the National Bank of Yugoslavia, which was said to be entirely under governmental control, i.e. in effect through creating money by providing credit to the FRY budget for the use of the JNA. The same was the case for the budgets of the Republika Srpska and the Republika Srpska Krajina, which according to the Applicant had virtually no independent sources of income; the Respondent asserts that income was forthcoming from various sources, but has not specified the extent of this. The National Bank of Yugoslavia was making available funds (80 per cent of those available from primary issues) for "special purposes", that is to say "to avoid the adverse effects of war on the economy of the Serbian Republic of Bosnia and Herzegovina". The Respondent has denied that the budget deficit of the Republika Srpska was financed by the FRY but has not presented evidence to show how it was financed. Furthermore, the Respondent emphasizes that any financing supplied was simply on the basis of credits, to be repaid, and was therefore quite normal, particularly in view of the economic isolation of the FRY, the Republika Srpska and the Republika Srpska Krajina; it also suggested that any funds received would have been under the sole control of the recipient, the Republika Srpska or the Republika Srpska Krajina.

241. The Court finds it established that the Respondent was thus making its considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities.

* *

*(3) Examination of Factual Evidence: Introduction*

242. The Court will therefore now examine the facts alleged by the Applicant, in order to satisfy itself, first, whether the alleged atrocities occurred; secondly, whether such atrocities, if established, fall within the scope of Article II of the Genocide Convention, that is to say whether the facts establish the existence of an intent, on the part of the perpetrators of those atrocities, to destroy, in whole or in part, a defined group *(dolus specialis)*. The group taken into account for this purpose will, for the reasons explained above (paragraphs 191-196), be that of the Bosnian Muslims; while the Applicant has presented evidence said to relate to the wider group of non-Serb Bosnians, the Bosnian Muslims formed such a substantial part of this wider group that that evidence appears to have equal probative value as regards the facts, in relation to the more restricted

group. The Court will also consider the facts alleged in the light of the question whether there is persuasive and consistent evidence for a pattern of atrocities, as alleged by the Applicant, which would constitute evidence of *dolus specialis* on the part of the Respondent. For this purpose it is not necessary to examine every single incident reported by the Applicant, nor is it necessary to make an exhaustive list of the allegations; the Court finds it sufficient to examine those facts that would illuminate the question of intent, or illustrate the claim by the Applicant of a pattern of acts committed against members of the group, such as to lead to an inference from such pattern of the existence of a specific intent *(dolus specialis)*.

243. The Court will examine the evidence following the categories of prohibited acts to be found in Article II of the Genocide Convention. The nature of the events to be described is however such that there is considerable overlap between these categories: thus, for example, the conditions of life in the camps to which members of the protected group were confined have been presented by the Applicant as violations of Article II, paragraph *(c)*, of the Convention (the deliberate infliction of destructive conditions of life), but since numerous inmates of the camps died, allegedly as a result of those conditions, or were killed there, the camps fall to be mentioned also under paragraph *(a)*, killing of members of the protected group.

244. In the evidentiary material submitted to the Court, and that referred to by the ICTY, frequent reference is made to the actions of "Serbs" or "Serb forces", and it is not always clear what relationship, if any, the participants are alleged to have had with the Respondent. In some cases it is contended, for example, that the JNA, as an organ *de jure* of the Respondent, was involved; in other cases it seems clear that the participants were Bosnian Serbs, with no *de jure* link with the Respondent, but persons whose actions are, it is argued, attributable to the Respondent on other grounds. Furthermore, as noted in paragraph 238 above, it appears that JNA troops of Bosnian Serb origin were transformed into, or joined the VRS. At this stage of the present Judgment, the Court is not yet concerned with the question of the attributability to the Respondent of the atrocities described; it will therefore use the terms "Serb" and "Serb forces" purely descriptively, without prejudice to the status they may later, in relation to each incident, be shown to have had. When referring to documents of the ICTY, or to the Applicant's pleadings or oral argument, the Court will use the terminology of the original.

* *

*(4) Article II* (a)*: Killing Members of the Protected Group*

245. Article II *(a)* of the Convention deals with acts of killing members of the protected group. The Court will first examine the evidence of killings of members of the protected group in the principal areas of Bosnia and in the various detention camps, and ascertain whether there is evidence of a specific intent *(dolus specialis)* in one or more of them. The Court will then consider under this heading the evidence of the massacres reported to have occurred in July 1995 at Srebrenica.

*Sarajevo*

246. The Court notes that the Applicant refers repeatedly to killings, by shelling and sniping, perpetrated in Sarajevo. The Fifth Periodic Report of the United Nations Special Rapporteur is presented by the Applicant in support of the allegation that between 1992 and 1993 killings of Muslim civilians were perpetrated in Sarajevo, partly as a result of continuous shelling by Bosnian Serb forces. The Special Rapporteur stated that on 9 and 10 November 1993 mortar attacks killed 12 people (E/CN.4/1994/47, 17 November 1992, p. 4, para. 14). In his periodic Report of 5 July 1995, the Special Rapporteur observed that as from late February 1995 numerous civilians were killed by sniping activities of Bosnian Serb forces and that "one local source reported that a total of 41 civilians were killed . . . in Sarajevo during the month of May 1995" (Report of 5 July 1995, para. 69). The Report also noted that, in late June and early July 1995, there was further indiscriminate shelling and rocket attacks on Sarajevo by Bosnian Serb forces as a result of which many civilian deaths were reported (Report of 5 July 1995, para. 70).

247. The Report of the Commission of Experts gives a detailed account of the battle and siege of Sarajevo. The Commission estimated that over the course of the siege nearly 10,000 persons had been killed or were missing in the city of Sarajevo (Report of the Commission of Experts, Vol. II, Ann. VI, p. 8). According to the estimates made in a report presented by the Prosecution before the ICTY in the *Galić* case (IT-98-29-T, Trial Chamber Judgment, 5 December 2003, paras. 578 and 579), the monthly average of civilians killed fell from 105 in September to December 1992, to around 64 in 1993 and to around 28 in the first six months of 1994.

248. The Trial Chamber of the ICTY, in its Judgment of 5 December 2003 in the *Galić* case examined specific incidents in the area of Sarajevo, for instance the shelling of the Markale market on 5 February 1994 which resulted in the killing of 60 persons. The majority of the Trial

Chamber found that "civilians in ARBiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory during the Indictment Period, and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured" (*Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 591), the Trial Chamber further concluded that "[i]n sum, the Majority of the Trial Chamber finds that each of the crimes alleged in the Indictment — crime of terror, attacks on civilians, murder and inhumane acts — were committed by SRK forces during the Indictment Period" (*ibid.*, para. 600).

249. In this connection, the Respondent makes the general point that in a civil war it is not always possible to differentiate between military personnel and civilians. It does not deny that crimes were committed during the siege of Sarajevo, crimes that "could certainly be characterized as war crimes and certain even as crimes against humanity", but it does not accept that there was a strategy of targeting civilians.

*Drina River Valley*

(a) *Zvornik*

250. The Applicant made a number of allegations with regard to killings that occurred in the area of Drina River Valley. The Applicant, relying on the Report of the Commission of Experts, claims that at least 2,500 Muslims died in Zvornik from April to May 1992. The Court notes that the findings of the Report of the Commission of Experts are based on individual witness statements and one declassified United States State Department document No. 94-11 (Vol. V, Ann. X, para. 387; Vol. IV, Ann. VIII, p. 342 and para. 2884; Vol. I, Ann. III.A, para. 578). Further, a video reporting on massacres in Zvornik was shown during the oral proceedings (excerpts from "The Death of Yugoslavia", BBC documentary). With regard to specific incidents, the Applicant alleges that Serb soldiers shot 36 Muslims and mistreated 27 Muslim children in the local hospital of Zvornik in the second half of May 1992.

251. The Respondent contests those allegations and contends that all three sources used by the Applicant are based solely on the account of one witness. It considers that the three reports cited by the Applicant cannot be used as evidence before the Court. The Respondent produced the statement of a witness made before an investigating judge in Zvornik which claimed that the alleged massacre in the local hospital of Zvornik had never taken place. The Court notes that the Office of the Prosecutor of the ICTY had never indicted any of the accused for the alleged massacres in the hospital.

(b) *Camps*

(i) *Sušica camp*

252. The Applicant further presents claims with regard to killings perpetrated in detention camps in the area of Drina River Valley. The Report of the Commission of Experts includes the statement of an exguard at the Sušica camp who personally witnessed 3,000 Muslims being killed (Vol. IV, Ann. VIII, p. 334) and the execution of the last 200 surviving detainees (Vol. I, Ann. IV, pp. 31-32). In proceedings before the ICTY, the Commander of that camp, Dragan Nikolić, pleaded guilty to murdering nine non-Serb detainees and, according to the Sentencing Judgment of 18 December 2003, "the Accused persecuted Muslim and other non-Serb detainees by subjecting them to murders, rapes and torture as charged specifically in the Indictment" (*Nikolić*, IT-94-2-S, para. 67).

(ii) *Foča Kazneno-Popravní Dom camp*

253. The Report of the Commission of Experts further mentions numerous killings at the camp of Foča Kazneno-Popravní Dom (Foča KP Dom). The Experts estimated that the number of prisoners at the camp fell from 570 to 130 over two months (Vol. IV, Ann. VIII, p. 129). The United States State Department reported one eye-witness statement of regular executions in July 1992 and mass graves at the camp.

254. The Trial Chamber of the ICTY made the following findings on several killings at this camp in its Judgment in the *Krnojelac* case:

> "The Trial Chamber is satisfied beyond reasonable doubt that all but three of the persons listed in Schedule C to the Indictment were killed at the KP Dom. The Trial Chamber is satisfied that these persons fell within the pattern of events that occurred at the KP Dom during the months of June and July 1992, and that the only reasonable explanation for the disappearance of these persons since that time is that they died as a result of acts or omissions, with the relevant state of mind [sc. that required to establish murder], at the KP Dom." (IT-97-25-T, Judgment, 15 March 2002, para. 330.)

(iii) *Batković camp*

255. As regards the detention camp of Batković, the Applicant claims that many prisoners died at this camp as a result of mistreatment by the Serb guards. The Report of the Commission of Experts reports one witness statement according to which there was a mass grave located next to the Batković prison camp. At least 15 bodies were buried next to a cow stable, and the prisoners neither knew the identity of those buried at the stable nor the circumstances of their deaths (Report of the Commission

of Experts, Vol. V, Ann. X, p. 9). The Report furthermore stresses that

> "[b]ecause of the level of mistreatment, many prisoners died. One man stated that during his stay, mid-July to mid-August, 13 prisoners were beaten to death. Another prisoner died because he had gangrene which went untreated. Five more may have died from hunger. Allegedly, 20 prisoners died prior to September." (Vol. IV, Ann. VIII, p. 63.)

Killings at the Batković camp are also mentioned in the Dispatch of the United States State Department of 19 April 1993. According to a witness, several men died as a result of bad conditions and beatings at the camp (United States Dispatch, 19 April 1993, Vol. 4, No. 30, p. 538).

256. On the other hand, the Respondent stressed that, when the United Nations Special Rapporteur visited the Batković prison camp, he found that: "The prisoners did not complain of ill-treatment and, in general appeared to be in good health." (Report of 17 November 1992, para. 29) However, the Applicant contends that "it is without any doubt that Mazowiecki was shown a 'model' camp".

*Prijedor*

(a) *Kozarac and Hambarine*

257. With regard to the area of the municipality of Prijedor, the Applicant has placed particular emphasis on the shelling and attacks on Kozarac, 20 km east of Prijedor, and on Hambarine in May 1992. The Applicant contends that after the shelling, Serb forces shot people in their homes and that those who surrendered were taken to a soccer stadium in Kozarac where some men were randomly shot. The Report of the Commission of Experts (Vol. I, Ann. III, pp. 154-155) states that:

> "The attack on Kozarac lasted three days and caused many villagers to flee to the forest while the soldiers were shooting at 'every moving thing'. Survivors calculated that at least 2,000 villagers were killed in that period. The villagers' defence fell on 26 May . . .
>
> Serbs then reportedly announced that the villagers had 10 minutes to reach the town's soccer stadium. However, many people were shot in their homes before given a chance to leave. One witness reported that several thousand people tried to surrender by carrying white flags, but three Serb tanks opened fire on them, killing many."

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The Respondent submits that the number of killings is exaggerated and that "there was severe fighting in Kozarac, which took place on 25 and 26 May, and naturally, it should be concluded that a certain number of the victims were Muslim combatants".

258. As regards Hambarine, the Report of the Commission of Experts (Vol. I, p. 39) states that:

> "Following an incident in which less than a handful of Serb[ian] soldiers were shot dead under unclear circumstances, the village of Hambarine was given an ultimatum to hand over a policeman who lived where the shooting had occurred. As it was not met, Hambarine was subjected to several hours of artillery bombardment on 23 May 1992.
>
> The shells were fired from the aerodrome Urije just outside Prijedor town. When the bombardment stopped, the village was stormed by infantry, including paramilitary units, which sought out the inhabitants in every home. Hambarine had a population of 2,499 in 1991."

The Report of the Special Rapporteur of 17 November 1992, states that:

> "Between 23 and 25 May, the Muslim village of Hambarine, 5 km south of Prijedor, received an ultimatum: all weapons must be surrendered by 11 a.m. Then, alleging that a shot was fired at a Serbian patrol, heavy artillery began to shell the village and tanks appeared, firing at homes. The villagers fled to Prijedor. Witnesses reported many deaths, probably as many as 1,000." (Periodic Report of 17 November 1992, p. 8, para. 17 *(c)*.)

The Respondent says, citing the indictment in the *Stakić* case, that "merely 11 names of the victims are known" and that it is therefore impossible that the total number of victims in Hambarine was "as many as 1,000".

259. The Report of the Commission of Experts found that on 26, 27 or 28 May, the Muslim village of Kozarac, came under attack of heavy Serb artillery. It furthermore notes that:

> "The population, estimated at 15,000, suffered a great many summary executions, possibly as many as 5,000 persons according to some witnesses." (Report of the Commission of Experts, Vol. IV, pt. 4.)

260. The Applicant also claimed that killings of members of the protected group were perpetrated in Prijedor itself. The Report of the Commission of Experts, as well as the United Nations Special Rapporteur collected individual witness statements on several incidents of killing in the town of Prijedor (Report of the Commission of Experts, Vol. I, Ann. V, pp. 54 *et seq.*). In particular, the Special Rapporteur received

testimony "from a number of reliable sources" that 200 people were killed in Prijedor on 29 May 1992 (Report of 17 November 1992, para. 17).

261. In the *Stakić* case, the ICTY Trial Chamber found that "many people were killed during the attacks by the Bosnian Serb army on predominantly Bosnian Muslim villages and towns throughout the Prijedor municipality and several massacres of Muslims took place", and that "a comprehensive pattern of atrocities against Muslims in Prijedor municipality in 1992 ha[d] been proved beyond reasonable doubt" (IT-97-24-T, Judgment, 31 July 2003, paras. 544 and 546). Further, in the *Brđanin* case, the Trial Chamber was satisfied that "at least 80 Bosnian Muslim civilians were killed when Bosnian Serb soldiers and police entered the villages of the Kozarac area" (IT-99-36, Judgment, 1 September 2004, para. 403).

(b) *Camps*

(i) *Omarska camp*

262. With respect to the detention camps in the area of Prijedor, the Applicant has stressed that the camp of Omarska was "arguably the cruellest camp in Bosnia and Herzegovina". The Report of the Commission of Experts gives an account of seven witness statements reporting between 1,000 to 3,000 killings (Vol. IV, Ann. VIII, p. 222). The Report noted that

> "[s]ome prisoners estimate that on an average there may have been 10 to 15 bodies displayed on the grass each morning, when the first prisoners went to receive their daily food rations. But there were also other dead bodies observed in other places at other times. Some prisoners died from their wounds or other causes in the rooms where they were detained. Constantly being exposed to the death and suffering of fellow prisoners made it impossible for anyone over any period of time to forget in what setting he or she was. Given the length of time Logor Omarska was used, the numbers of prisoners detained in the open, and the allegations that dead bodies were exhibited there almost every morning."

The Report of the Commission of Experts concludes that "all information available . . . seems to indicate that [Omarska] was more than anything else a death camp" (Vol. I, Ann. V, p. 80). The United Nations Secretary-General also received submissions from Canada, Austria and the United States, containing witness statements about the killings at Omarska.

263. In the Opinion and Judgment of the Trial Chamber in the *Tadić* case, the ICTY made the following findings on Omarska: "Perhaps the most notorious of the camps, where the most horrific conditions existed,

was the Omarska camp." (IT-94-1-T, Judgment, 7 May 1997, para. 155.) "The Trial Chamber heard from 30 witnesses who survived the brutality to which they were systematically subjected at Omarska. By all accounts, the conditions at the camp were horrendous; killings and torture were frequent." (*Ibid.*, para. 157.) The Trial Chamber in the *Stakić* Judgment found that "over a hundred people were killed in late July 1992 in the Omarska camp" and that

> "[a]round late July 1992, 44 people were taken out of Omarska and put in a bus. They were told that they would be exchanged in the direction of Bosanska Krupa; they were never seen again. During the exhumation in Jama Lisac, 56 bodies were found: most of them had died from gunshot injuries." (IT-97-24-T, Judgment, 31 July 2003, paras. 208 and 210).

At least 120 people detained at Omarska were killed after having been taken away by bus.

> "The corpses of some of those taken away on the buses were later found in Hrastova Glavica and identified. A large number of bodies, 126, were found in this area, which is about 30 kilometres away from Prijedor. In 121 of the cases, the forensic experts determined that the cause of death was gunshot wounds." (*Ibid.*, para. 212.)

264. In the *Brđanin* case, the Trial Chamber, in its Judgment of 1 September 2004 held that between 28 May and 6 August, a massive number of people were killed at Omarska camp. The Trial Chamber went on to say specifically that "[a]s of late May 1992, a camp was set up at Omarska, where evidence shows that several hundred Bosnian Muslim and Bosnian Croat civilians from the Prijedor area were detained, and where killings occurred on a massive scale" (IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 441). "The Trial Chamber is unable to precisely identify all detainees that were killed at Omarska camp. It is satisfied beyond reasonable doubt however that, at a minimum, 94 persons were killed, including those who disappeared." (*Ibid.*, para. 448.)

(ii) *Keraterm camp*

265. A second detention camp in the area of Prijedor was the Keraterm camp where, according to the Applicant, killings of members of the protected group were also perpetrated. Several corroborating accounts of a mass execution on the morning of 25 July 1992 in Room 3 at Keraterm camp were presented to the Court. This included the United States Dispatch of the State Department and a letter from the Permanent Repre-

sentative of Austria to the United Nations dated 5 March 1993, addressed to the Secretary-General. The Report of the Commission of Experts cites three separate witness statements to the effect that ten prisoners were killed per day at Keraterm over three months (Vol. IV, para. 1932; see also Vol. I, Ann. V, para. 445).

266. The Trial Chamber of the ICTY, in the *Sikirica et al.* case, concerning the Commander of Keraterm camp, found that 160 to 200 men were killed or wounded in the so-called Room 3 massacre (IT-95-8-S, Sentencing Judgment, 13 November 2001, para. 103). According to the Judgment, Sikirica himself admitted that there was considerable evidence "concerning the murder and killing of other named individuals at Keraterm during the period of his duties". There was also evidence that "others were killed because of their rank and position in society and their membership of a particular ethnic group or nationality" (*ibid.*, para. 122). In the *Stakić* case, the Trial Chamber found that "from 30 April 1992 to 30 September 1992 . . . killings occurred frequently in the Omarska, Keraterm and Trnopolje camps" (IT-97-24-T, Judgment, 31 July 2003, para. 544).

(iii) *Trnopolje camp*

267. The Applicant further contends that there is persuasive evidence of killing at Trnopolje camp, with individual eye-witnesses corroborating each other. The Report of the Commission of Experts found that "[i]n Trnopolje, the regime was far better than in Omarska and Keraterm. Nonetheless, harassment and malnutrition was a problem for all the inmates. Rapes, beatings and other kinds of torture, and even killings, were not rare." (Report of the Commission of Experts, Vol. IV, Ann. V, p. 10.)

> "The first period was allegedly the worst in Trnopolje, with the highest numbers of inmates killed, raped, and otherwise mistreated and tortured . . .
>
> The people killed in the camp were usually removed soon after by some camp inmates who were ordered by the Serbs to take them away and bury them . . .
>
> Albeit *Logor* Trnopolje was not a death camp like *Logor* Omarska or *Logor* Keraterm, the label 'concentration camp' is none the less justified for *Logor* Trnopolje due to the regime prevailing in the camp." (*Ibid.*, Vol. I, Ann. V, pp. 88-90.)

268. With regard to the number of killings at Trnopolje, the ICTY considered the period between 25 May and 30 September 1992, the relevant period in the *Stakić* case (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, paras. 226-227). The Trial Chamber came to the conclusion that "killings occurred frequently in the Omarska, Keraterm and Trno-

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polje camps and other detention centres" (IT-97-24-T, para. 544). In the Judgment in the *Brđanin* case, the Trial Chamber found that in the period from 28 May to October 1992,

> "numerous killings occurred in Trnopolje camp. A number of detainees died as a result of the beatings received by the guards. Others were killed by camp guards with rifles. The Trial Chamber also [found] that at least 20 inmates were taken outside the camp and killed there." (IT-99-36-T, Judgment, 1 September 2004, para. 450.)

269. In response to the allegations of killings at the detention camps in the area of Prijedor, the Respondent questions the number of victims, but not the fact that killings occurred. It contends that killings in Prijedor "were committed sporadically and against individuals who were not a significant part of the group". It further observed that the ICTY had not characterized the acts committed in the Prijedor region as genocide.

*Banja Luka*

*Manjača camp*

270. The Applicant further contends that killings were also frequent at Manjača camp in Banja Luka. The Court notes that multiple witness accounts of killings are contained in the Report of the Commission of Experts (Vol. IV, paras. 370-376) and a mass grave of 540 bodies, "presumably" from prisoners at Manjača, is mentioned in a report on missing persons submitted by Manfred Nowak, the United Nations Expert on Missing Persons:

> "In September 1995, mass graves were discovered near Krasulje in northwest Bosnia and Herzegovina. The Government has exhumed 540 bodies of persons who were presumably detained at Manjaca concentration camp in 1992. In January 1996, a mass grave containing 27 bodies of Bosnian Muslims was discovered near Sanski Most; the victims were reportedly killed in July 1992 during their transfer from Sanski Most to Manjaca concentration camp (near Banja Luka)." (E/CN.4/1996/36 of 4 March 1996, para. 52.)

*Brčko*

*Luka camp*

271. The Applicant claims that killings of members of the protected group were also perpetrated at Luka camp and Brčko. The Report of the Commission of Experts confirms these allegations. One witness reported that "[s]hootings often occurred at 4.00 a.m. The witness estimates that during his first week at Luka more than 2,000 men were killed and

thrown into the Sava River." (Report of the Commission of Experts Vol. IV, Ann. VIII, p. 93.) The Report further affirms that "[a]pparently, murder and torture were a daily occurrence" (*ibid.*, p. 96), and that it was reported that

> "[t]he bodies of the dead or dying internees were often taken to the camp dump or moved behind the prisoner hangars. Other internees were required to move the bodies. Sometimes the prisoners who carried the dead were killed while carrying such bodies to the dump. The dead were also taken and dumped outside the Serbian Police Station located on Majevička Brigada Road in Brčko." (*Ibid.*)

These findings are corroborated by evidence of a mass grave being found near the site (Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 101, and United States State Department Dispatch).

272. In the *Jelisić* case, eight of the 13 murders to which the accused pleaded guilty were perpetrated at Luka camp and five were perpetrated at the Brčko police station (IT-95-10-T, Trial Chamber Judgment, 14 December 1999, paras. 37-38). The Trial Chamber further held that "[a]lthough the Trial Chamber is not in a position to establish the precise number of victims ascribable to Goran Jelisić for the period in the indictment, it notes that, in this instance, the material element of the crime of genocide has been satisfied" (*ibid.*, para. 65).

273. In the *Milošević* Decision on Motion for Judgment of Acquittal, the Trial Chamber found that many Muslims were detained in Luka camp in May and June 1992 and that many killings were observed by witnesses (IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paras. 159, 160-168), it held that "[t]he conditions and treatment to which the detainees at Luka Camp were subjected were terrible and included regular beatings, rapes, and killings" (*ibid.*, para. 159). "At Luka Camp . . . The witness personally moved about 12 to 15 bodies and saw approximately 100 bodies stacked up like firewood at Luka Camp; each day a refrigerated meat truck from the local Bimeks Company in Brčko would come to take away the dead bodies." (*Ibid.*, para. 161.)

274. The Court notes that the *Brđanin* Trial Chamber Judgment of 1 September 2004 made a general finding as to killings of civilians in camps and municipalities at Banja Luka, Prijedor, Sanski Most, Ključ, Kotor Varoš and Bosanski Novi. It held that:

> "In sum, the Trial Chamber is satisfied beyond reasonable doubt that, considering all the incidents described in this section of the judgment, at least 1,669 Bosnian Muslims and Bosnian Croats were killed by Bosnian Serb forces, all of whom were non-combatants." (IT-99-36-T, Judgment, 1 September 2004, para. 465.)

There are contemporaneous Security Council and General Assembly resolutions condemning the killing of civilians in connection with ethnic cleansing, or expressing alarm at reports of mass killings (Security Council resolution 819 (1993), Preamble, paras. 6 and 7; General Assembly resolution 48/153 (1993), paras. 5 and 6; General Assembly resolution 49/196 (1994), para. 6).

275. The Court further notes that several resolutions condemn specific incidents. These resolutions, *inter alia*, condemn "the Bosnian Serb forces for their continued offensive against the safe area of Goražde, which has resulted in the death of numerous civilians" (Security Council resolution 913 (1994), Preamble, para. 5); condemn ethnic cleansing "perpetrated in Banja Luka, Bijeljina and other areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces" (Security Council resolution 941 (1994), para. 2); express concern at "grave violations of international humanitarian law and of human rights in and around Srebrenica, and in the areas of Banja Luka and Sanski Most, including reports of mass murder" (Security Council resolution 1019 (1995), Preamble, para. 2); and condemn "the indiscriminate shelling of civilians in the safe areas of Sarajevo, Tuzla, Bihać and Goražde and the use of cluster bombs on civilian targets by Bosnian Serb and Croatian Serb forces" (General Assembly resolution 50/193 (1995) para. 5).

*

276. On the basis of the facts set out above, the Court finds that it is established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia and Herzegovina were perpetrated during the conflict. Furthermore, the evidence presented shows that the victims were in large majority members of the protected group, which suggests that they may have been systematically targeted by the killings. The Court notes in fact that, while the Respondent contested the veracity of certain allegations, and the number of victims, or the motives of the perpetrators, as well as the circumstances of the killings and their legal qualification, it never contested, as a matter of fact, that members of the protected group were indeed killed in Bosnia and Herzegovina. The Court thus finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and that therefore the requirements of the material element, as defined by Article II *(a)* of the Convention, are fulfilled. At this stage of its reasoning, the Court is not called upon to list the specific killings, nor even to make a conclusive finding on the total number of victims.

277. The Court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent *(dolus specialis)* on the part of the perpetrators to destroy, in whole or in part, the group as such. The Court has carefully examined the criminal proceedings of the ICTY and the findings of its Chambers, cited above, and observes that none of those convicted were found to have acted with specific intent *(dolus specialis)*. The killings outlined above may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so. In the exercise of its jurisdiction under the Genocide Convention, the Court finds that it has not been established by the Applicant that the killings amounted to acts of genocide prohibited by the Convention. As to the Applicant's contention that the specific intent *(dolus specialis)* can be inferred from the overall pattern of acts perpetrated throughout the conflict, examination of this must be reserved until the Court has considered all the other alleged acts of genocide (violations of Article II, paragraphs *(b)* to *(e)*) (see paragraph 370 below).

* *

*(5) The Massacre at Srebrenica*

278. The atrocities committed in and around Srebrenica are nowhere better summarized than in the first paragraph of the Judgment of the Trial Chamber in the *Krstić* case:

> "The events surrounding the Bosnian Serb take-over of the United Nations ('UN') 'safe area' of Srebrenica in Bosnia and Herzegovina, in July 1995, have become well known to the world. Despite a UN Security Council resolution declaring that the enclave was to be 'free from armed attack or any other hostile act', units of the Bosnian Serb Army ('VRS') launched an attack and captured the town. Within a few days, approximately 25,000 Bosnian Muslims, most of them women, children and elderly people who were living in the area, were uprooted and, in an atmosphere of terror, loaded onto overcrowded buses by the Bosnian Serb forces and transported across the confrontation lines into Bosnian Muslim-held territory. The military-aged Bosnian Muslim men of Srebrenica, however, were consigned to a separate fate. As thousands of them attempted to flee the area, they were taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again." (IT-98-33-T, Judgment, 2 August 2001, para. 1; footnotes omitted.)

While the Respondent raises a question about the number of deaths, it does not essentially question that account. What it does question is whether specific intent *(dolus specialis)* existed and whether the acts complained of can be attributed to it. It also calls attention to the attacks carried out by the Bosnian army from within Srebrenica and the fact that the enclave was never demilitarized. In the Respondent's view the military action taken by the Bosnian Serbs was in revenge and part of a war for territory.

279. The Applicant contends that the planning for the final attack on Srebrenica must have been prepared quite some time before July 1995. It refers to a report of 4 July 1994 by the commandant of the Bratunac Brigade. He outlined the "final goal" of the VRS: "an entirely Serbian Podrinje. The enclaves of Srebrenica, Žepa and Goražde must be militarily defeated." The report continued:

> "We must continue to arm, train, discipline, and prepare the RS Army for the execution of this crucial task — the expulsion of Muslims from the Srebrenica enclave. There will be no retreat when it comes to the Srebrenica enclave, we must advance. The enemy's life has to be made unbearable and their temporary stay in the enclave impossible so that they leave *en masse* as soon as possible, realising that they cannot survive there."

The Chamber in the *Blagojević* case mentioned testimony showing that some "members of the Bratunac Brigade . . . did not consider this report to be an order. Testimony of other witnesses and documentary evidence show that the strategy was in fact implemented." (IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 104; footnotes omitted.) The Applicant sees the "final goal" described here as "an entirely Serbian Podrinje", in conformity with the objective of a Serbian region 50 km to the west of the Drina river identified in an April or a May 1991 meeting of the political and State leadership of Yugoslavia. The Court observes that the object stated in the report, like the 1992 Strategic Objectives, does not envisage the destruction of the Muslims in Srebrenica, but rather their departure. The Chamber did not give the report any particular significance.

280. The Applicant, like the Chamber, refers to a meeting on 7 March 1995 between the Commander of the United Nations Protection Force (UNPROFOR) and General Mladić, at which the latter expressed dissatisfaction with the safe area régime and indicated that he might take military action against the eastern enclaves. He gave assurances however for the safety of the Bosnian Muslim population of those enclaves. On the following day, 8 March 1995, President Karadžić issued the Directive for Further Operations 7, also quoted by the Chamber and the Applicant: "'Planned and well-thought-out combat operations' were

to create 'an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of both enclaves'." The *Blagojević* Chamber continues as follows:

> "The separation of the Srebrenica and Žepa enclaves became the task of the Drina Corps. As a result of this directive, General Ratko Mladić on 31 March 1995 issued Directive for Further Operations, Operative No. 7/1, which further directive specified the Drina Corps' tasks." (IT-02-60-T, pp. 38-39, para. 106.)

281. Counsel for the Applicant asked in respect of the first of those directives "[w]hat could be a more clear-cut definition of the genocidal intent to destroy on the part of the authorities in Pale?". As with the July 1994 report, the Court observes that the expulsion of the inhabitants would achieve the purpose of the operation. That observation is supported by the ruling of the Appeals Chamber in the *Krstić* case that the directives were "insufficiently clear" to establish specific intent *(dolus specialis)* on the part of the members of the Main Staff who issued them. "Indeed, the Trial Chamber did not even find that those who issued Directives 7 and 7.1 had genocidal intent, concluding instead that the genocidal plan crystallized at a later stage." (IT-98-33-A, Judgment, 19 April 2004, para. 90.)

282. A Netherlands Battalion (Dutchbat) was deployed in the Srebrenica safe area. Within that area in January 1995 it had about 600 personnel. By February and through the spring the VRS was refusing to allow the return of Dutch soldiers who had gone on leave, causing their numbers to drop by at least 150, and were restricting the movement of international convoys of aid and supplies to Srebrenica and to other enclaves. It was estimated that without new supplies about half of the population of Srebrenica would be without food after mid-June.

283. On 2 July the Commander of the Drina Corps issued an order for active combat operations; its stated objective on the Srebrenica enclave was to reduce "the enclave to its urban area". The attack began on 6 July with rockets exploding near the Dutchbat headquarters in Potočari; 7 and 8 July were relatively quiet because of poor weather, but the shelling intensified around 9 July. Srebrenica remained under fire until 11 July when it fell, with the Dutchbat observation posts having been taken by the VRS. Contrary to the expectations of the VRS, the Bosnia and Herzegovina army showed very little resistance (*Blagojević*, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 125). The United Nations Secretary-General's report quotes an assessment made by United Nations military observers on the afternoon of 9 July which concluded as follows:

> " 'the BSA offensive will continue until they achieve their aims. These aims may even be widening since the United Nations response has been almost non-existent and the BSA are now in a position to overrun the enclave if they wish.' Documents later obtained from Serb sources appear to suggest that this assessment was correct. Those documents indicate that the Serb attack on Srebrenica initially had limited objectives. Only after having advanced with unexpected ease did the Serbs decide to overrun the entire enclave. Serb civilian and military officials from the Srebrenica area have stated the same thing, adding, in the course of discussions with a United Nations official, that they decided to advance all the way to Srebrenica town when they assessed that UNPROFOR was not willing or able to stop them." (A/54/549, para. 264.)

Consistently with that conclusion, the Chamber in the *Blagojević* case says this:

> "As the operation progressed its military object changed from 'reducing the enclave to the urban area' [the objective stated in a Drina Corps order of 2 July] to the taking-over of Srebrenica town and the enclave as a whole. The Trial Chamber has heard no direct evidence as to the exact moment the military objective changed. The evidence does show that President Karadžić was 'informed of successful combat operations around Srebrenica . . . which enable them to occupy the very town of Srebrenica' on 9 July. According to Miroslav Deronjić, the President of the Executive Board of the Bratunac Municipality, President Karadžić told him on 9 July that there were two options in relation to the operation, one of which was the complete take-over of Srebrenica. Later on 9 July, President Karadžić 'agreed with continuation of operations for the takeover of Srebrenica'. By the morning of 11 July the change of objective of the 'Krivaja 95' operation had reached the units in the field; and by the middle of the afternoon, the order to enter Srebrenica had reached the Bratunac Brigade's IKM in Pribićevac and Colonel Blagojević. Miroslav Deronjić visited the Bratunac Brigade IKM in Pribićevac on 11 July. He briefly spoke with Colonel Blagojević about the Srebrenica operation. According to Miroslav Deronjić, the VRS had just received the order to enter Srebrenica town." (IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 130.)

284. The Chamber then begins an account of the dreadful aftermath of the fall of Srebrenica. A Dutchbat Company on 11 July started directing the refugees to the UNPROFOR headquarters in Potočari which was

considered to be the only safe place for them. Not all the refugees went towards Potočari; many of the Bosnian Muslim men took to the woods. Refugees were soon shelled and shot at by the VRS despite attempts to find a safe route to Potočari where, to quote the ICTY, chaos reigned:

> "The crowd outside the UNPROFOR compound grew by the thousands during the course of 11 July. By the end of the day, an estimated 20,000 to 30,000 Bosnian Muslims were in the surrounding area and some 4,000 to 5,000 refugees were in the UNPROFOR compound.
>
> *(b)* Conditions in Potočari
>
> The standards of hygiene within Potočari had completely deteriorated. Many of the refugees seeking shelter in the UNPROFOR headquarters were injured. Medical assistance was given to the extent possible; however, there was a dramatic shortage of medical supplies. As a result of the VRS having prevented aid convoys from getting through during the previous months, there was hardly any fresh food in the DutchBat headquarters. There was some running water available outside the compound. From 11 to 13 July 1995 the temperature was very high, reaching 35 degrees centigrade and this small water supply was insufficient for the 20,000 to 30,000 refugees who were outside the UNPROFOR compound." (IT-02-60-T, paras. 146-147.)

The Tribunal elaborates on those matters and some efforts made by Bosnian Serb and Serbian authorities, i.e., the local Municipal Assembly, the Bratunac Brigade and the Drina Corps, as well as UNHCR, to assist the Bosnian Muslim refugees (*ibid.*, para. 148).

285. On 10 July at 10.45 p.m., according to the Secretary-General's 1999 Report, the delegate in Belgrade of the Secretary-General's Special Representative telephoned the Representative to say that he had seen President Milošević who had responded that not much should be expected of him because "the Bosnian Serbs did not listen to him" (A/54/549, para. 292). At 3 p.m. the next day, the President rang the Special Representative and, according to the same report, "stated that the Dutchbat soldiers in Serb-held areas had retained their weapons and equipment, and were free to move about. This was not true." (*Ibid.*, para. 307.) About 20 minutes earlier two NATO aircraft had dropped two bombs on what were thought to be Serb vehicles advancing towards the town from the south. The Secretary-General's report gives the VRS reaction:

> "Immediately following this first deployment of NATO close air support, the BSA radioed a message to Dutchbat. They threatened

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> to shell the town and the compound where thousands of inhabitants had begun to gather, and to kill the Dutchbat soldiers being held hostage, if NATO continued with its use of air power. The Special Representative of the Secretary-General recalled having received a telephone call from the Netherlands Minister of Defence at this time, requesting that the close air support action be discontinued, because Serb soldiers on the scene were too close to Netherlands troops, and their safety would be jeopardized. The Special Representative considered that he had no choice but to comply with this request." (A/54/549, para. 306.)

286. The Trial Chamber in the *Blagojević* case recorded that on 11 July at 8 p.m. there was a meeting between a Dutch colonel and General Mladić and others. The former said that he had come to negotiate the withdrawal of the refugees and to ask for food and medicine for them. He sought assurances that the Bosnian Muslim population and Dutchbat would be allowed to withdraw from the area. General Mladić said that the civilian population was not the target of his actions and the goal of the meeting was to work out an arrangement. He then said "'you can all leave, all stay, or all die here' . . . 'we can work out an agreement for all this to stop and for the issues of the civilian population, your soldiers and the Muslim military to be resolved in a peaceful way'" (*Blagojević*, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, paras. 150-152). Later that night at a meeting beginning at 11 p.m., attended by a representative of the Bosnian Muslim community, General Mladić said:

> "'Number one, you need to lay down your weapons and I guarantee that all those who lay down their weapon will live. I give you my word, as a man and a General, that I will use my influence to help the innocent Muslim population which is not the target of the combat operations carried out by the VRS . . . In order to make a decision as a man and a Commander, I need to have a clear position of the representatives of your people on whether you want to survive . . . stay or vanish. I am prepared to receive here tomorrow at 10 a.m. hrs. a delegation of officials from the Muslim side with whom I can discuss the salvation of your people from . . . the former enclave of Srebrenica . . . Nesib [a Muslim representative], the future of your people is in your hands, not only in this territory . . . Bring the people who can secure the surrender of weapons and save your people from destruction.'
>
> The Trial Chamber finds, based on General Mladić's comments, that he was unaware that the Bosnian Muslim men had left the Srebrenica enclave in the column.
>
> General Mladić also stated that he would provide the vehicles to transport the Bosnian Muslims out of Potočari. The Bosnian

Muslim and Bosnian Serb sides were not on equal terms and Nesib Mandžić felt his presence was only required to put up a front for the international public. Nesib Mandžić felt intimidated by General Mladić. There was no indication that anything would happen the next day." (IT-02-60-T, paras. 156-158.)

287. A third meeting was held the next morning, 12 July. The Tribunal in the *Blagojević* case gives this account:

"After the Bosnian Muslim representatives had introduced themselves, General Mladić stated:

> 'I want to help you, but I want absolute co-operation from the civilian population because your army has been defeated. There is no need for your people to get killed, your husband, your brothers or your neighbours . . . As I told this gentleman last night, you can either survive or disappear. For your survival, I demand that all your armed men, even those who committed crimes, and many did, against our people, surrender their weapons to the VRS . . . You can choose to stay or you can choose to leave. If you wish to leave, you can go anywhere you like. When the weapons have been surrendered every individual will go where they say they want to go. The only thing is to provide the needed gasoline. You can pay for it if you have the means. If you can't pay for it, UNPROFOR should bring four or five tanker trucks to fill up trucks . . .'

Čamila Omanović [one of the Muslim representatives] interpreted this to mean that if the Bosnian Muslim population left they would be saved, but that if they stayed they would die. General Mladić did not give a clear answer in relation to whether a safe transport of the civilian population out of the enclave would be carried out. General Mladić stated that the male Bosnian Muslim population from the age of 16 to 65 would be screened for the presence of war criminals. He indicated that after this screening, the men would be returned to the enclave. This was the first time that the separation of men from the rest of the population was mentioned. The Bosnian Muslim representatives had the impression that 'everything had been prepared in advance, that there was a team of people working together in an organized manner' and that 'Mladić was the chief organizer.'

The third Hotel Fontana meeting ended with an agreement that the VRS would transport the Bosnian Muslim civilian population out of the enclave to ARBiH-held territory, with the assistance of UNPROFOR to ensure that the transportation was carried out in a humane manner." (*Ibid.*, paras. 160-161.)

The Court notes that the accounts of the statements made at the meetings come from transcripts of contemporary video recordings.

288. The VRS and MUP of the Republika Srpska from 12 July separated men aged 16 to approximately 60 or 70 from their families. The Bosnian Muslim men were directed to various locations but most were sent to a particular house ("The White House") near the UNPROFOR headquarters in Potočari, where they were interrogated. During the afternoon of 12 July a large number of buses and other vehicles arrived in Potočari including some from Serbia. Only women, children and the elderly were allowed to board the buses bound for territory held by the Bosnia and Herzegovina military. Dutchbat vehicles escorted convoys to begin with, but the VRS stopped that and soon after stole 16-18 Dutchbat jeeps, as well as around 100 small arms, making further escorts impossible. Many of the Bosnian Muslim men from Srebrenica and its surroundings including those who had attempted to flee through the woods were detained and killed.

289. Mention should also be made of the activities of certain paramilitary units, the "Red Berets" and the "Scorpions", who are alleged by the Applicant to have participated in the events in and around Srebrenica. The Court was presented with certain documents by the Applicant, which were said to show that the "Scorpions" were indeed sent to the Trnovo area near Srebrenica and remained there through the relevant time period. The Respondent cast some doubt on the authenticity of these documents (which were copies of intercepts, but not originals) without ever formally denying their authenticity. There was no denial of the fact of the relocation of the "Scorpions" to Trnovo. The Applicant during the oral proceedings presented video material showing the execution by paramilitaries of six Bosnian Muslims, in Trnovo, in July 1995.

290. The Trial Chambers in the *Krstić* and *Blagojević* cases both found that Bosnian Serb forces killed over 7,000 Bosnian Muslim men following the takeover of Srebrenica in July 1995 (*Krstić*, IT-98-33-T, Judgment, 2 August 2001, paras. 426-427 and *Blagojević*, IT-02-60-T, Judgment, 17 January 2005, para. 643). Accordingly they found that the *actus reus* of killings in Article II *(a)* of the Convention was satisfied. Both also found that actions of Bosnian Serb forces also satisfied the *actus reus* of causing serious bodily or mental harm, as defined in Article II *(b)* of the Convention — both to those who where about to be executed, and to the others who were separated from them in respect of their forced displacement and the loss suffered by survivors among them (*Krstić*, *ibid.*, para. 543, and *Blagojević*, *ibid.*, paras. 644-654).

291. The Court is fully persuaded that both killings within the terms of Article II *(a)* of the Convention, and acts causing serious bodily or men-

tal harm within the terms of Article II *(b)* thereof occurred during the Srebrenica massacre. Three further aspects of the ICTY decisions relating to Srebrenica require closer examination — the specific intent *(dolus specialis)*, the date by which the intent was formed, and the definition of the "group" in terms of Article II. A fourth issue which was not directly before the ICTY but which this Court must address is the involvement, if any, of the Respondent in the actions.

292. The issue of intent has been illuminated by the *Krstić* Trial Chamber. In its findings, it was convinced of the existence of intent by the evidence placed before it. Under the heading "A Plan to Execute the Bosnian Muslim Men of Srebrenica", the Chamber "finds that, following the takeover of Srebrenica in July 1995, the Bosnian Serbs devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men present in the enclave" (IT-98-33-T, Judgment, 2 August 2001, para. 87). All the executions, the Chamber decided, "systematically targeted Bosnian Muslim men of military age, regardless of whether they were civilians or soldiers" (*ibid.*, para. 546). While "[t]he VRS may have initially considered only targeting military men for execution, . . . [the] evidence shows, however, that a decision was taken, at some point, to capture and kill all the Bosnian Muslim men indiscriminately. No effort was made to distinguish the soldiers from the civilians." (*Ibid.*, para. 547.) Under the heading "Intent to Destroy", the Chamber reviewed the Parties' submissions and the documents, concluding that it would "adhere to the characterization of genocide which encompass[es] only acts committed with the *goal* of destroying all or part of a group" (*ibid.*, para. 571; original emphasis). The acts of genocide need not be premeditated and the intent may become the goal later in an operation (*ibid.*, para. 572).

> "Evidence presented in this case has shown that the killings were planned: the number and nature of the forces involved, the standardized coded language used by the units in communicating information about the killings, the scale of the executions, the invariability of the killing methods applied, indicate that a decision was made to kill all the Bosnian Muslim military aged men.
>
> The Trial Chamber is unable to determine the precise date on which the decision to kill all the military aged men was taken. Hence, it cannot find that the killings committed in Potočari on 12 and 13 July 1995 formed part of the plan to kill all the military aged men. Nevertheless, the Trial Chamber is confident that the mass executions and other killings committed from 13 July onwards were part of this plan." (*Ibid.*, paras. 572-573; see also paras. 591-598.)

293. The Court has already quoted (paragraph 281) the passage from the Judgment of the Appeals Chamber in the *Krstić* case rejecting the Prosecutor's attempted reliance on the Directives given earlier in July, and it would recall the evidence about the VRS's change of plan in the course of the operation in relation to the complete takeover of the enclave. The Appeals Chamber also rejected the appeal by General Krstić against the finding that genocide occurred in Srebrenica. It held that the Trial Chamber was entitled to conclude that the destruction of such a sizeable number of men, one fifth of the overall Srebrenica community, "'would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica'" (IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 28-33); and the Trial Chamber, as the best assessor of the evidence presented at trial, was entitled to conclude that the evidence of the transfer of the women and children supported its finding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica. The Appeals Chamber concluded this part of its Judgment as follows:

> "The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements — the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part — guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name. By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the forty thousand Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.

In concluding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims of Srebrenica, the Trial Chamber

did not depart from the legal requirements for genocide. The Defence appeal on this issue is dismissed." (*Ibid.*, paras. 37-38.)

294. On one view, taken by the Applicant, the *Blagojević* Trial Chamber decided that the specific intent *(dolus specialis)* was formed earlier than 12 or 13 July, the time chosen by the *Krstić* Chamber. The Court has already called attention to that Chamber's statement that at some point (it could not determine "the exact moment") the military objective in Srebrenica changed, from "reducing the enclave to the urban area" (stated in a Drina Corps order of 2 July 1995 referred to at times as the "Krivaja 95 operation") to taking over Srebrenica town and the enclave as a whole. Later in the Judgment, under the heading "Findings: was genocide committed?", the Chamber refers to the 2 July document:

> "The Trial Chamber is convinced that the criminal acts committed by the Bosnian Serb forces were all parts of one single scheme to commit genocide of the Bosnian Muslims of Srebrenica, as reflected in the 'Krivaja 95 operation', the ultimate objective of which was to eliminate the enclave and, therefore, the Bosnian Muslim community living there." (*Blagojević*, IT-02-60-T, Judgment, 17 January 2005, para. 674.)

The Chamber immediately goes on to refer only to the events — the massacres and the forcible transfer of the women and children — after the fall of Srebrenica, that is sometime after the change of military objective on 9 or 10 July. The conclusion on intent is similarly focused:

> "The Trial Chamber has no doubt that all these acts constituted a single operation executed with the intent to destroy the Bosnian Muslim population of Srebrenica. The Trial Chamber finds that the Bosnian Serb forces not only knew that the combination of the killings of the men with the forcible transfer of the women, children and elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica, but clearly intended through these acts to physically destroy this group." (*Ibid.*, para. 677.) (See similarly all but the first item in the list in paragraph 786.)

295. The Court's conclusion, fortified by the Judgments of the Trial Chambers in the *Krstić* and *Blagojević* cases, is that the necessary intent was not established until after the change in the military objective and after the takeover of Srebrenica, on about 12 or 13 July. This may be significant for the application of the obligations of the Respondent under

the Convention (paragraph 423 below). The Court has no reason to depart from the Tribunal's determination that the necessary specific intent *(dolus specialis)* was established and that it was not established until that time.

296. The Court now turns to the requirement of Article II that there must be the intent to destroy a protected "group" in whole or in part. It recalls its earlier statement of the law and in particular the three elements there discussed: substantiality (the primary requirement), relevant geographic factors and the associated opportunity available to the perpetrators, and emblematic or qualitative factors (paragraphs 197-201). Next, the Court recalls the assessment it made earlier in the Judgment of the persuasiveness of the ICTY's findings of facts and its evaluation of them (paragraph 223). Against that background it turns to the findings in the *Krstić* case (IT-98-33-T, Trial Chamber Judgment, 2 August 2001, paras. 551-599 and IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 6-22), in which the Appeals Chamber endorsed the findings of the Trial Chamber in the following terms.

> "In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia. This conclusion comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people. This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region. Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size." (IT-98-33-A, Judgment, 19 April 2004, para. 15; footnotes omitted.)

The Court sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber.

297. The Court concludes that the acts committed at Srebrenica falling within Article II *(a)* and *(b)* of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995.

* *

*(6) Article II* (b)*: Causing Serious Bodily or Mental Harm to Members of the Protected Group*

298. The Applicant contends that besides the massive killings, systematic serious harm was caused to the non-Serb population of Bosnia and Herzegovina. The Applicant includes the practice of terrorizing the non-Serb population, the infliction of pain and the administration of torture as well as the practice of systematic humiliation into this category of acts of genocide. Further, the Applicant puts a particular emphasis on the issue of systematic rapes of Muslim women, perpetrated as part of genocide against the Muslims in Bosnia during the conflict.

299. The Respondent does not dispute that, as a matter of legal qualification, the crime of rape may constitute an act of genocide, causing serious bodily or mental harm. It disputes, however, that the rapes in the territory of Bosnia and Herzegovina were part of a genocide perpetrated therein. The Respondent, relying on the Report of the Commission of Experts, maintains that the rapes and acts of sexual violence committed during the conflict, were not part of genocide, but were committed on all sides of the conflict, without any specific intent *(dolus specialis)*.

300. The Court notes that there is no dispute between the Parties that rapes and sexual violence could constitute acts of genocide, if accompanied by a specific intent to destroy the protected group. It notes also that the ICTR, in its Judgment of 2 September 1998 in the *Akayesu* case, addressed the issue of acts of rape and sexual violence as acts of genocide in the following terms:

> "Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm." (ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 731.)

The ICTY, in its Judgment of 31 July 2003 in the *Stakić* case, recognized that:

> "'Causing serious bodily and mental harm' in subparagraph *(b)* [of Article 4 (2) of the Statute of the ICTY] is understood to mean, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury. The harm inflicted need not be permanent and irremediable." (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 516.)

301. The Court notes furthermore that Security Council and General Assembly resolutions contemporary with the facts are explicit in referring

to sexual violence. These resolutions were in turn based on reports before the General Assembly and the Security Council, such as the Reports of the Secretary-General, the Commission of Experts, the Special Rapporteur for Human Rights, Tadeusz Mazowiecki, and various United Nations agencies in the field. The General Assembly stressed the "extraordinary suffering of the victims of rape and sexual violence" (General Assembly resolution 48/143 (1993), Preamble; General Assembly resolution 50/192 (1995), para. 8). In resolution 48/143 (1993), the General Assembly declared it was:

> "*Appalled* at the recurring and substantiated reports of widespread rape and abuse of women and children in the areas of armed conflict in the former Yugoslavia, in particular its systematic use against the Muslim women and children in Bosnia and Herzegovina by Serbian forces" (Preamble, para. 4).

302. Several Security Council resolutions expressed alarm at the "massive, organised and systematic detention and rape of women", in particular Muslim women in Bosnia and Herzegovina (Security Council resolutions 798 (1992), Preamble, para. 2; resolution 820 (1993), para. 6; 827 (1993), Preamble, para. 3). In terms of other kinds of serious harm, Security Council resolution 1034 (1995) condemned

> "in the strongest possible terms the violations of international humanitarian law and of human rights by Bosnian Serb and paramilitary forces in the areas of Srebrenica, Žepa, Banja Luka and Sanski Most as described in the report of the Secretary-General of 27 November 1995 and showing a consistent pattern of summary executions, rape, mass expulsions, arbitrary detentions, forced labour and large-scale disappearances" (para. 2).

The Security Council further referred to a "persistent and systematic campaign of terror" in Banja Luka, Bijeljina and other areas under the control of Bosnian Serb forces (Security Council resolution 941 (1994), Preamble, para. 4). It also expressed concern at reports of mass murder, unlawful detention and forced labour, rape and deportation of civilians in Banja Luka and Sanski Most (Security Council resolution 1019 (1995), Preamble, para. 2).

303. The General Assembly also condemned specific violations including torture, beatings, rape, disappearances, destruction of houses, and other acts or threats of violence aimed at forcing individuals to leave their homes (General Assembly resolution 47/147 (1992), para. 4; see also General Assembly resolution 49/10 (1994), Preamble, para. 14, and General Assembly resolution 50/193 (1995), para. 2).

304. The Court will now examine the specific allegations of the Applicant under this heading, in relation to the various areas and camps identified as having been the scene of acts causing "bodily or mental harm" within the meaning of the Convention. As regards the events of Srebrenica, the Court has already found it to be established that such acts were committed (paragraph 291 above).

*Drina River Valley*

(a) *Zvornik*

305. As regards the area of the Drina River Valley, the Applicant has stressed the perpetration of acts and abuses causing serious bodily or mental harm in the events at Zvornik. In particular, the Court has been presented with a report on events at Zvornik which is based on eye-witness accounts and extensive research (Hannes Tretter *et al.*, "'Ethnic cleansing' Operations in the Northeast Bosnian-City of Zvornik from April through June 1992", Ludwig Boltzmann Institute of Human Rights (1994), p. 48). The report of the Ludwig Boltzmann Institute gives account of a policy of terrorization, forced relocation, torture, rape during the takeover of Zvornik in April-June 1992. The Report of the Commission of Experts received 35 reports of rape in the area of Zvornik in May 1992 (Vol. V, Ann. IX, p. 54).

(b) *Foča*

306. Further acts causing serious bodily and mental harm were perpetrated in the municipality of Foča. The Applicant, relying on the Judgment in the *Kunarac et al.* case (IT-96-23-T and IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001, paras. 574 and 592), claims, in particular, that many women were raped repeatedly by Bosnian Serb soldiers or policemen in the city of Foča.

(c) *Camps*

(i) *Batković camp*

307. The Applicant further claims that in Batković camp, prisoners were frequently beaten and mistreated. The Report of the Commission of Experts gives an account of a witness statement according to which "prisoners were forced to perform sexual acts with each other, and sometimes with guards". The Report continues: "Reports of the frequency of beatings vary from daily beatings to beatings 10 times each day." (Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 62, para. 469.) Individual witness accounts reported by the Commission of Experts (Report of the Commission of Experts, Vol. IV, Ann. VIII, pp. 62-63, and Ann. X, p. 9) provide second-hand testimony that beatings occurred and prisoners lived in terrible conditions. As already noted

above (paragraph 256), however, the periodic Report of Special Rapporteur Mazowiecki of 17 November 1992 stated that "[t]he prisoners . . . appeared to be in good health" (p. 13); but according to the Applicant, Mazowiecki was shown a "model" camp and therefore his impression was inaccurate. The United States Department of State Dispatch of 19 April 1993 (Vol. 4, No. 16), alleges that in Batković camp, prisoners were frequently beaten and mistreated. In particular, the Dispatch records two witness statements according to which "[o]n several occasions, they and other prisoners were forced to remove their clothes and perform sex acts on each other and on some guards".

(ii) *Sušica camp*

308. According to the Applicant, rapes and physical assaults were also perpetrated at Sušica camp; it pointed out that in the proceedings before the ICTY, in the "Rule 61 Review of the Indictment" and the Sentencing Judgment, in the *Nikolić* case, the accused admitted that many Muslim women were raped and subjected to degrading physical and verbal abuse in the camp and at locations outside of it (*Nikolić*, IT-94-2-T, Sentencing Judgment, 18 December 2003, paras. 87-90), and that several men were tortured in that same camp.

(iii) *Foča Kazneno-Popravní Dom camp*

309. With regard to the Foča Kazneno-Popravní Dom camp, the Applicant asserts that beatings, rapes of women and torture were perpetrated. The Applicant bases these allegations mainly on the Report of the Commission of Experts and the United States State Department Dispatch. The Commission of Experts based its findings on information provided by a Helsinki Watch Report. A witness claimed that some prisoners were beaten in Foča KP Dom (Report of the Commission of Experts, Vol. IV, pp. 128-132); similar accounts are contained in the United States State Department Dispatch. One witness stated that

> "Those running the center instilled fear in the Muslim prisoners by selecting certain prisoners for beatings. From his window in Room 13, the witness saw prisoners regularly being taken to a building where beatings were conducted. This building was close enough for him to hear the screams of those who were being beaten." (Dispatch of the United States Department of State, 19 April 1993, No. 16, p. 262.)

310. The ICTY Trial Chamber in its *Kunarac* Judgment of 22 February 2001, described the statements of several witnesses as to the poor and brutal living conditions in Foča KP Dom. These seem to confirm that the Muslim men and women from Foča, Gacko and Kalinovik municipalities were arrested, rounded up, separated from each other, and imprisoned or detained at several detention centres like the Foča KP

Dom where some of them were killed, raped or severely beaten (*Kunarac et al*, IT-96-23-T and IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001).

*Prijedor*

(a) *Municipality*

311. Most of the allegations of abuses said by the Applicant to have occurred in Prijedor have been examined in the section of the present Judgment concerning the camps situated in Prijedor. However, the Report of the Commission of Experts refers to a family of nine found dead in Stara Rijeka in Prijedor, who had obviously been tortured (Vol. V, Ann. X, p. 41). The Trial Chamber of the ICTY, in its Judgment in the *Tadić* case made the following factual finding as to an attack on two villages in the Kozarac area, Jaskići and Sivci:

> "On 14 June 1992 both villages were attacked. In the morning the approaching sound of shots was heard by the inhabitants of Sivci and soon after Serb tanks and Serb soldiers entered the village . . . There they were made to run along that road, hands clasped behind their heads, to a collecting point in the yard of one of the houses. On the way there they were repeatedly made to stop, lie down on the road and be beaten and kicked by soldiers as they lay there, before being made to get up again and run some distance further, where the whole performance would be repeated . . . In all some 350 men, mainly Muslims but including a few Croats, were treated in this way in Sivci.
>
> On arrival at the collecting point, beaten and in many cases covered with blood, some men were called out and questioned about others, and were threatened and beaten again. Soon buses arrived, five in all, and the men were made to run to them, hands again behind the head, and to crowd on to them. They were then taken to the Keraterm camp.
>
> The experience of the inhabitants of the smaller village of Jaskići, which contained only 11 houses, on 14 June 1992 was somewhat similar but accompanied by the killing of villagers. Like Sivci, Jaskići had received refugees after the attack on Kozarac but by 14 June 1992 many of those refugees had left for other villages. In the afternoon of 14 June 1992 gunfire was heard and Serb soldiers arrived in Jaskići and ordered men out of their homes and onto the village street, their hands clasped behind their heads; there they were made to lie down and were severely beaten." (IT-94-1-T, Judgment, 7 May 1997, paras. 346-348.)

(b) *Camps*

(i) *Omarska camp*

312. As noted above in connection with the killings (paragraph 262), the Applicant has been able to present abundant and persuasive evidence of physical abuses causing serious bodily harm in Omarska camp. The Report of the Commission of Experts contains witness accounts regarding the "white house" used for physical abuses, rapes, torture and, occasionally, killings, and the "red house" used for killings (Vol. IV, Ann. VIII, pp. 207-222). Those accounts of the sadistic methods of killing are corroborated by United States submissions to the Secretary-General. The most persuasive and reliable source of evidence may be taken to be the factual part of the Opinion and Judgment of the ICTY in the *Tadić* case (IT-94-1-T, Trial Chamber Judgment, 7 May 1997). Relying on the statements of 30 witnesses, the *Tadić* Trial Judgment made findings as to interrogations, beatings, rapes, as well as the torture and humiliation of Muslim prisoners in Omarska camp (in particular: *ibid.*, paras. 155-158, 163-167). The Trial Chamber was satisfied beyond reasonable doubt of the fact that several victims were mistreated and beaten by Tadić and suffered permanent harm, and that he had compelled one prisoner to sexually mutilate another (*ibid.*, paras. 194-206). Findings of mistreatment, torture, rape and sexual violence at Omarska camp were also made by the ICTY in other cases; in particular, the Trial Judgment of 2 November 2001 in the *Kvočka et al.* case (IT-98-30/1-T, Trial Chamber Judgment, paras. 21-50, and 98-108) — upheld on appeal, the Trial Judgment of 1 September 2004 in the *Brđanin* case (IT-99-36-T, Trial Chamber Judgment, paras. 515-517) and the Trial Judgment of 31 July 2003 in the *Stakić* case (IT-97-24-T, Trial Chamber Judgment, paras. 229-336).

(ii) *Keraterm camp*

313. The Applicant also pointed to evidence of beatings and rapes at Keraterm camp. Several witness accounts are reported in the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 225, 231, 233, 238) and corroborated by witness accounts reported by the Permanent Mission of Austria to the United Nations and Helsinki Watch. The attention of the Court has been drawn to several judgments of the ICTY which also document the severe physical abuses, rapes and sexual violence that occurred at this camp. The Trial Judgment of 1 September 2004 in the *Brđanin* case found that:

> "At Keraterm camp, detainees were beaten on arrival . . . Beatings were carried out with wooden clubs, baseball bats, electric cables and police batons . . .

> In some cases the beatings were so severe as to result in serious injury and death. Beatings and humiliation were often administered in front of other detainees. Female detainees were raped in Keraterm camp." (IT-99-36-T, Trial Chamber Judgment, paras. 851-852.)

The Trial Chamber in its Judgment of 31 July 2003 in the *Stakić* case found that

> "the detainees at the Keraterm camp were subjected to terrible abuse. The evidence demonstrates that many of the detainees at the Keraterm camp were beaten on a daily basis. Up until the middle of July, most of the beatings happened at night. After the detainees from Brdo arrived, around 20 July 1992, there were 'no rules', with beatings committed both day and night. Guards and others who entered the camp, including some in military uniforms carried out the beatings. There were no beatings in the rooms since the guards did not enter the rooms — people were generally called out day and night for beatings." (IT-97-24-T, Trial Chamber Judgment, para. 237.)

The Chamber also found that there was convincing evidence of further beatings and rape perpetrated in Keraterm camp (*ibid.*, paras. 238-241).

In the Trial Judgment in the *Kvočka et al.* case, the Chamber held that, in addition to the "dreadful" general conditions of life, detainees at Keraterm camp were "mercilessly beaten" and "women were raped" (IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001, para. 114).

(iii) *Trnopolje camp*

314. The Court has furthermore been presented with evidence that beatings and rapes occurred at Trnopolje camp. The rape of 30-40 prisoners on 6 June 1992 is reported by both the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 251-253) and a publication of the United States State Department. In the *Tadić* case the Trial Chamber of the ICTY concluded that at Trnopolje camp beatings occurred and that "[b]ecause this camp housed the largest number of women and girls, there were more rapes at this camp than at any other" (IT-94-1-T, Judgment, 7 May 1997, paras. 172-177 (para. 175)). These findings concerning beatings and rapes are corroborated by other Judgments of the ICTY, such as the Trial Judgment in the *Stakić* case where it found that,

> "although the scale of the abuse at the Trnopolje camp was less than that in the Omarska camp, mistreatment was commonplace. The

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> Serb soldiers used baseball bats, iron bars, rifle butts and their hands and feet or whatever they had at their disposal to beat the detainees. Individuals were who taken out for questioning would often return bruised or injured" (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 242);

and that, having heard the witness statement of a victim, it was satisfied beyond reasonable doubt "that rapes did occur in the Trnopolje camp" (*ibid.*, para. 244). Similar conclusions were drawn in the Judgment of the Trial Chamber in the *Brđanin* case (IT-99-36-T, 1 September 2004, paras. 513-514 and 854-857).

*Banja Luka*

*Manjača camp*

315. With regard to the Manjača camp in Banja Luka, the Applicant alleges that beatings, torture and rapes were occurring at this camp. The Applicant relies mainly on the witnesses cited in the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 50-54). This evidence is corroborated by the testimony of a former prisoner at the Joint Hearing before the Select Committee on Intelligence in the United States Senate on 9 August 1995, and a witness account reported in the Memorial of the Applicant (United States State Department Dispatch, 2 November 1992, p. 806). The Trial Chamber, in its Decision on Motion for Judgment of Acquittal of 16 June 2004, in the *Milošević* case reproduced the statement of a witness who testified that,

> "at the Manjaca camp, they were beaten with clubs, cables, bats, or other similar items by the military police. The men were placed in small, bare stables, which were overcrowded and contained no toilet facilities. While at the camp, the detainees received inadequate food and water. Their heads were shaved, and they were severely beaten during interrogations." (IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 178.)

316. The Applicant refers to the Report of the Commission of Experts, which contains reports that the Manjača camp held a limited number of women and that during their stay they were "raped repeatedly". Muslim male prisoners were also forced to rape female prisoners (Report of the Commission of Experts, Vol. IV, Annex VIII, pp. 53-54). The Respondent points out that the *Brđanin* Trial Judgment found no evidence had been presented that detainees were subjected to "acts of sexual degradation" in Manjača.

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*Brčko*

*Luka camp*

317. The Applicant alleges that torture, rape and beatings occurred at Luka camp (Brčko). The Report of the Commission of Experts contains multiple witness accounts, including the evidence of a local guard forced into committing rape (Vol. IV, Ann. VIII, pp. 93-97). The account of the rapes is corroborated by multiple sources (United States State Department Dispatch, 19 April 1993). The Court notes in particular the findings of the ICTY Trial Chamber in the *Češić* case, with regard to acts perpetrated in the Luka camp. In his plea agreement the accused admitted several grave incidents, such as beatings and compelling two Muslim brothers to perform sexual acts with each other (IT-95-10/1-S, Sentencing Judgment, 11 March 2004, paras. 8-17). These findings are corroborated by witness statements and the guilty plea in the *Jelisić* case.

318. The Respondent does not deny that the camps in Bosnia and Herzegovina were "in breach of humanitarian law and, in most cases, in breach of the law of war", but argues that the conditions in all the camps were not of the kind described by the Applicant. It stated that all that had been demonstrated was "the existence of serious crimes, committed in a particularly complex situation, in a civil and fratricidal war", but not the requisite specific intent *(dolus specialis)*.

*

319. Having carefully examined the evidence presented before it, and taken note of that presented to the ICTY, the Court considers that it has been established by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps. The requirements of the material element, as defined by Article II *(b)* of the Convention are thus fulfilled. The Court finds, however, on the basis of the evidence before it, that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent *(dolus specialis)* to destroy the protected group, in whole or in part, required for a finding that genocide has been perpetrated.

* *

*(7) Article II* (c)*: Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about Its Physical Destruction in Whole or in Part*

320. Article II *(c)* of the Genocide Convention concerns the deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part. Under this heading, the Applicant first points to an alleged policy by the Bosnian Serb forces to encircle civilians of the protected group in villages, towns or entire regions and to subsequently shell those areas and cut off all supplies in order to starve the population. Secondly, the Applicant claims that Bosnian Serb forces attempted to deport and expel the protected group from the areas which those forces occupied. Finally, the Applicant alleges that Bosnian Serb forces attempted to eradicate all traces of the culture of the protected group through the destruction of historical, religious and cultural property.

321. The Respondent argues that the events referred to by the Applicant took place in a context of war which affected the entire population, whatever its origin. In its view, "it is obvious that in any armed conflict the conditions of life of the civilian population deteriorate". The Respondent considers that, taking into account the civil war in Bosnia and Herzegovina which generated inhuman conditions of life for the entire population in the territory of that State, "it is impossible to speak of the deliberate infliction on the Muslim group alone or the non-Serb group alone of conditions of life calculated to bring about its destruction".

322. The Court will examine in turn the evidence concerning the three sets of claims made by the Applicant: encirclement, shelling and starvation; deportation and expulsion; destruction of historical, religious and cultural property. It will also go on to consider the evidence presented regarding the conditions of life in the detention camps already extensively referred to above (paragraphs 252-256, 262-273, 307-310 and 312-318).

*Alleged encirclement, shelling and starvation*

323. The principal incident referred to by the Applicant in this regard is the siege of Sarajevo by Bosnian Serb forces. Armed conflict broke out in Sarajevo at the beginning of April 1992 following the recognition by the European Community of Bosnia and Herzegovina as an independent State. The Commission of Experts estimated that, between the beginning of April 1992 and 28 February 1994, in addition to those killed or missing in the city (paragraph 247 above), 56,000 persons had been wounded (Report of the Commission of Experts, Vol. II, Ann. VI, p. 8). It was further estimated that, "over the course of the siege, the city [was] hit by an average of approximately 329 shell impacts per day, with a high of 3,777 shell impacts on 22 July 1993" *(ibid.)*. In his report of 28 August 1992, the Special Rapporteur observed that:

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> "The city is shelled on a regular basis . . . Snipers shoot innocent civilians . . .
>
> The civilian population lives in a constant state of anxiety, leaving their homes or shelters only when necessary . . . The public systems for distribution of electrical power and water no longer function. Food and other basic necessities are scarce, and depend on the airlift organized by UNHCR and protected by UNPROFOR." (Report of 28 August 1992, paras. 17-18.)

324. The Court notes that, in resolutions adopted on 16 April and 6 May 1993, the Security Council declared Sarajevo, together with Tuzla, Žepa, Goražde, Bihać and Srebrenica, to be "safe areas" which should be free from any armed attack or any other hostile act and fully accessible to UNPROFOR and international humanitarian agencies (resolutions 819 of 16 April 1993 and 824 of 6 May 1993). However, these resolutions were not adhered to by the parties to the conflict. In his report of 26 August 1993, the Special Rapporteur noted that

> "Since May 1993 supplies of electricity, water and gas to Sarajevo have all but stopped . . . a significant proportion of the damage caused to the supply lines has been deliberate, according to United Nations Protection Force engineers who have attempted to repair them. Repair crews have been shot at by both Bosnian Serb and government forces . . ." (Report of 26 August 1993, para. 6.)

He further found that UNHCR food and fuel convoys had been "obstructed or attacked by Bosnian Serb and Bosnian Croat forces and sometimes also by governmental forces" (Report of 26 August 1993, para. 15). The Commission of Experts also found that the "blockade of humanitarian aid ha[d] been used as an important tool in the siege" (Report of the Commission of Experts, Ann. VI, p. 17). According to the Special Rapporteur, the targeting of the civilian population by shelling and sniping continued and even intensified throughout 1994 and 1995 (Report of 4 November 1994, paras. 27-28; Report of 16 January 1995, para. 13; Report of 5 July 1995, paras. 67-70). The Special Rapporteur noted that

> "[a]ll sides are guilty of the use of military force against civilian populations and relief operations in Sarajevo. However, one cannot lose sight of the fact that the main responsibility lies with the [Bosnian Serb] forces, since it is they who have adopted the tactic of laying siege to the city." (Report of 17 November 1992, para. 42.)

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325. The Court notes that in the *Galić* case, the Trial Chamber of the ICTY found that the Serb forces (the SRK) conducted a campaign of sniping and shelling against the civilian population of Sarajevo (*Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 583). It was

> "convinced by the evidence in the Trial Record that civilians in ARBiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory . . ., and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured" (*ibid.*, para. 591).

These findings were subsequently confirmed by the Appeals Chamber (*Galić*, IT-98-29-A, Judgment, 30 November 2006, paras. 107-109). The ICTY also found that the shelling which hit the Markale market on 5 February 1994, resulting in 60 persons killed and over 140 injured, came from behind Bosnian Serb lines, and was deliberately aimed at civilians (*ibid.*, paras. 333 and 335 and *Galić*, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para. 496).

326. The Respondent argues that the safe areas proclaimed by the Security Council had not been completely disarmed by the Bosnian army. For instance, according to testimony given in the *Galić* case by the Deputy Commander of the Bosnian army corps covering the Sarajevo area, the Bosnian army had deployed 45,000 troops within Sarajevo. The Respondent also pointed to further testimony in that case to the effect that certain troops in the Bosnian army were wearing civilian clothes and that the Bosnian army was using civilian buildings for its bases and positioning its tanks and artillery in public places. Moreover, the Respondent observes that, in his book, *Fighting for Peace*, General Rose was of the view that military equipment was installed in the vicinity of civilians, for instance, in the grounds of the hospital in Sarajevo and that "[t]he Bosnians had evidently chosen this location with the intention of attracting Serb fire, in the hope that the resulting carnage would further tilt international support in their favour" (Michael Rose, *Fighting for Peace*, 1998, p. 254).

327. The Applicant also points to evidence of sieges of other towns in Bosnia and Herzegovina. For instance, with regard to Goražde, the Special Rapporteur found that the enclave was being shelled and had been denied convoys of humanitarian aid for two months. Although food was being air-dropped, it was insufficient (Report of 5 May 1992, para. 42). In a later report, the Special Rapporteur noted that, as of spring 1994, the town had been subject to a military offensive by Bosnian Serb forces, during which civilian objects including the hospital had been targeted and the water supply had been cut off (Report of 10 June 1994, paras. 7-12). Humanitarian convoys were harassed including by the detention of UNPROFOR personnel and the theft of equipment (Report of

19 May 1994, paras. 17 *et seq.*). Similar patterns occurred in Bihać, Tuzla, Cerska and Maglaj (Bihać: Special Rapporteur's Report of 28 August 1992, para. 20; Report of the Secretary-General pursuant to resolution 959 (1994), para. 17; Special Rapporteur's Report of 16 January 1995, para. 12; Tuzla: Report of the Secretary-General pursuant to resolutions 844 (1993), 836 (1993) and 776 (1992), paras. 2-4; Special Rapporteur's Report of 5 July 1995; Cerska: Special Rapporteur's Report of 5 May 1993, paras. 8-17; Maglaj: Special Rapporteur's Report of 17 November 1993, para. 93).

328. The Court finds that virtually all the incidents recounted by the Applicant have been established by the available evidence. It takes account of the assertion that the Bosnian army may have provoked attacks on civilian areas by Bosnian Serb forces, but does not consider that this, even if true, can provide any justification for attacks on civilian areas. On the basis of a careful examination of the evidence presented by the Parties, the Court concludes that civilian members of the protected group were deliberately targeted by Serb forces in Sarajevo and other cities. However, reserving the question whether such acts are in principle capable of falling within the scope of Article II, paragraph *(c)*, of the Convention, the Court does not find sufficient evidence that the alleged acts were committed with the specific intent to destroy the protected group in whole or in part. For instance, in the *Galić* case, the ICTY found that

> "the attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to wipe out or even deplete the civilian population through attrition . . . the only reasonable conclusion in light of the evidence in the Trial Record is that the primary purpose of the campaign was to instil in the civilian population a state of extreme fear" (*Galić*, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para. 593).

These findings were not overruled by the judgment of the Appeals Chamber of 30 November 2006 (*Galić*, IT-98-29-A, Judgment: see e.g., paras. 107-109, 335 and 386-390). The Special Rapporteur of the United Nations Commission on Human Rights was of the view that "[t]he siege, including the shelling of population centres and the cutting off of supplies of food and other essential goods, is another tactic used to force Muslims and ethnic Croatians to flee" (Report of 28 August 1992, para. 17). The Court thus finds that it has not been conclusively established that the acts were committed with the specific intent *(dolus specialis)* to destroy the protected group in whole or in part.

*Deportation and expulsion*

329. The Applicant claims that deportations and expulsions occurred systematically all over Bosnia and Herzegovina. With regard to Banja Luka, the Special Rapporteur noted that since late November 1993, there had been a "sharp rise in repossessions of apartments, whereby Muslim and Croat tenants [were] summarily evicted" and that "a form of housing agency ha[d] been established . . . which chooses accommodation for incoming Serb displaced persons, evicts Muslim or Croat residents and reputedly receives payment for its services in the form of possessions left behind by those who have been evicted" (Report of 21 February 1994, para. 8). In a report dated 21 April 1995 dedicated to the situation in Banja Luka, the Special Rapporteur observed that since the beginning of the war, there had been a 90 per cent reduction in the local Muslim population (Report of 21 April 1995, para. 4). He noted that a forced labour obligation imposed by the *de facto* authorities in Banja Luka, as well as "the virulence of the ongoing campaign of violence" had resulted in "practically all non-Serbs fervently wishing to leave the Banja Luka area" (Report of 21 April 1995, para. 24). Those leaving Banja Luka were required to pay fees and to relinquish in writing their claim to their homes, without reimbursement (Report of 21 April 1995, para. 26). The displacements were "often very well organized, involving the bussing of people to the Croatian border, and involve[d] large numbers of people" (Report of 4 November 1994, para. 23). According to the Special Rapporteur, "[o]n one day alone in mid-June 1994, some 460 Muslims and Croats were displaced" *(ibid.)*.

330. As regards Bijeljina, the Special Rapporteur observed that, between mid-June and 17 September 1994, some 4,700 non-Serbs were displaced from the Bijeljina and Janja regions. He noted that many of the displaced, "whether forced or choosing to depart, were subject to harassment and theft by the Bosnian Serb forces orchestrating the displacement" (Report of 4 November 1994, para. 21). These reports were confirmed by those of non-governmental organizations based on witness statements taken on the ground (Amnesty International, "Bosnia and Herzegovina: Living for the Day — Forced expulsions from Bijeljina and Janja", December 1994, p. 2).

331. As for Zvornik, the Commission of Experts, relying on a study carried out by the Ludwig Boltzmann Institute of Human Rights based on an evaluation of 500 interviews of individuals who had fled the area, found that a systematic campaign of forced deportation had occurred (Report of the Commission of Experts, Vol. I, Ann. IV, pp. 55 *et seq*). The study observed that Bosnian Muslims obtained an official stamp on their identity card indicating a change of domicile in exchange for transferring their property to an "agency for the exchange of houses" which was subsequently a prerequisite for being able to leave the town (Lud-

wig Boltzmann Institute of Human Rights, "'Ethnic Cleansing Operations' in the northeast Bosnian city of Zvornik from April through June 1992", pp. 28-29). According to the study, forced deportations of Bosnian Muslims began in May/June 1992 by bus to Mali Zvornik and from there to the Bosnian town of Tuzla or to Subotica on the Serbian-Hungarian border (*ibid.*, pp. 28 and 35-36). The Special Rapporteur's report of 10 February 1993 supports this account, stating that deportees from Zvornik had been "ordered, some at gunpoint, to board buses and trucks and later trains", provided with Yugoslav passports and subsequently taken to the Hungarian border to be admitted as refugees (Report of 10 February 1993, para. 99).

332. According to the Trial Chamber of the ICTY in its review of the indictment in the cases against *Karadžić and Mladić*, "[t]housands of civilians were unlawfully expelled or deported to other places inside and outside the Republic of Bosnia and Herzegovina" and "[t]he result of these expulsions was the partial or total elimination of Muslims and Bosnian Croats in some of [the] Bosnian Serb-held regions of Bosnia and Herzegovina". The Chamber further stated that "[i]n the municipalities of Prijedor, Foča, Vlasenica, Brčko and Bosanski Šamac, to name but a few, the once non-Serbian majority was systematically exterminated or expelled by force or intimidation" (*Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 16).

333. The Respondent argues that displacements of populations may be necessary according to the obligations set down in Articles 17 and 49, paragraph 2, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, for instance if the security of the population or imperative military reasons so demand. It adds that the displacement of populations has always been a way of settling certain conflicts between opposing parties and points to a number of examples of forced population displacements in history following an armed conflict. The Respondent also argues that the mere expulsion of a group cannot be characterized as genocide, but that, according to the ICTY Judgment in the *Stakić* case, "[a] clear distinction must be drawn between physical destruction and mere dissolution of a group" and "[t]he expulsion of a group or part of a group does not in itself suffice for genocide" (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519).

334. The Court considers that there is persuasive and conclusive evidence that deportations and expulsions of members of the protected group occurred in Bosnia and Herzegovina. With regard to the Respondent's argument that in time of war such deportations or expulsions may be justified under the Geneva Convention, or may be a normal way of settling a conflict, the Court would observe that no such justification

could be accepted in the face of proof of specific intent *(dolus specialis)*. However, even assuming that deportations and expulsions may be categorized as falling within Article II, paragraph *(c)*, of the Genocide Convention, the Court cannot find, on the basis of the evidence presented to it, that it is conclusively established that such deportations and expulsions were accompanied by the intent to destroy the protected group in whole or in part (see paragraph 190 above).

*Destruction of historical, religious and cultural property*

335. The Applicant claims that throughout the conflict in Bosnia and Herzegovina, Serb forces engaged in the deliberate destruction of historical, religious and cultural property of the protected group in "an attempt to wipe out the traces of their very existence".

336. In the *Tadić* case, the ICTY found that "[n]on-Serb cultural and religious symbols throughout the region were targeted for destruction" in the Banja Luka area (*Tadić*, IT-94-1-T, Trial Chamber Judgment, 7 May 1997, para. 149). Further, in reviewing the indictments of Karadžić and Mladić, the Trial Chamber stated that:

> "Throughout the territory of Bosnia and Herzegovina under their control, Bosnian Serb forces . . . destroyed, quasi-systematically, the Muslim and Catholic cultural heritage, in particular, sacred sites. According to estimates provided at the hearing by an expert witness, Dr. Kaiser, a total of 1.123 mosques, 504 Catholic churches and five synagogues were destroyed or damaged, for the most part, in the absence of military activity or after the cessation thereof.
>
> This was the case in the destruction of the entire Islamic and Catholic heritage in the Banja Luka area, which had a Serbian majority and the nearest area of combat to which was several dozen kilometres away. All of the mosques and Catholic churches were destroyed. Some mosques were destroyed with explosives and the ruins were then levelled and the rubble thrown in the public dumps in order to eliminate any vestige of Muslim presence.
>
> Aside from churches and mosques, other religious and cultural symbols like cemeteries and monasteries were targets of the attacks." (*Karadžić and Mladić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 15.)

In the *Brđanin* case, the Trial Chamber was "satisfied beyond reasonable doubt that there was wilful damage done to both Muslim and Roman Catholic religious buildings and institutions in the relevant municipalities by Bosnian Serb forces" (*Brđanin*, IT-99-36-T, Judgment, 1 September 2004, paras. 640 and 658). On the basis of the findings regarding a number of incidents in various regions of Bosnia and Herzegovina, the

Trial Chamber concluded that a "campaign of devastation of institutions dedicated to religion took place throughout the conflict" but "intensified in the summer of 1992" and that this concentrated period of significant damage was "indicative that the devastation was targeted, controlled and deliberate" (*Brđanin*, IT-99-36-T, paras. 642-657). For instance, the Trial Chamber found that the Bosanska Krupa town mosque was mined by Bosnian Serb forces in April 1992, that two mosques in Bosanski Petrovac were destroyed by Bosnian Serb forces in July 1992 and that the mosques in Staro Šipovo, Bešnjevo and Pljeva were destroyed on 7 August 1992 (*ibid.*, paras. 644, 647 and 656).

337. The Commission of Experts also found that religious monuments especially mosques and churches had been destroyed by Bosnian Serb forces (Report of the Commission of Experts, Vol. I, Ann. IV, pp. 5, 9, 21 ff.). In its report on the Prijedor region, the Commission found that at least five mosques and associated buildings in Prijedor town had been destroyed and noted that it was claimed that all 16 mosques in the Kozarac area had been destroyed and that not a single mosque, or other Muslim religious building, remained intact in the Prijedor region (Report of the Commission of Experts, Vol. I, Ann. V, p. 106). The report noted that those buildings were "allegedly not desecrated, damaged and destroyed for any military purpose nor as a side-effect of the military operations as such" but rather that the destruction "was due to later separate operations of dynamiting" *(ibid.)*.

338. The Special Rapporteur found that, during the conflict, "many mosques, churches and other religious sites, including cemeteries and monasteries, have been destroyed or profaned" (Report of 17 November 1992, para. 26). He singled out the "systematic destruction and profanation of mosques and Catholic churches in areas currently or previously under [Bosnian Serb] control" (Report of 17 November 1992, para. 26).

339. Bosnia and Herzegovina called as an expert Mr. András Riedlmayer, who had carried out a field survey on the destruction of cultural heritage in 19 municipalities in Bosnia and Herzegovina for the Prosecutor of the ICTY in the *Milošević* case and had subsequently studied seven further municipalities in two other cases before the ICTY ("Destruction of Cultural Heritage in Bosnia and Herzegovina, 1992-1996: A Post-war Survey of Selected Municipalities", *Milošević*, IT-02-54-T, Exhibit Number P486). In his report prepared for the *Milošević* case, Mr. Riedlmayer documented 392 sites, 60 per cent of which were inspected first hand while for the other 40 per cent his assessment was based on photographs and information obtained from other sources judged to be reliable and where there was corroborating documentation (Riedlmayer Report, p. 5).

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340. The report compiled by Mr. Riedlmayer found that of the 277 mosques surveyed, none were undamaged and 136 were almost or entirely destroyed (Riedlmayer Report, pp. 9-10). The report found that:

> "The damage to these monuments was clearly the result of attacks directed against them, rather than incidental to the fighting. Evidence of this includes signs of blast damage indicating explosives placed inside the mosques or inside the stairwells of minarets; many mosques [were] burnt out. In a number of towns, including Bijeljina, Janja (Bijeljina municipality), Foča, Banja Luka, Sanski Most, Zvornik and others, the destruction of mosques took place while the area was under the control of Serb forces, at times when there was no military action in the immediate vicinity." (*Ibid.*, p. 11.)

The report also found that, following the destruction of mosques:

> "the ruins [of the mosques] were razed and the sites levelled with heavy equipment, and all building materials were removed from the site . . . Particularly well-documented instances of this practice include the destruction and razing of 5 mosques in the town of Bijeljina; of 2 mosques in the town of Janja (in Bijeljina municipality); of 12 mosques and 4 turbes in Banja Luka; and of 3 mosques in the city of Brčko." (*Ibid.*, p. 12.)

Finally, the Report noted that the sites of razed mosques had been "turned into rubbish tips, bus stations, parking lots, automobile repair shops, or flea markets" (*ibid.*, p. 14), for example, a block of flats and shops had been erected on the site of the Zamlaz Mosque in Zvornik and a new Serbian Orthodox church was built on the site of the destroyed Divic Mosque (*ibid.*, p. 14).

341. Mr. Riedlmayer's report together with his testimony before the Court and other corroborative sources detail the destruction of the cultural and religious heritage of the protected group in numerous locations in Bosnia and Herzegovina. For instance, according to the evidence before the Court, 12 of the 14 mosques in Mostar were destroyed or damaged and there are indications from the targeting of the minaret that the destruction or damage was deliberate (Council of Europe, *Information Report: The Destruction by War of the Cultural Heritage in Croatia and Bosnia-Herzegovina*, Parliamentary Assembly doc. 6756, 2 February 1993, paras. 129 and 155). In Foča, the town's 14 historic mosques were allegedly destroyed by Serb forces. In Banja Luka, all 16 mosques were destroyed by Serb forces including the city's two largest mosques,

the Ferhadija Mosque (built in 1578) and the Arnaudija Mosque (built in 1587) (United States Department of State, Bureau of Public Affairs, *Dispatch*, 26 July 1993, Vol. 4, No. 30, pp. 547-548; "War Crimes in Bosnia-Herzegovina: UN Cease-Fire Won't Help Banja Luka", Human Rights Watch/Helsinki Watch, June 1994, Vol. 6, No. 8, pp. 15-16; The Humanitarian Law Centre, Spotlight Report, No. 14, August 1994, pp. 143-144).

342. The Court notes that archives and libraries were also subjected to attacks during the war in Bosnia and Herzegovina. On 17 May 1992, the Institute for Oriental Studies in Sarajevo was bombarded with incendiary munitions and burnt, resulting in the loss of 200,000 documents including a collection of over 5,000 Islamic manuscripts (Riedlmayer Report, p. 18; Council of Europe, Parliamentary Assembly; Second Information Report on War Damage to the Cultural Heritage in Croatia and Bosnia-Herzegovina, doc. 6869, 17 June 1993, p. 11, Ann. 38). On 25 August 1992, Bosnia's National Library was bombarded and an estimated 1.5 million volumes were destroyed (Riedlmayer Report, p. 19). The Court observes that, although the Respondent considers that there is no certainty as to who shelled these institutions, there is evidence that both the Institute for Oriental Studies in Sarajevo and the National Library were bombarded from Serb positions.

343. The Court notes that, in cross-examination of Mr. Riedlmayer, counsel for the Respondent pointed out that the municipalities included in Mr. Riedlmayer's report only amounted to 25 per cent of the territory of Bosnia and Herzegovina. Counsel for the Respondent also called into question the methodology used by Mr. Riedlmayer in compiling his report. However, having closely examined Mr. Riedlmayer's report and having listened to his testimony, the Court considers that Mr. Riedlmayer's findings do constitute persuasive evidence as to the destruction of historical, cultural and religious heritage in Bosnia and Herzegovina albeit in a limited geographical area.

344. In light of the foregoing, the Court considers that there is conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group during the period in question. The Court takes note of the submission of the Applicant that the destruction of such heritage was "an essential part of the policy of ethnic purification" and was "an attempt to wipe out the traces of [the] very existence" of the Bosnian Muslims. However, in the Court's view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group,

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and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention. In this regard, the Court observes that, during its consideration of the draft text of the Convention, the Sixth Committee of the General Assembly decided not to include cultural genocide in the list of punishable acts. Moreover, the ILC subsequently confirmed this approach, stating that:

> "As clearly shown by the preparatory work for the Convention . . ., the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group." (Report of the International Law Commission on the work of its Forty-eighth Session, *Yearbook of the International Law Commission 1996*, Vol. II, Part Two, pp. 45-46, para. 12.)

Furthermore, the ICTY took a similar view in the *Krstić* case, finding that even in customary law, "despite recent developments", the definition of acts of genocide is limited to those seeking the physical or biological destruction of a group (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 580). The Court concludes that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention. At the same time, it also endorses the observation made in the *Krstić* case that "where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group" *(ibid.)*.

*Camps*

345. The Court notes that the Applicant has presented substantial evidence as to the conditions of life in the detention camps and much of this evidence has already been discussed in the sections regarding Articles II *(a)* and *(b)*. The Court will briefly examine the evidence presented by the Applicant which relates specifically to the conditions of life in the principal camps.

(a) *Drina River Valley*

(i) *Sušica camp*

346. In the Sentencing Judgment in the case of Dragan Nikolić, the Commander of Sušica camp, the ICTY found that he subjected detainees to inhumane living conditions by depriving them of adequate food, water, medical care, sleeping and toilet facilities (*Nikolić*, IT-94-2-S, Sentencing Judgment, 18 December 2003, para. 69).

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(ii) *Foča Kazneno-Popravní Dom camp*

347. In the *Krnojelac* case, the ICTY Trial Chamber made the following findings regarding the conditions at the camp:

> "the non-Serb detainees were forced to endure brutal and inadequate living conditions while being detained at the KP Dom, as a result of which numerous individuals have suffered lasting physical and psychological problems. Non-Serbs were locked in their rooms or in solitary confinement at all times except for meals and work duty, and kept in overcrowded rooms even though the prison had not reached its capacity. Because of the overcrowding, not everyone had a bed or even a mattress, and there were insufficient blankets. Hygienic conditions were poor. Access to baths or showers, with no hot water, was irregular at best. There were insufficient hygienic products and toiletries. The rooms in which the non-Serbs were held did not have sufficient heating during the harsh winter of 1992. Heaters were deliberately not placed in the rooms, windowpanes were left broken and clothes made from blankets to combat the cold were confiscated. Non-Serb detainees were fed starvation rations leading to severe weight loss and other health problems. They were not allowed to receive visits after April 1992 and therefore could not supplement their meagre food rations and hygienic supplies". (*Krnojelac*, IT-97-25-T, Judgment, 15 March 2002, para. 440.)

(b) *Prijedor*

(i) *Omarska camp*

348. In the Trial Judgment in the *Kvočka et al.* case, the ICTY Trial Chamber provided the following description of the poor conditions in the Omarska camp based on the accounts of detainees:

> "Detainees were kept in inhuman conditions and an atmosphere of extreme mental and physical violence pervaded the camp. Intimidation, extortion, beatings, and torture were customary practices. The arrival of new detainees, interrogations, mealtimes, and use of the toilet facilities provided recurrent opportunities for abuse. Outsiders entered the camp and were permitted to attack the detainees at random and at will . . .
>
> . . . . . .
>
> The Trial Chamber finds that the detainees received poor quality food that was often rotten or inedible, caused by the high temperatures and sporadic electricity during the summer of 1992. The food

was sorely inadequate in quantity. Former detainees testified of the acute hunger they suffered in the camp: most lost 25 to 35 kilograms in body weight during their time at Omarska; some lost considerably more." (*Kvočka et al.*, IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001, paras. 45 and 55.)

(ii) *Keraterm camp*

349. The *Stakić* Trial Judgment contained the following description of conditions in the Keraterm camp based on multiple witness accounts:

"The detainees slept on wooden pallets used for the transport of goods or on bare concrete in a big storage room. The conditions were cramped and people often had to sleep on top of each other. In June 1992, Room 1, which according to witness statements was slightly larger than Courtroom 2 of this Tribunal (98.6 $m^2$), held 320 people and the number continued to grow. The detainees were given one meal a day, made up of two small slices of bread and some sort of stew. The rations were insufficient for the detainees. Although families tried to deliver food and clothing every day they rarely succeeded. The detainees could see their families walking to the camp and leaving empty-handed, so in all likelihood someone at the gates of the camp took the food and prevented it from being distributed to the detainees." (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 163.)

(iii) *Trnopolje camp*

350. With respect to the Trnopolje camp, the *Stakić* Trial Judgment described the conditions as follows, noting that they were slightly better than at Omarska and Keraterm:

"The detainees were provided with food at least once a day and, for some time, the families of detainees were allowed to bring food. However the quantity of food available was insufficient and people often went hungry. Moreover, the water supply was insufficient and the toilet facilities inadequate. The majority of the detainees slept in the open air. Some devised makeshift . . . shelters of blankets and plastic bags. While clearly inadequate, the conditions in the Trnopolje camp were not as appalling as those that prevailed in Omarska and Keraterm." (*Ibid.*, para. 190.)

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(c) *Banja Luka*

*Manjača camp*

351. According to ICTY Trial Chamber in the *Plavšić* Sentencing Judgment:

> "the sanitary conditions in Manjača were 'disastrous . . . inhuman and really brutal': the concept of sanitation did not exist. The temperature inside was low, the inmates slept on the concrete floor and they relieved themselves in the compound or in a bucket placed by the door at night. There was not enough water, and any water that became available was contaminated. In the first three months of Adil Draganović's detention, Manjača was a 'camp of hunger' and when there was food available, it was of a very poor quality. The inmates were given two small meals per day, which usually consisted of half a cup of warm tea, which was more like warm water, and a small piece of thin, 'transparent' bread. Between two and a half thousand men there were only 90 loaves of bread, with each loaf divided into 20 or 40 pieces. Most inmates lost between 20 and 30 kilograms of body weight while they were detained at Manjača. The witness believes that had the ICRC and UNHCR not arrived, the inmates would have died of starvation." (*Plavšić*, IT-00-39-S and 40/1-S, Sentencing Judgment, 27 February 2003, para. 48.)

(d) *Bosanski Šamac*

352. In its Judgment in the *Simić* case, the Trial Chamber made the following findings:

> "the detainees who were imprisoned in the detention centres in Bosanski Šamac were confined under inhumane conditions. The prisoners were subjected to humiliation and degradation. The forced singing of 'Chetnik' songs and the verbal abuse of being called 'ustasha' or 'balija' were forms of such abuse and humiliation of the detainees. They did not have sufficient space, food or water. They suffered from unhygienic conditions, and they did not have appropriate access to medical care. These appalling detention conditions, the cruel and inhumane treatment through beatings and the acts of torture caused severe physical suffering, thus attacking the very fundamentals of human dignity . . . This was done because of the non-Serb ethnicity of the detainees." (*Simić*, IT-95-9-T, Judgment, 17 October 2003, para. 773.)

353. The Respondent does not deny that the camps in Bosnia and Herzegovina were in breach of humanitarian law and, in most cases, in breach of the law of war. However, it notes that, although a number of

detention camps run by the Serbs in Bosnia and Herzegovina were the subject of investigation and trials at the ICTY, no conviction for genocide was handed down on account of any criminal acts committed in those camps. With specific reference to the Manjača camp, the Respondent points out that the Special Envoy of the United Nations Secretary-General visited the camp in 1992 and found that it was being run correctly and that a Muslim humanitarian organization also visited the camp and found that "material conditions were poor, especially concerning hygiene [b]ut there were no signs of maltreatment or execution of prisoners".

354. On the basis of the elements presented to it, the Court considers that there is convincing and persuasive evidence that terrible conditions were inflicted upon detainees of the camps. However, the evidence presented has not enabled the Court to find that those acts were accompanied by specific intent *(dolus specialis)* to destroy the protected group, in whole or in part. In this regard, the Court observes that, in none of the ICTY cases concerning camps cited above, has the Tribunal found that the accused acted with such specific intent *(dolus specialis)*.

* *

### *(8) Article II* (d)*: Imposing Measures to Prevent Births within the Protected Group*

355. The Applicant invoked several arguments to show that measures were imposed to prevent births, contrary to the provision of Article II, paragraph *(d)*, of the Genocide Convention. First, the Applicant claimed that the

> "forced separation of male and female Muslims in Bosnia and Herzegovina, as systematically practised when various municipalities were occupied by the Serb forces . . . in all probability entailed a decline in the birth rate of the group, given the lack of physical contact over many months".

The Court notes that no evidence was provided in support of this statement.

356. Secondly, the Applicant submitted that rape and sexual violence against women led to physical trauma which interfered with victims' reproductive functions and in some cases resulted in infertility. However, the only evidence adduced by the Applicant was the indictment in the *Gagović* case before the ICTY in which the Prosecutor stated that one witness could no longer give birth to children as a result of the sexual abuse she suffered (*Gagović et al.*, IT-96-23-I, Initial Indictment, 26 June 1996, para. 7.10). In the Court's view, an indictment by the Prosecutor

does not constitute persuasive evidence (see paragraph 217 above). Moreover, it notes that the *Gagović* case did not proceed to trial due to the death of the accused.

357. Thirdly, the Applicant referred to sexual violence against men which prevented them from procreating subsequently. In support of this assertion, the Applicant noted that, in the *Tadić* case, the Trial Chamber found that, in Omarska camp, the prison guards forced one Bosnian Muslim man to bite off the testicles of another Bosnian Muslim man (*Tadić*, IT-94-1-T, Judgment, 7 May 1997, para. 198). The Applicant also cited a report in the newspaper, *Le Monde*, on a study by the World Health Organization and the European Union on sexual assaults on men during the conflict in Bosnia and Herzegovina, which alleged that sexual violence against men was practically always accompanied by threats to the effect that the victim would no longer produce Muslim children. The article in *Le Monde* also referred to a statement by the President of a non-governmental organization called the Medical Centre for Human Rights to the effect that approximately 5,000 non-Serb men were the victims of sexual violence. However, the Court notes that the article in *Le Monde* is only a secondary source. Moreover, the results of the World Health Organization and European Union study were only preliminary, and there is no indication as to how the Medical Centre for Human Rights arrived at the figure of 5,000 male victims of sexual violence.

358. Fourthly, the Applicant argued that rape and sexual violence against men and women led to psychological trauma which prevented victims from forming relationships and founding a family. In this regard, the Applicant noted that in the *Akayesu* case, the ICTR considered that "rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate" (*Akayesu*, ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 508). However, the Court notes that the Applicant presented no evidence that this was the case for women in Bosnia and Herzegovina.

359. Fifthly, the Applicant considered that Bosnian Muslim women who suffered sexual violence might be rejected by their husbands or not be able to find a husband. Again, the Court notes that no evidence was presented in support of this statement.

360. The Respondent considers that the Applicant "alleges no fact, puts forward no serious argument, and submits no evidence" for its allegations that rapes were committed in order to prevent births within a group and notes that the Applicant's contention that there was a decline in births within the protected group is not supported by any evidence concerning the birth rate in Bosnia and Herzegovina either before or after the war.

361. Having carefully examined the arguments of the Parties, the Court finds that the evidence placed before it by the Applicant does not enable it to conclude that Bosnian Serb forces committed acts which could be qualified as imposing measures to prevent births in the protected group within the meaning of Article II *(d)* of the Convention.

* *

*(9) Article II* (e)*: Forcibly Transferring Children of the Protected Group to Another Group*

362. The Applicant claims that rape was used "as a way of affecting the demographic balance by impregnating Muslim women with the sperm of Serb males" or, in other words, as "procreative rape". The Applicant argues that children born as a result of these "forced pregnancies" would not be considered to be part of the protected group and considers that the intent of the perpetrators was to transfer the unborn children to the group of Bosnian Serbs.

363. As evidence for this claim, the Applicant referred to a number of sources including the following. In the indictment in the *Gagović et al.* case, the Prosecutor alleged that one of the witnesses was raped by two Bosnian Serb soldiers and that "[b]oth perpetrators told her that she would now give birth to Serb babies" (*Gagović et al.*, IT-96-23-I, Initial Indictment, 26 June 1996, para. 9.3). However, as in paragraph 356 above, the Court notes that an indictment cannot constitute persuasive evidence for the purposes of the case now before it and that the *Gagović* case did not proceed to trial. The Applicant further referred to the Report of the Commission of Experts which stated that one woman had been detained and raped daily by three or four soldiers and that "[s]he was told that she would give birth to a chetnik boy" (Report of the Commission of Experts, Vol. I, p. 59, para. 248).

364. The Applicant also cited the Review of the Indictment in the *Karadžić and Mladić* cases in which the Trial Chamber stated that "[s]ome camps were specially devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late to undergo an abortion" and that "[i]t would seem that the aim of many rapes was enforced impregnation" (*Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 64). However, the Court notes that this finding of the Trial Chamber was based only on the testimony of one *amicus curiae* and on the above-mentioned incident reported by the Commission of Experts (*ibid.*, para. 64, footnote 154).

365. Finally, the Applicant noted that in the *Kunarac* case, the ICTY Trial Chamber found that, after raping one of the witnesses, the accused had told her that "she would now carry a Serb baby and would not know who the father would be" (*Kunarac et al.* cases, Nos. IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, para. 583).

366. The Respondent points out that Muslim women who had been raped gave birth to their babies in Muslim territory and consequently the babies would have been brought up not by Serbs but, on the contrary, by Muslims. Therefore, in its view, it cannot be claimed that the children were transferred from one group to the other.

367. The Court, on the basis of the foregoing elements, finds that the evidence placed before it by the Applicant does not establish that there was any form of policy of forced pregnancy, nor that there was any aim to transfer children of the protected group to another group within the meaning of Article II *(e)* of the Convention.

* *

*(10) Alleged Genocide outside Bosnia and Herzegovina*

368. In the submissions in its Reply, the Applicant has claimed that the Respondent has violated its obligations under the Genocide Convention "by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, *but not limited to* the, territory of Bosnia and Herzegovina, including in particular the Muslim population . . ." (emphasis added). The Applicant devoted a section in its Reply to the contention that acts of genocide, for which the Respondent was allegedly responsible, also took place on the territory of the FRY; these acts were similar to those perpetrated on Bosnian territory, and the constituent elements of "ethnic cleansing as a policy" were also found in the territory of the FRY. This question of genocide committed within the FRY was not actively pursued by the Applicant in the course of the oral argument before the Court; however, the submission quoted above was maintained in the final submissions presented at the hearings, and the Court must therefore address it. It was claimed by the Applicant that the genocidal policy was aimed not only at citizens of Bosnia and Herzegovina, but also at Albanians, Sandžak Muslims, Croats, Hungarians and other minorities; however, the Applicant has not established to the satisfaction of the Court any facts in support of that allegation. The Court has already found (paragraph 196 above) that, for purposes of establishing genocide, the targeted group must be defined positively, and not as a "non-Serb" group.

369. The Applicant has not in its arguments dealt separately with the question of the nature of the specific intent *(dolus specialis)* alleged to accompany the acts in the FRY complained of. It does not appear to be

contending that actions attributable to the Respondent, and committed on the territory of the FRY, were accompanied by a specific intent *(dolus specialis)*, peculiar to or limited to that territory, in the sense that the objective was to eliminate the presence of non-Serbs in the FRY itself. The Court finds in any event that the evidence offered does not in any way support such a contention. What the Applicant has sought to do is to convince the Court of a pattern of acts said to evidence specific intent *(dolus specialis)* inspiring the actions of Serb forces in Bosnia and Herzegovina, involving the destruction of the Bosnian Muslims in that territory; and that same pattern lay, it is contended, behind the treatment of Bosnian Muslims in the camps established in the FRY, so that that treatment supports the pattern thesis. The Applicant has emphasized that the same treatment was meted out to those Bosnian Muslims as was inflicted on their compatriots in Bosnia and Herzegovina. The Court will thus now turn to the question whether the specific intent *(dolus specialis)* can be deduced, as contended by the Applicant, from the pattern of actions against the Bosnian Muslims taken as a whole.

* *

*(11) The Question of Pattern of Acts Said to Evidence an Intent to Commit Genocide*

370. In the light of its review of the factual evidence before it of the atrocities committed in Bosnia and Herzegovina in 1991-1995, the Court has concluded that, save for the events of July 1995 at Srebrenica, the necessary intent required to constitute genocide has not been conclusively shown in relation to each specific incident. The Applicant however relies on the alleged existence of an overall plan to commit genocide, indicated by the pattern of genocidal or potentially acts of genocide committed throughout the territory, against persons identified everywhere and in each case on the basis of their belonging to a specified group. In the case, for example, of the conduct of Serbs in the various camps (described in paragraphs 252-256, 262-273, 307-310 and 312-318 above), it suggests that "[t]he genocidal intent of the Serbs becomes particularly clear in the description of camp practices, due to their striking similarity all over the territory of Bosnia and Herzegovina". Drawing attention to the similarities between actions attributed to the Serbs in Croatia, and the later events at, for example, Kosovo, the Applicant observed that

> "it is not surprising that the picture of the takeovers and the following human and cultural destruction looks indeed similar from 1991

through 1999. These acts were perpetrated as the expression of one single project, which basically and effectively included the destruction in whole or in part of the non-Serb group, wherever this ethnically and religiously defined group could be conceived as obstructing the all-Serbs-in-one-State group concept."

371. The Court notes that this argument of the Applicant moves from the intent of the individual perpetrators of the alleged acts of genocide complained of to the intent of higher authority, whether within the VRS or the Republika Srpska, or at the level of the Government of the Respondent itself. In the absence of an official statement of aims reflecting such an intent, the Applicant contends that the specific intent *(dolus specialis)* of those directing the course of events is clear from the consistency of practices, particularly in the camps, showing that the pattern was of acts committed "within an organized institutional framework". However, something approaching an official statement of an overall plan is, the Applicant contends, to be found in the Decision on Strategic Goals issued on 12 May 1992 by Momčilo Krajišnik as the President of the National Assembly of Republika Srpska, published in the *Official Gazette* of the Republika Srpska, and the Court will first consider what significance that Decision may have in this context. The English translation of the Strategic Goals presented by the Parties during the hearings, taken from the Report of Expert Witness Donia in the *Milošević* case before the ICTY, Exhibit No. 537, reads as follows:

"DECISION ON THE STRATEGIC GOALS OF THE SERBIAN PEOPLE IN BOSNIA AND HERZEGOVINA

The Strategic Goals, i.e., the priorities, of the Serbian people in Bosnia and Herzegovina are:

1. Separation as a state from the other two ethnic communities.

2. A corridor between Semberija and Krajina.
3. The establishment of a corridor in the Drina River valley, i.e., the elimination of the border between Serbian states.

4. The establishment of a border on the Una and Neretva rivers.
5. The division of the city of Sarajevo into a Serbian part and a Muslim part, and the establishment of effective state authorities within each part.
6. An outlet to the sea for the Republika Srpska."

While the Court notes that this document did not emanate from the Government of the Respondent, evidence before the Court of intercepted exchanges between President Milošević of Serbia and President Karadžić of the Republika Srpska is sufficient to show that the objectives defined represented their joint view.

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372. The Parties have drawn the Court's attention to statements in the Assembly by President Karadžić which appear to give conflicting interpretations of the first and major goal of these objectives, the first on the day they were adopted, the second two years later. On that first occasion, the Applicant contended, he said: "It would be much better to solve this situation by political means. It would be best if a truce could be established right away and the borders set up, even if we lose something." Two years later he said (according to the translation of his speech supplied by the Applicant):

> "We certainly know that we must give up something — that is beyond doubt in so far as we want to achieve our first strategic goal: to drive our enemies by the force of war from their homes, that is the Croats and Muslims, so that we will no longer be together [with them] in a State."

The Respondent disputes the accuracy of the translation, claiming that the stated goal was not "to drive our enemies by the force of war from their homes" but "to free the homes from the enemy". The 1992 objectives do not include the elimination of the Bosnian Muslim population. The 1994 statement even on the basis of the Applicant's translation, however shocking a statement, does not necessarily involve the intent to destroy in whole or in part the Muslim population in the enclaves. The Applicant's argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership — to create a larger Serb State, by a war of conquest if necessary — did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion. The 1992 objectives, particularly the first one, were capable of being achieved by the displacement of the population and by territory being acquired, actions which the Respondent accepted (in the latter case at least) as being unlawful since they would be at variance with the inviolability of borders and the territorial integrity of a State which had just been recognized internationally. It is significant that in cases in which the Prosecutor has put the Strategic Goals in issue, the ICTY has not characterized them as genocidal (see *Brđanin*, IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 303, and *Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, paras. 546-561 (in particular para. 548)). The Court does not see the 1992 Strategic Goals as establishing the specific intent.

373. Turning now to the Applicant's contention that the very pattern of the atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims and also Croats, demonstrates the necessary intent, the Court cannot agree with such a broad proposition. The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demon-

strated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.

374. Furthermore, and again significantly, the proposition is not consistent with the findings of the ICTY relating to genocide or with the actions of the Prosecutor, including decisions not to charge genocide offences in possibly relevant indictments, and to enter into plea agreements, as in the *Plavšić* and *Sikirica et al.* cases (IT-00-40 and IT-95-8), by which the genocide-related charges were withdrawn. Those actions of the Prosecution and the Tribunal can be conveniently enumerated here. Prosecutions for genocide and related crimes before the ICTY can be grouped in the following way:

*(a)* convictions in respect of charges involving genocide relating to Srebrenica in July 1995: *Krstić* (IT-98-33) (conviction of genocide at trial was reduced to aiding and abetting genocide on appeal) and *Blagojević* (IT-02-60) (conviction of complicity in genocide "through aiding and abetting" at trial is currently on appeal);

*(b)* plea agreements in which such charges were withdrawn, with the accused pleading guilty to crimes against humanity: *Obrenović* (IT-02-60/2) and *Momir Nikolić* (IT-02-60/1);

*(c)* acquittals on genocide-related charges in respect of events occurring elsewhere: *Krajišnik* (paragraph 219 above) (on appeal), *Jelisić* (IT-95-10) (completed), *Stakić* (IT-97-24) (completed), *Brđanin* (IT-99-36) (on appeal) and *Sikirica* (IT-95-8) (completed);

*(d)* cases in which genocide-related charges in respect of events occurring elsewhere were withdrawn: *Plavšić* (IT-00-39 and 40/1) (plea agreement), *Župljanin* (IT-99-36) (genocide-related charges withdrawn) and *Mejakić* (IT-95-4) (genocide-related charges withdrawn);

*(e)* case in which the indictment charged genocide and related crimes in Srebrenica and elsewhere in which the accused died during the proceedings: *Milošević* (IT-02-54);

*(f)* cases in which indictments charge genocide or related crimes in respect of events occurring elsewhere, in which accused have died before or during proceedings: *Kovačević and Drljača* (IT-97-24) and *Talić* (IT-99-36/1);

*(g)* pending cases in which the indictments charge genocide and related crimes in Srebrenica and elsewhere: *Karadžić and Mladić* (IT-95-5/18); and

*(h)* pending cases in which the indictments charge genocide and related crimes in Srebrenica: *Popović, Beara, Drago Nikolić, Borovčanin, Pandurević and Trbić* (IT-05-88/1) and *Tolimir* (IT-05-88/2).

375. In the cases of a number of accused, relating to events in July 1995 in Srebrenica, charges of genocide or its related acts have not been brought: *Erdemović* (IT-96-22) (completed), *Jokić* (IT-02-60) (on appeal), *Miletić and Gvero* (IT-05-88, part of the *Popović et al.* proceeding referred to in paragraph 374 *(h)* above), *Perišić* (IT-04-81) (pending) and *Stanišić and Simatović* (IT-03-69) (pending).

376. The Court has already concluded above that — save in the case of Srebrenica — the Applicant has not established that any of the widespread and serious atrocities, complained of as constituting violations of Article II, paragraphs *(a)* to *(e)*, of the Genocide Convention, were accompanied by the necessary specific intent *(dolus specialis)* on the part of the perpetrators. It also finds that the Applicant has not established the existence of that intent on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent. Having however concluded (paragraph 297 above), in the specific case of the massacres at Srebrenica in July 1995, that acts of genocide were committed in operations led by members of the VRS, the Court now turns to the question whether those acts are attributable to the Respondent.

* * *

## VII. The Question of Responsibility for Events at Srebrenica under Article III, Paragraph *(a)*, of the Genocide Convention

### *(1) The Alleged Admission*

377. The Court first notes that the Applicant contends that the Respondent has in fact recognized that genocide was committed at Srebrenica, and has accepted legal responsibility for it. The Applicant called attention to the following official declaration made by the Council of Ministers of the Respondent on 15 June 2005, following the showing on a Belgrade television channel on 2 June 2005 of a video-recording of the murder by a paramilitary unit of six Bosnian Muslim prisoners near Srebrenica (paragraph 289 above). The statement reads as follows:

> "Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre represented neither Serbia

> nor Montenegro, but an undemocratic regime of terror and death, against whom the majority of citizens of Serbia and Montenegro put up the strongest resistance.
>
> Our condemnation of crimes in Srebrenica does not end with the direct perpetrators. We demand the criminal responsibility of all who committed war crimes, organized them or ordered them, and not only in Srebrenica.
>
> Criminals must not be heroes. Any protection of the war criminals, for whatever reason, is also a crime."

The Applicant requests the Court to declare that this declaration "be regarded as a form of admission and as having decisive probative force regarding the attributability to the Yugoslav State of the Srebrenica massacre".

378. It is for the Court to determine whether the Respondent is responsible for any acts of genocide which may be established. For purposes of a finding of this kind the Court may take into account any statements made by either party that appear to bear upon the matters in issue, and have been brought to its attention (cf. *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 263 ff., paras. 32 ff., and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, pp. 465 ff., paras. 27 ff.; *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 573-574, paras. 38-39), and may accord to them such legal effect as may be appropriate. However, in the present case, it appears to the Court that the declaration of 15 June 2005 was of a political nature; it was clearly not intended as an admission, which would have had a legal effect in complete contradiction to the submissions made by the Respondent before this Court, both at the time of the declaration and subsequently. The Court therefore does not find the statement of 15 June 2005 of assistance to it in determining the issues before it in the case.

* *

*(2) The Test of Responsibility*

379. In view of the foregoing conclusions, the Court now must ascertain whether the international responsibility of the Respondent can have been incurred, on whatever basis, in connection with the massacres committed in the Srebrenica area during the period in question. For the reasons set out above, those massacres constituted the crime of genocide within the meaning of the Convention. For this purpose, the Court may be required to consider the following three issues in turn. First, it needs to be determined whether the acts of genocide could be attributed to the Respondent under the rules of customary international law of State responsibility; this means ascertaining whether the acts were committed by persons or organs whose conduct is attributable, specifically in the case of the events at Srebrenica, to the Respondent. Second, the Court

will need to ascertain whether acts of the kind referred to in Article III of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent under those same rules of State responsibility: that is to say, the acts referred to in Article III, paragraphs *(b)* to *(e)*, one of these being complicity in genocide. Finally, it will be for the Court to rule on the issue as to whether the Respondent complied with its twofold obligation deriving from Article I of the Convention to prevent and punish genocide.

380. These three issues must be addressed in the order set out above, because they are so interrelated that the answer on one point may affect the relevance or significance of the others. Thus, if and to the extent that consideration of the first issue were to lead to the conclusion that some acts of genocide are attributable to the Respondent, it would be unnecessary to determine whether it may also have incurred responsibility under Article III, paragraphs *(b)* to *(e),* of the Convention for the same acts. Even though it is theoretically possible for the same acts to result in the attribution to a State of acts of genocide (contemplated by Art. III, para. *(a)*), conspiracy to commit genocide (Art. III, para. *(b)*), and direct and public incitement to commit genocide (Art. III, para. *(c)*), there would be little point, where the requirements for attribution are fulfilled under *(a)*, in making a judicial finding that they are also satisfied under *(b)* and *(c)*, since responsibility under *(a)* absorbs that under the other two. The idea of holding the same State responsible by attributing to it acts of "genocide" (Art. III, para. *(a)*), "attempt to commit genocide" (Art. III, para. *(d)*), and "complicity in genocide" (Art. III, para. *(e)*), in relation to the same actions, must be rejected as untenable both logically and legally.

381. On the other hand, there is no doubt that a finding by the Court that no acts that constitute genocide, within the meaning of Article II and Article III, paragraph *(a),* of the Convention, can be attributed to the Respondent will not free the Court from the obligation to determine whether the Respondent's responsibility may nevertheless have been incurred through the attribution to it of the acts, or some of the acts, referred to in Article III, paragraphs *(b)* to *(e)*. In particular, it is clear that acts of complicity in genocide can be attributed to a State to which no act of genocide could be attributed under the rules of State responsibility, the content of which will be considered below.

382. Furthermore, the question whether the Respondent has complied with its obligations to prevent and punish genocide arises in different terms, depending on the replies to the two preceding questions. It is only if the Court answers the first two questions in the negative that it will have to consider whether the Respondent fulfilled its obligation of pre-

vention, in relation to the whole accumulation of facts constituting genocide. If a State is held responsible for an act of genocide (because it was committed by a person or organ whose conduct is attributable to the State), or for one of the other acts referred to in Article III of the Convention (for the same reason), then there is no point in asking whether it complied with its obligation of prevention in respect of the same acts, because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated. On the other hand, it is self-evident, as the Parties recognize, that if a State is not responsible for any of the acts referred to in Article III, paragraphs *(a)* to *(e)*, of the Convention, this does not mean that its responsibility cannot be sought for a violation of the obligation to prevent genocide and the other acts referred to in Article III.

383. Finally, it should be made clear that, while, as noted above, a State's responsibility deriving from any of those acts renders moot the question whether it satisfied its obligation of prevention in respect of the same conduct, it does not necessarily render superfluous the question whether the State complied with its obligation to punish the perpetrators of the acts in question. It is perfectly possible for a State to incur responsibility at once for an act of genocide (or complicity in genocide, incitement to commit genocide, or any of the other acts enumerated in Article III) committed by a person or organ whose conduct is attributable to it, and for the breach by the State of its obligation to punish the perpetrator of the act: these are two distinct internationally wrongful acts attributable to the State, and both can be asserted against it as bases for its international responsibility.

384. Having thus explained the interrelationship among the three issues set out above (paragraph 379), the Court will now proceed to consider the first of them. This is the question whether the massacres committed at Srebrenica during the period in question, which constitute the crime of genocide within the meaning of Articles II and III, paragraph *(a)*, of the Convention, are attributable, in whole or in part, to the Respondent. This question has in fact two aspects, which the Court must consider separately. First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.

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*(3) The Question of Attribution of the Srebrenica Genocide to the Respondent on the Basis of the Conduct of Its Organs*

385. The first of these two questions relates to the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State. This rule, which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility as follows:

> "*Article 4*
>
> *Conduct of organs of a State*
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

386. When applied to the present case, this rule first calls for a determination whether the acts of genocide committed in Srebrenica were perpetrated by "persons or entities" having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force. It must be said that there is nothing which could justify an affirmative response to this question. It has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres. It is true that there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica. That participation was repeatedly condemned by the political organs of the United Nations, which demanded that the FRY put an end to it (see, for example, Security Council resolutions 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993)). It has however not been shown that there was any such participation in relation to the massacres committed at Srebrenica (see also paragraphs 278 to 297 above). Further, neither the Republika Srpska, nor the VRS were *de jure* organs of the FRY, since none of them had the status of organ of that State under its internal law.

387. The Applicant has however claimed that all officers in the VRS, including General Mladić, remained under FRY military administration, and that their salaries were paid from Belgrade right up to 2002, and

accordingly contends that these officers "were *de jure* organs of [the FRY], intended by their superiors to serve in Bosnia and Herzegovina with the VRS". On this basis it has been alleged by the Applicant that those officers, in addition to being officers of the VRS, remained officers of the VJ, and were thus *de jure* organs of the Respondent (paragraph 238 above). The Respondent however asserts that only some of the VRS officers were being "administered" by the 30th Personnel Centre in Belgrade, so that matters like their payment, promotion, pension, etc., were being handled from the FRY (paragraph 238 above); and that it has not been clearly established whether General Mladić was one of them. The Applicant has shown that the promotion of Mladić to the rank of Colonel General on 24 June 1994 was handled in Belgrade, but the Respondent emphasizes that this was merely a verification for administrative purposes of a promotion decided by the authorities of the Republika Srpska.

388. The Court notes first that no evidence has been presented that either General Mladić or any of the other officers whose affairs were handled by the 30th Personnel Centre were, according to the internal law of the Respondent, officers of the army of the Respondent — a *de jure* organ of the Respondent. Nor has it been conclusively established that General Mladić was one of those officers; and even on the basis that he might have been, the Court does not consider that he would, for that reason alone, have to be treated as an organ of the FRY for the purposes of the application of the rules of State responsibility. There is no doubt that the FRY was providing substantial support, *inter alia*, financial support, to the Republika Srpska (cf. paragraph 241 above), and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but this did not automatically make them organs of the FRY. Those officers were appointed to their commands by the President of the Republika Srpska, and were subordinated to the political leadership of the Republika Srpska. In the absence of evidence to the contrary, those officers must be taken to have received their orders from the Republika Srpska or the VRS, not from the FRY. The expression "State organ", as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf (cf. ILC Commentary to Art. 4, para. (1)). The functions of the VRS officers, including General Mladić, were however to act on behalf of the Bosnian Serb authorities, in particular the Republika Srpska, not on behalf of the FRY; they exercised elements of the public authority of the Republika Srpska. The particular situation of General Mladić, or of any other VRS officer present at Srebrenica who may have been being "administered" from Belgrade, is not therefore such as to lead the Court to modify the conclusion reached in the previous paragraph.

389. The issue also arises as to whether the Respondent might bear responsibility for the acts of the "Scorpions" in the Srebrenica area. In this connection, the Court will consider whether it has been proved that the Scorpions were a *de jure* organ of the Respondent. It is in dispute between the Parties as to when the "Scorpions" became incorporated into the forces of the Respondent. The Applicant has claimed that incorporation occurred by a decree of 1991 (which has not been produced as an Annex). The Respondent states that "these regulations [were] relevant exclusively for the war in Croatia in 1991" and that there is no evidence that they remained in force in 1992 in Bosnia and Herzegovina. The Court observes that, while the single State of Yugoslavia was disintegrating at that time, it is the status of the "Scorpions" in mid-1995 that is of relevance to the present case. In two of the intercepted documents presented by the Applicant (the authenticity of which was queried — see paragraph 289 above), there is reference to the "Scorpions" as "MUP of Serbia" and "a unit of Ministry of Interiors of Serbia". The Respondent identified the senders of these communications, Ljubiša Borovčanin and Savo Cvjetinović, as being "officials of the police forces of Republika Srpska". The Court observes that neither of these communications was addressed to Belgrade. Judging on the basis of these materials, the Court is unable to find that the "Scorpions" were, in mid-1995, *de jure* organs of the Respondent. Furthermore, the Court notes that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.

390. The argument of the Applicant however goes beyond mere contemplation of the status, under the Respondent's internal law, of the persons who committed the acts of genocide; it argues that Republika Srpska and the VRS, as well as the paramilitary militias known as the "Scorpions", the "Red Berets", the "Tigers" and the "White Eagles" must be deemed, notwithstanding their apparent status, to have been "*de facto* organs" of the FRY, in particular at the time in question, so that all of their acts, and specifically the massacres at Srebrenica, must be considered attributable to the FRY, just as if they had been organs of that State under its internal law; reality must prevail over appearances. The Respondent rejects this contention, and maintains that these were not *de facto* organs of the FRY.

391. The first issue raised by this argument is whether it is possible in principle to attribute to a State conduct of persons — or groups of persons — who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State's responsibility for an internationally wrongful act. The Court has in fact already addressed this question, and given an answer to it in principle, in

its Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*Merits, Judgment, I.C.J. Reports 1986*, pp. 62-64). In paragraph 109 of that Judgment the Court stated that it had to

> "determine . . . whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government" (p. 62).

Then, examining the facts in the light of the information in its possession, the Court observed that "there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf" (para. 109), and went on to conclude that "the evidence available to the Court . . . is insufficient to demonstrate [the *contras*'] complete dependence on United States aid", so that the Court was "unable to determine that the *contra* force may be equated for legal purposes with the forces of the United States" (pp. 62-63, para. 110).

392. The passages quoted show that, according to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.

393. However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court's Judgment quoted above expressly described as "complete dependence". It remains to be determined in the present case whether, at the time in question, the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they can be deemed to have been completely dependent on it; it is only if this condition is met that they can be equated with organs of the Respondent for the purposes of its international responsibility.

394. The Court can only answer this question in the negative. At the relevant time, July 1995, neither the Republika Srpska nor the VRS could

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be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy. While the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the VRS, had been strong and close in previous years (see paragraph 238 above), and these ties undoubtedly remained powerful, they were, at least at the relevant time, not such that the Bosnian Serbs' political and military organizations should be equated with organs of the FRY. It is even true that differences over strategic options emerged at the time between Yugoslav authorities and Bosnian Serb leaders; at the very least, these are evidence that the latter had some qualified, but real, margin of independence. Nor, notwithstanding the very important support given by the Respondent to the Republika Srpska, without which it could not have "conduct[ed] its crucial or most significant military and paramilitary activities" (*I.C.J. Reports 1986*, p. 63, para. 111), did this signify a total dependence of the Republika Srpska upon the Respondent.

395. The Court now turns to the question whether the "Scorpions" were in fact acting in complete dependence on the Respondent. The Court has not been presented with materials to indicate this. The Court also notes that, in giving his evidence, General Dannatt, when asked under whose control or whose authority the paramilitary groups coming from Serbia were operating, replied, "they would have been under the command of Mladić and part of the chain of the command of the VRS". The Parties referred the Court to the *Stanišić and Simatović* case (IT-03-69, pending); notwithstanding that the defendants are not charged with genocide in that case, it could have its relevance for illuminating the status of the "Scorpions" as Serbian MUP or otherwise. However, the Court cannot draw further conclusions as this case remains at the indictment stage. In this respect, the Court recalls that it can only form its opinion on the basis of the information which has been brought to its notice at the time when it gives its decision, and which emerges from the pleadings and documents in the case file, and the arguments of the Parties made during the oral exchanges.

The Court therefore finds that the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the Respondent's international responsibility.

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### *(4) The Question of Attribution of the Srebrenica Genocide to the Respondent on the Basis of Direction or Control*

396. As noted above (paragraph 384), the Court must now determine whether the massacres at Srebrenica were committed by persons who,

though not having the status of organs of the Respondent, nevertheless acted on its instructions or under its direction or control, as the Applicant argues in the alternative; the Respondent denies that such was the case.

397. The Court must emphasize, at this stage in its reasoning, that the question just stated is not the same as those dealt with thus far. It is obvious that it is different from the question whether the persons who committed the acts of genocide had the status of organs of the Respondent under its internal law; nor however, and despite some appearance to the contrary, is it the same as the question whether those persons should be equated with State organs *de facto*, even though not enjoying that status under internal law. The answer to the latter question depends, as previously explained, on whether those persons were in a relationship of such complete dependence on the State that they cannot be considered otherwise than as organs of the State, so that all their actions performed in such capacity would be attributable to the State for purposes of international responsibility. Having answered that question in the negative, the Court now addresses a completely separate issue: whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent's instructions, or under its direction or control. An affirmative answer to this question would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would merely mean that the FRY's international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. In other words, it is no longer a question of ascertaining whether the persons who directly committed the genocide were acting as organs of the FRY, or could be equated with those organs — this question having already been answered in the negative. What must be determined is whether FRY organs — incontestably having that status under the FRY's internal law — originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.

398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility as follows:

"*Article 8*

*Conduct directed or controlled by a State*

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of

> persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

399. This provision must be understood in the light of the Court's jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* referred to above (paragraph 391). In that Judgment the Court, as noted above, after having rejected the argument that the *contras* were to be equated with organs of the United States because they were "completely dependent" on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State" (*I.C.J. Reports 1986*, p. 64, para. 115); this led to the following significant conclusion:

> "For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed." (*Ibid.*, p. 65.)

400. The test thus formulated differs in two respects from the test — described above — to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of "complete dependence" on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its "effective control". It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

401. The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the "effective control" of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (see paragraph 399 above). The rules

for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.

402. The Court notes however that the Applicant has further questioned the validity of applying, in the present case, the criterion adopted in the *Military and Paramilitary Activities* Judgment. It has drawn attention to the Judgment of the ICTY Appeals Chamber in the *Tadić* case (IT-94-1-A, Judgment, 15 July 1999). In that case the Chamber did not follow the jurisprudence of the Court in the *Military and Paramilitary Activities* case: it held that the appropriate criterion, applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY under the law of State responsibility, was that of the "overall control" exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case (on this point, *ibid.*, para. 145). In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY's instructions, or under its effective control.

403. The Court has given careful consideration to the Appeals Chamber's reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber's view. First, the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

404. This is the case of the doctrine laid down in the *Tadić* Judgment. Insofar as the "overall control" test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the "overall control" test as equally applicable under the law of State responsibility for the purpose of determining — as the Court is required to do in the present case — when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.

406. It must next be noted that the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the "overall control" test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.

407. Thus it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under

the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility.

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408. The Respondent has emphasized that in the final judgments of the Chambers of the ICTY relating to genocide in Srebrenica, none of its leaders have been found to have been implicated. The Applicant does not challenge that reading, but makes the point that that issue has not been before the ICTY for decision. The Court observes that the ICTY has indeed not up to the present been directly concerned in final judgments with the question whether those leaders might bear responsibility in that respect. The Court notes the fact that the report of the United Nations Secretary-General does not establish any direct involvement by President Milošević with the massacre. The Court has already recorded the contacts between Milošević and the United Nations on 10 and 11 July (paragraph 285). On 14 July, as recorded in the Secretary-General's Report,

> "the European Union negotiator, Mr. Bildt, travelled to Belgrade to meet with President Milošević. The meeting took place at Dobanovci, the hunting lodge outside Belgrade, where Mr. Bildt had met President Milošević and General Mladić one week earlier. According to Mr. Bildt's public account of that second meeting, he pressed the President to arrange immediate access for UNHCR to assist the people of Srebrenica, and for ICRC to start to register those who were being treated by the BSA as prisoners of war. He also insisted that the Netherlands soldiers be allowed to leave at will. Mr. Bildt added that the international community would not tolerate an attack on Goražde, and that a 'green light' would have to be secured for free and unimpeded access to the enclaves. He also demanded that the road between Kiseljak and Sarajevo ('Route Swan') be opened to all non-military transport. President Milošević apparently acceded to the various demands, but also claimed that he did not have control over the matter. Milošević had also apparently explained, earlier in the meeting, that the whole incident had been provoked by escalating Muslim attacks from the enclave, in violation of the 1993 demilitarization agreement.
>
> A few hours into the meeting, General Mladić arrived at Dobanovci. Mr. Bildt noted that General Mladić readily agreed to most of the demands on Srebrenica, but remained opposed to some of the arrangements pertaining to the other enclaves, Sarajevo in particular. Eventually, with President Milošević's intervention, it appeared that an agreement in principle had been reached. It was decided that

another meeting would be held the next day in order to confirm the arrangements. Mr. Bildt had already arranged with Mr. Stoltenberg and Mr. Akashi [the Special Representative of the Secretary-General] that they would join him in Belgrade. He also requested that the UNPROFOR Commander also come to Belgrade in order to finalize some of the military details with Mladić." (A/54/549, paras. 372-373.)

409. By 19 July, on the basis of the Belgrade meeting, Mr. Akashi was hopeful that both President Milošević and General Mladić might show some flexibility. The UNPROFOR Commander met with Mladić on 19 July and throughout the meeting kept in touch with Mr. Bildt who was holding parallel negotiations with President Milošević in Belgrade. Mladić gave his version of the events of the preceding days (his troops had "'finished [it] in a correct way'"; some "'unfortunate small incidents' had occurred"). The UNPROFOR Commander and Mladić then signed an agreement which provided for

"ICRC access to all 'reception centres' where the men and boys of Srebrenica were being held, by the next day;

UNHCR and humanitarian aid convoys to be given access to Srebrenica;

The evacuation of wounded from Potočari, as well as the hospital in Bratunac;

The return of Dutchbat weapons and equipment taken by the BSA;

The transfer of Dutchbat out of the enclave commencing on the afternoon of 21 July, following the evacuation of the remaining women, children and elderly who wished to leave.

Subsequent to the signing of this agreement, the Special Representative wrote to President Milošević, reminding him of the agreement, that had not yet been honoured, to allow ICRC access to Srebrenica. The Special Representative later also telephoned President Milošević to reiterate the same point." (*Ibid.*, para. 392.)

410. The Court was referred to other evidence supporting or denying the Respondent's effective control over, participation in, involvement in, or influence over the events in and around Srebrenica in July 1995. The Respondent quotes two substantial reports prepared seven years after the events, both of which are in the public domain, and readily accessible. The first, *Srebrenica — a "Safe" Area*, published in 2002 by the Netherlands Institute for War Documentation was prepared over a lengthy period by an expert team. The Respondent has drawn attention to the fact that this report contains no suggestion that the FRY leadership was involved in planning the attack or inciting the killing of non-Serbs; nor

any hard evidence of assistance by the Yugoslav army to the armed forces of the Republika Srpska before the attack; nor any suggestion that the Belgrade Government had advance knowledge of the attack. The Respondent also quotes this passage from point 10 of the Epilogue to the Report relating to the "mass slaughter" and "the executions" following the fall of Srebrenica: "There is no evidence to suggest any political or military liaison with Belgrade, and in the case of this mass murder such a liaison is highly improbable." The Respondent further observes that the Applicant's only response to this submission is to point out that "the report, by its own admission, is not exhaustive", and that this Court has been referred to evidence not used by the authors.

411. The Court observes, in respect of the Respondent's submissions, that the authors of the Report do conclude that Belgrade was aware of the intended attack on Srebrenica. They record that the Dutch Military Intelligence Service and another Western intelligence service concluded that the July 1995 operations were co-ordinated with Belgrade (Part III, Chap. 7, Sect. 7). More significantly for present purposes, however, the authors state that "there is no evidence to suggest participation in the preparations for executions on the part of Yugoslav military personnel or the security agency (RDB). In fact there is some evidence to support the opposite view . . ." (Part IV, Chap. 2, Sect. 20). That supports the passage from point 10 of the Epilogue quoted by the Respondent, which was preceded by the following sentence: "Everything points to a central decision by the General Staff of the VRS."

412. The second report is *Balkan Battlegrounds*, prepared by the United States Central Intelligence Agency, also published in 2002. The first volume under the heading "The Possibility of Yugoslav involvement" arrives at the following conclusion:

> "No basis has been established to implicate Belgrade's military or security forces in the post-Srebrenica atrocities. While there are indications that the VJ or RDB [the Serbian State Security Department] may have contributed elements to the Srebrenica battle, there is no similar evidence that Belgrade-directed forces were involved in any of the subsequent massacres. Eyewitness accounts by survivors may be imperfect recollections of events, and details may have been overlooked. Narrations and other available evidence suggest that only Bosnian Serb troops were employed in the atrocities and executions that followed the military conquest of Srebrenica." (*Balkan Battlegrounds*, p. 353.)

The response of the Applicant was to quote an earlier passage which refers to reports which "suggest" that VJ troops and possibly elements of the Serbian State Security Department may have been engaged in the battle in Srebrenica — as indeed the second sentence of the passage quoted by the Respondent indicates. It is a cautious passage, and significantly gives no indication of any involvement by the Respondent in the post-conflict atrocities which are the subject of genocide-related convictions. Counsel for the Respondent also quoted from the evidence of the Deputy Commander of Dutchbat, given in the *Milošević* trial, in which the accused put to the officer the point quoted earlier from the Epilogue to the Netherlands report. The officer responded:

> "At least for me, I did not have any evidence that it was launched in co-operation with Belgrade. And again, I read all kinds of reports and opinions and papers where all kinds of scenarios were analysed, and so forth. Again, I do not have any proof that the action, being the attack on the enclave, was launched in co-operation with Belgrade."

The other evidence on which the Applicant relied relates to the influence, rather than the control, that President Milošević had or did not have over the authorities in Pale. It mainly consists of the evidence given at the *Milošević* trial by Lord Owen and General Wesley Clark and also Lord Owen's publications. It does not establish a factual basis for finding the Respondent responsible on a basis of direction or control.

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*(5) Conclusion as to Responsibility for Events at Srebrenica under Article III, Paragraph* (a)*, of the Genocide Convention*

413. In the light of the information available to it, the Court finds, as indicated above, that it has not been established that the massacres at Srebrenica were committed by persons or entities ranking as organs of the Respondent (see paragraph 395 above). It finds also that it has not been established that those massacres were committed on the instructions or under the direction of organs of the respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which, as indicated in paragraph 297 above, constituted the crime of genocide, were perpetrated.

The Applicant has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres, still less that any such instructions were given with the specific intent *(dolus specialis)* characterizing the crime of genocide, which would have had to be present in order for the Respondent to be held responsible on this basis. All indications are to the contrary: that the

decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY.

As for the killings committed by the "Scorpions" paramilitary militias, notably at Trnovo (paragraph 289 above), even if it were accepted that they were an element of the genocide committed in the Srebrenica area, which is not clearly established by the decisions thus far rendered by the ICTY (see, in particular, the Trial Chamber's decision of 12 April 2006 in the *Stanišić and Simatović* case, IT-03-69), it has not been proved that they took place either on the instructions or under the control of organs of the FRY.

414. Finally, the Court observes that none of the situations, other than those referred to in Articles 4 and 8 of the ILC's Articles on State Responsibility, in which specific conduct may be attributed to a State, matches the circumstances of the present case in regard to the possibility of attributing the genocide at Srebrenica to the Respondent. The Court does not see itself required to decide at this stage whether the ILC's Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case. The acts constituting genocide were not committed by persons or entities which, while not being organs of the FRY, were empowered by it to exercise elements of the governmental authority (Art. 5), nor by organs placed at the Respondent's disposal by another State (Art. 6), nor by persons in fact exercising elements of the governmental authority in the absence or default of the official authorities of the Respondent (Art. 9); finally, the Respondent has not acknowledged and adopted the conduct of the perpetrators of the acts of genocide as its own (Art. 11).

415. The Court concludes from the foregoing that the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent under the rules of international law of State responsibility: thus, the international responsibility of the Respondent is not engaged on this basis.

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## VIII. The Question of Responsibility, in Respect of Srebrenica, for Acts Enumerated in Article III, Paragraphs *(b)* to *(e)*, of the Genocide Convention

416. The Court now comes to the second of the questions set out in paragraph 379 above, namely, that relating to the Respondent's possible responsibility on the ground of one of the acts related to genocide enumerated in Article III of the Convention. These are: conspiracy to

commit genocide (Art. III, para. *(b)*), direct and public incitement to commit genocide (Art. III, para. *(c)*), attempt to commit genocide (Art. III, para. *(d)*) — though no claim is made under this head in the Applicant's final submissions in the present case — and complicity in genocide (Art. III, para. *(e)*). For the reasons already stated (paragraph 380 above), the Court must make a finding on this matter inasmuch as it has replied in the negative to the previous question, that of the Respondent's responsibility in the commission of the genocide itself.

417. It is clear from an examination of the facts of the case that subparagraphs *(b)* and *(c)* of Article III are irrelevant in the present case. It has not been proved that organs of the FRY, or persons acting on the instructions or under the effective control of that State, committed acts that could be characterized as "[c]onspiracy to commit genocide"(Art. III, para. *(b)*), or as "[d]irect and public incitement to commit genocide" (Art. III, para. *(c)*), if one considers, as is appropriate, only the events in Srebrenica. As regards paragraph *(b)*, what was said above regarding the attribution to the Respondent of acts of genocide, namely that the massacres were perpetrated by persons and groups of persons (the VRS in particular) who did not have the character of organs of the Respondent, and did not act on the instructions or under the effective control of the Respondent, is sufficient to exclude the latter's responsibility in this regard. As regards subparagraph *(c)*, none of the information brought to the attention of the Court is sufficient to establish that organs of the Respondent, or persons acting on its instructions or under its effective control, directly and publicly incited the commission of the genocide in Srebrenica; nor is it proven, for that matter, that such organs or persons incited the commission of acts of genocide anywhere else on the territory of Bosnia and Herzegovina. In this respect, the Court must only accept precise and incontrovertible evidence, of which there is clearly none.

418. A more delicate question is whether it can be accepted that acts which could be characterized as "complicity in genocide", within the meaning of Article III, paragraph *(e)*, can be attributed to organs of the Respondent or to persons acting under its instructions or under its effective control.

This question calls for some preliminary comment.

419. First, the question of "complicity" is to be distinguished from the question, already considered and answered in the negative, whether the perpetrators of the acts of genocide committed in Srebrenica acted on the instructions of or under the direction or effective control of the organs of the FRY. It is true that in certain national systems of criminal law, giving instructions or orders to persons to commit a criminal act is considered as the mark of complicity in the commission of that act. However, in the particular context of the application of the law of international responsibility in the domain of genocide, if it were established that a genocidal act had been committed on the instructions or under the direction of a

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State, the necessary conclusion would be that the genocide was attributable to the State, which would be directly responsible for it, pursuant to the rule referred to above (paragraph 398), and no question of complicity would arise. But, as already stated, that is not the situation in the present case.

However there is no doubt that "complicity", in the sense of Article III, paragraph *(e)*, of the Convention, includes the provision of means to enable or facilitate the commission of the crime; it is thus on this aspect that the Court must focus. In this respect, it is noteworthy that, although "complicity", as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the "aid or assistance" furnished by one State for the commission of a wrongful act by another State.

420. In this connection, reference should be made to Article 16 of the ILC's Articles on State Responsibility, reflecting a customary rule, which reads as follows:

> "*Article 16*
>
> *Aid or assistance in the commission of an internationally wrongful act*
>
> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> *(a)* That State does so with knowledge of the circumstances of the internationally wrongful act; and
> *(b)* The act would be internationally wrongful if committed by that State."

Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between "complicity in genocide", within the meaning of Article III, paragraph *(e)*, of the Convention, and the "aid or assistance" of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 — setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity. In other words, to ascertain whether the Respondent is responsible for "complicity in genocide" within the meaning of Article III, paragraph *(e)*, which is what the Court now has to do, it must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished "aid or assistance" in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.

421. Before the Court turns to an examination of the facts, one further comment is required. It concerns the link between the specific intent *(dolus specialis)* which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime): the question arises whether complicity presupposes that the accomplice shares the specific intent *(dolus specialis)* of the principal perpetrator. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent *(dolus specialis)* of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity. The Court will thus first consider whether this latter condition is met in the present case. It is only if it replies to that question of fact in the affirmative that it will need to determine the legal point referred to above.

422. The Court is not convinced by the evidence furnished by the Applicant that the above conditions were met. Undoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY. However, the sole task of the Court is to establish the legal responsibility of the Respondent, a responsibility which is subject to very specific conditions. One of those conditions is not fulfilled, because it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied — and continued to supply — the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.

423. A point which is clearly decisive in this connection is that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken; the Court has found (paragraph 295 above) that that decision was taken shortly before it was actually carried out, a process which took a very short time (essentially between 13 and 16 July 1995), despite the exceptionally high number of victims. It has therefore not been conclusively established

that, at the crucial time, the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide.

424. The Court concludes from the above that the international responsibility of the Respondent is not engaged for acts of complicity in genocide mentioned in Article III, paragraph *(e)*, of the Convention. In the light of this finding, and of the findings above relating to the other paragraphs of Article III, the international responsibility of the Respondent is not engaged under Article III as a whole.

* * *

## IX. The Question of Responsibility for Breach of the Obligations to Prevent and Punish Genocide

425. The Court now turns to the third and last of the questions set out in paragraph 379 above: has the respondent State complied with its obligations to prevent and punish genocide under Article I of the Convention?

Despite the clear links between the duty to prevent genocide and the duty to punish its perpetrators, these are, in the view of the Court, two distinct yet connected obligations, each of which must be considered in turn.

426. It is true that, simply by its wording, Article I of the Convention brings out the close link between prevention and punishment: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." It is also true that one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent. Lastly, it is true that, although in the subsequent Articles, the Convention includes fairly detailed provisions concerning the duty to punish (Articles III to VII), it reverts to the obligation of prevention, stated as a principle in Article I, only in Article VIII:

> "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."

427. However, it is not the case that the obligation to prevent has no separate legal existence of its own; that it is, as it were, absorbed by the

obligation to punish, which is therefore the only duty the performance of which may be subject to review by the Court. The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs.

This is the reason why the Court will first consider the manner in which the Respondent has performed its obligation to prevent before examining the situation as regards the obligation to punish.

*(1) The Obligation to Prevent Genocide*

428. As regards the obligation to prevent genocide, the Court thinks it necessary to begin with the following introductory remarks and clarifications, amplifying the observations already made above.

429. First, the Genocide Convention is not the only international instrument providing for an obligation on the States parties to it to take certain steps to prevent the acts it seeks to prohibit. Many other instruments include a similar obligation, in various forms: see, for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Art. 2); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 14 December 1973 (Art. 4); the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994 (Art. 11); the International Convention on the Suppression of Terrorist Bombings of 15 December 1997 (Art. 15). The content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented.

The decision of the Court does not, in this case, purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts. Still less does the decision of the Court purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law. The Court will therefore confine itself to determining the specific scope of the duty to prevent in the Genocide Convention, and to the extent that such a

determination is necessary to the decision to be given on the dispute before it. This will, of course, not absolve it of the need to refer, if need be, to the rules of law whose scope extends beyond the specific field covered by the Convention.

430. Secondly, it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.

431. Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach

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of an obligation of prevention occurs. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility:

> ". . . . . .
> 3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent *(dolus specialis)*, it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent.

In consequence, in the present case the Court will have to consider the Respondent's conduct, in the light of its duty to prevent, solely in connection with the massacres at Srebrenica, because these are the only acts in respect of which the Court has concluded in this case that genocide was committed.

432. Fourth and finally, the Court believes it especially important to lay stress on the differences between the requirements to be met before a State can be held to have violated the obligation to prevent genocide — within the meaning of Article I of the Convention — and those to be satisfied in order for a State to be held responsible for "complicity in genocide" — within the meaning of Article III, paragraph *(e)* — as previously discussed. There are two main differences; they are so significant as to make it impossible to treat the two types of violation in the same way.

In the first place, as noted above, complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent

results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission; this is merely the reflection of the notion that the ban on genocide and the other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts, while the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur.

In the second place, as also noted above, there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts. In other words, an accomplice must have given support in perpetrating the genocide with full knowledge of the facts. By contrast, a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed. As will be seen below, this latter difference could prove decisive in the present case in determining the responsibility incurred by the Respondent.

433. In light of the foregoing, the Court will now consider the facts of the case. For the reasons stated above (paragraph 431), it will confine itself to the FRY's conduct vis-à-vis the Srebrenica massacres.

434. The Court would first note that, during the period under consideration, the FRY was in a position of influence over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other, which, though somewhat weaker than in the preceding period, nonetheless remained very close.

435. Secondly, the Court cannot but note that, on the relevant date, the FRY was bound by very specific obligations by virtue of the two Orders indicating provisional measures delivered by the Court in 1993. In particular, in its Order of 8 April 1993, the Court stated, *inter alia*, that although not able, at that early stage in the proceedings, to make "definitive findings of fact or of imputability" (*I.C.J. Reports 1993*, p. 22, para. 44) the FRY was required to ensure:

> "that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide . . ." (*I.C.J. Reports 1993*, p. 24, para. 52 A (2)).

The Court's use, in the above passage, of the term "influence" is particularly revealing of the fact that the Order concerned not only the persons or entities whose conduct was attributable to the FRY, but also all those with whom the Respondent maintained close links and on which it could exert a certain influence. Although in principle the two issues are separate, and the second will be examined below, it is not possible, when considering the way the Respondent discharged its obligation of prevention under the Convention, to fail to take account of the obligation incumbent upon it, albeit on a different basis, to implement the provisional measures indicated by the Court.

436. Thirdly, the Court recalls that although it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above: paragraph 424), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave. Among the documents containing information clearly suggesting that such an awareness existed, mention should be made of the above-mentioned report (see paragraphs 283 and 285 above) of the United Nations Secretary-General prepared pursuant to General Assembly resolution 53/35 on the "fall of Srebrenica" (United Nations doc. A/54/549), which recounts the visit to Belgrade on 14 July 1995 of the European Union negotiator Mr. Bildt to meet Mr. Milošević. Mr. Bildt, in substance, informed Mr. Milošević of his serious concern and

> "pressed the President to arrange immediate access for the UNHCR to assist the people of Srebrenica, and for the ICRC to start to register those who were being treated by the BSA [Bosnian Serb Army] as prisoners of war".

437. The Applicant has drawn attention to certain evidence given by General Wesley Clark before the ICTY in the *Milošević* case. General Clark referred to a conversation that he had had with Milošević during the negotiation of the Dayton Agreement. He stated that

> "I went to Milošević and I asked him. I said, 'If you have so much influence over these [Bosnian] Serbs, how could you have allowed

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> General Mladić to have killed all those people at Srebrenica?' And he looked to me — at me. His expression was very grave. He paused before he answered, and he said, 'Well, General Clark, I warned him not to do this, but he didn't listen to me.' And it was in the context of all the publicity at the time about the Srebrenica massacre." (*Milošević*, IT-02-54-T, Transcript, 16 December 2003, pp. 30494-30495).

General Clark gave it as his opinion, in his evidence before the ICTY, that the circumstances indicated that Milošević had foreknowledge of what was to be "a military operation combined with a massacre" (*ibid.*, p. 30497). The ICTY record shows that Milošević denied ever making the statement to which General Clark referred, but the Trial Chamber nevertheless relied on General Clark's testimony in its Decision of 16 June 2004 when rejecting the Motion for Judgment of Acquittal (*Milošević*, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 280).

438. In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milošević's own observations to Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.

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Such is the case here. In view of the foregoing, the Court concludes that the Respondent violated its obligation to prevent the Srebrenica genocide in such a manner as to engage its international responsibility.

* *

*(2) The Obligation to Punish Genocide*

439. The Court now turns to the question of the Respondent's compliance with its obligation to punish the crime of genocide stemming from Article I and the other relevant provisions of the Convention.

440. In its fifth final submission, Bosnia and Herzegovina requests the Court to adjudge and declare:

> "5. That Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal."

441. This submission implicitly refers to Article VI of the Convention, according to which:

> "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."

442. The Court would first recall that the genocide in Srebrenica, the commission of which it has established above, was not carried out in the Respondent's territory. It concludes from this that the Respondent cannot be charged with not having tried before its own courts those accused of having participated in the Srebrenica genocide, either as principal perpetrators or as accomplices, or of having committed one of the other acts mentioned in Article III of the Convention in connection with the Srebrenica genocide. Even if Serbian domestic law granted jurisdiction to its criminal courts to try those accused, and even supposing such proceedings were compatible with Serbia's other international obligations, *inter alia* its obligation to co-operate with the ICTY, to which the Court will revert below, an obligation to try the perpetrators of the Srebrenica massacre in Serbia's domestic courts cannot be deduced from Article VI. Article VI only obliges the Contracting Parties to institute and exercise

territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.

443. It is thus to the obligation for States parties to co-operate with the "international penal tribunal" mentioned in the above provision that the Court must now turn its attention. For it is certain that once such a court has been established, Article VI obliges the Contracting Parties "which shall have accepted its jurisdiction" to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory — even if the crime of which they are accused was committed outside it — and, failing prosecution of them in the parties' own courts, that they will hand them over for trial by the competent international tribunal.

444. In order to determine whether the Respondent has fulfilled its obligations in this respect, the Court must first answer two preliminary questions: does the ICTY constitute an "international penal tribunal" within the meaning of Article VI? And must the Respondent be regarded as having "accepted the jurisdiction" of the tribunal within the meaning of that provision?

445. As regards the first question, the Court considers that the reply must definitely be in the affirmative. The notion of an "international penal tribunal" within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III. The nature of the legal instrument by which such a court is established is without importance in this respect. When drafting the Genocide Convention, its authors probably thought that such a court would be created by treaty: a clear pointer to this lies in the reference to "those Contracting Parties which shall have accepted [the] jurisdiction" of the international penal tribunal. Yet, it would be contrary to the object of the provision to interpret the notion of "international penal tribunal" restrictively in order to exclude from it a court which, as in the case of the ICTY, was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter. The Court has found nothing to suggest that such a possibility was considered by the authors of the Convention, but no intention of seeking to exclude it can be imputed to them.

446. The question whether the Respondent must be regarded as having "accepted the jurisdiction" of the ICTY within the meaning of Article VI must consequently be formulated as follows: is the Respondent obliged to accept the jurisdiction of the ICTY, and to co-operate with the Tribunal by virtue of the Security Council resolution which established it, or of

some other rule of international law? If so, it would have to be concluded that, for the Respondent, co-operation with the ICTY constitutes both an obligation stemming from the resolution concerned and from the United Nations Charter, or from another norm of international law obliging the Respondent to co-operate, and an obligation arising from its status as a party to the Genocide Convention, this last clearly being the only one of direct relevance in the present case.

447. For the purposes of the present case, the Court only has to determine whether the FRY was under an obligation to co-operate with the ICTY, and if so, on what basis, from when the Srebrenica genocide was committed in July 1995. To that end, suffice it to note that the FRY was under an obligation to co-operate with the ICTY from 14 December 1995 at the latest, the date of the signing and entry into force of the Dayton Agreement between Bosnia and Herzegovina, Croatia and the FRY. Annex 1A of that treaty, made binding on the parties by virtue of its Article II, provides that they must fully co-operate, notably with the ICTY. Thus, from 14 December 1995 at the latest, and at least on the basis of the Dayton Agreement, the FRY must be regarded as having "accepted [the] jurisdiction" of the ICTY within the meaning of Article VI of the Convention. This fact is sufficient for the Court in its consideration of the present case, since its task is to rule upon the Respondent's compliance with the obligation resulting from Article VI of the Convention in relation to the Srebrenica genocide, from when it was perpetrated to the present day, and since the Applicant has not invoked any failure to respect the obligation to co-operate alleged to have occurred specifically between July and December 1995. Similarly, the Court is not required to decide whether, between 1995 and 2000, the FRY's obligation to co-operate had any legal basis besides the Dayton Agreement. Needless to say, the admission of the FRY to the United Nations in 2000 provided a further basis for its obligation to co-operate: but while the legal basis concerned was thereby confirmed, that did not change the scope of the obligation. There is therefore no need, for the purposes of assessing how the Respondent has complied with its obligation under Article VI of the Convention, to distinguish between the period before and the period after its admission as a Member of the United Nations, at any event from 14 December 1995 onwards.

448. Turning now to the facts of the case, the question the Court must answer is whether the Respondent has fully co-operated with the ICTY, in particular by arresting and handing over to the Tribunal any persons accused of genocide as a result of the Srebrenica genocide and finding themselves on its territory. In this connection, the Court would first observe that, during the oral proceedings, the Respondent asserted that the duty to co-operate had been complied with following the régime change in Belgrade in the year 2000, thus implicitly admitting that such had not been the case during the preceding period. The conduct of the

organs of the FRY before the régime change however engages the Respondent's international responsibility just as much as it does that of its State authorities from that date. Further, the Court cannot but attach a certain weight to the plentiful, and mutually corroborative, information suggesting that General Mladić, indicted by the ICTY for genocide, as one of those principally responsible for the Srebrenica massacres, was on the territory of the Respondent at least on several occasions and for substantial periods during the last few years and is still there now, without the Serb authorities doing what they could and can reasonably do to ascertain exactly where he is living and arrest him. In particular, counsel for the Applicant referred during the hearings to recent statements made by the Respondent's Minister for Foreign Affairs, reproduced in the national press in April 2006, and according to which the intelligence services of that State knew where Mladić was living in Serbia, but refrained from informing the authorities competent to order his arrest because certain members of those services had allegedly remained loyal to the fugitive. The authenticity and accuracy of those statements has not been disputed by the Respondent at any time.

449. It therefore appears to the Court sufficiently established that the Respondent failed in its duty to co-operate fully with the ICTY. This failure constitutes a violation by the Respondent of its duties as a party to the Dayton Agreement, and as a Member of the United Nations, and accordingly a violation of its obligations under Article VI of the Genocide Convention. The Court is of course without jurisdiction in the present case to declare that the Respondent has breached any obligations other than those under the Convention. But as the Court has jurisdiction to declare a breach of Article VI insofar as it obliges States to co-operate with the "international penal tribunal", the Court may find for that purpose that the requirements for the existence of such a breach have been met. One of those requirements is that the State whose responsibility is in issue must have "accepted [the] jurisdiction" of that "international penal tribunal"; the Court thus finds that the Respondent was under a duty to co-operate with the tribunal concerned pursuant to international instruments other than the Convention, and failed in that duty. On this point, the Applicant's submissions relating to the violation by the Respondent of Articles I and VI of the Convention must therefore be upheld.

450. It follows from the foregoing considerations that the Respondent failed to comply both with its obligation to prevent and its obligation to punish genocide deriving from the Convention, and that its international responsibility is thereby engaged.

* * *

## X. The Question of Responsibility for Breach of the Court's Orders Indicating Provisional Measures

451. In its seventh submission Bosnia and Herzegovina requests the Court to adjudge and declare:

> "7. That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court."

452. The Court observes that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109). Although the Court only had occasion to make such a finding in a judgment subsequent to the Orders that it made in the present dispute, this does not affect the binding nature of those Orders, since in the Judgment referred to the Court did no more than give the provisions of the Statute the meaning and scope that they had possessed from the outset. It notes that provisional measures are aimed at preserving the rights of each of the parties pending the final decision of the Court. The Court's Orders of 8 April and 13 September 1993 indicating provisional measures created legal obligations which both Parties were required to satisfy.

453. The Court indicated the following provisional measures in the *dispositif*, paragraph 52, of its Order of 8 April 1993:

> "A. (1). . . . . .
>
> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide;
>
> (2). . . . . .
>
> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group;
>
> . . . . . .

B. . . . . .

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of the Republic of Bosnia and Herzegovina should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution."

454. The Court reaffirmed these measures in the *dispositif* of its Order of 13 September 1993.

455. From the Applicant's written and oral pleadings as a whole, it is clear that the Applicant is not accusing the Respondent of failing to respect measure B above, and that its submissions relate solely to the measures indicated in paragraph A, subparagraphs (1) and (2). It is therefore only to that extent that the Court will consider whether the Respondent has fully complied with its obligation to respect the measures ordered by the Court.

456. The answer to this question may be found in the reasoning in the present Judgment relating to the Applicant's other submissions to the Court. From these it is clear that in respect of the massacres at Srebrenica in July 1995 the Respondent failed to fulfil its obligation indicated in paragraph 52 A (1) of the Order of 8 April 1993 and reaffirmed in the Order of 13 September 1993 to "take all measures within its power to prevent commission of the crime of genocide". Nor did it comply with the measure indicated in paragraph 52 A (2) of the Order of 8 April 1993, reaffirmed in the Order of 13 September 1993, insofar as that measure required it to "ensure that any . . . organizations and persons which may be subject to its . . . influence . . . do not commit any acts of genocide".

457. However, the remainder of the Applicant's seventh submission claiming that the Respondent failed to comply with the provisional measures indicated must be rejected for the reasons set out above in respect of the Applicant's other submissions (paragraphs 415 and 424).

458. As for the request that the Court hold the Respondent to be under an obligation to the Applicant to provide symbolic compensation, in an amount to be determined by the Court, for the breach thus found, the Court observes that the question of compensation for the injury caused to the Applicant by the Respondent's breach of aspects of the Orders indicating provisional measures merges with the question of compensation for the injury suffered from the violation of the corresponding obligations under the Genocide Convention. It will therefore be dealt with below, in connection with consideration of points *(b)* and *(c)* of the Respondent's sixth submission, which concern the financial compensation which the Applicant claims to be owed by the Respondent.

* * *

## XI. The Question of Reparation

459. Having thus found that the Respondent has failed to comply with its obligations under the Genocide Convention in respect of the prevention and punishment of genocide, the Court turns to the question of reparation. The Applicant, in its final submissions, has asked the Court to decide that the Respondent

> "must redress the consequences of its international wrongful acts and, as a result of the international responsibility incurred for . . . violations of the Convention on the Prevention and Punishment of the Crime of Genocide, must pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused" (submission 6 *(b)*).

The Applicant also asks the Court to decide that the Respondent

> "shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal" (submission 6 *(a)*),

and that the Respondent "shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court" (submission 6 *(d)*). These submissions, and in particular that relating to compensation, were however predicated on the basis that the Court would have upheld, not merely that part of the Applicant's claim as relates to the obligation of prevention and punishment, but also the claim that the Respondent has violated its substantive obligation not to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement, and the claim that the Respondent has aided and abetted genocide. The Court has now to consider what is the appropriate form of reparation for the other forms of violation of the Convention which have been alleged against the Respondent and which the Court has found to have been established, that is to say breaches of the obligations to prevent and punish.

460. The principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the *Factory at Chorzów* case: that "reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47: see

also Article 31 of the ILC's Articles on State Responsibility). In the circumstances of this case, as the Applicant recognizes, it is inappropriate to ask the Court to find that the Respondent is under an obligation of *restitutio in integrum*. Insofar as restitution is not possible, as the Court stated in the case of the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, "[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it" (*I.C.J. Reports 1997*, p. 81, para. 152.; cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 198, paras. 152-153; see also Article 36 of the ILC's Articles on State Responsibility). It is therefore appropriate to consider what were the consequences of the failure of the Respondent to comply with its obligations under the Genocide Convention to prevent and punish the crime of genocide, committed in Bosnia and Herzegovina, and what damage can be said to have been caused thereby.

461. The Court has found that the authorities of the Respondent could not have been unaware of the grave risk of genocide once the VRS forces had decided to take possession of the Srebrenica enclave, and that in view of its influence over the events, the Respondent must be held to have had the means of action by which it could seek to prevent genocide, and to have manifestly refrained from employing them (paragraph 438). To that extent therefore it failed to comply with its obligation of prevention under the Convention. The obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide. To make this finding, the Court did not have to decide whether the acts of genocide committed at Srebrenica would have occurred anyway even if the Respondent had done as it should have and employed the means available to it. This is because, as explained above, the obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome. It therefore does not follow from the Court's reasoning above in finding a violation by the Respondent of its obligation of prevention that the atrocious suffering caused by the genocide committed at Srebrenica would not have occurred had the violation not taken place.

462. The Court cannot however leave it at that. Since it now has to rule on the claim for reparation, it must ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent with the consequence that the Respondent should be required to make reparation for it, in accordance with the

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principle of customary international law stated above. In this context, the question just mentioned, whether the genocide at Srebrenica would have taken place even if the Respondent had attempted to prevent it by employing all means in its possession, becomes directly relevant, for the definition of the extent of the obligation of reparation borne by the Respondent as a result of its wrongful conduct. The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so. As noted above, the Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities, but it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought. Since the Court cannot therefore regard as proven a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide.

463. It is however clear that the Applicant is entitled to reparation in the form of satisfaction, and this may take the most appropriate form, as the Applicant itself suggested, of a declaration in the present Judgment that the Respondent has failed to comply with the obligation imposed by the Convention to prevent the crime of genocide. As in the *Corfu Channel (United Kingdom* v. *Albania)* case, the Court considers that a declaration of this kind is "in itself appropriate satisfaction" (*Merits, Judgment, I.C.J. Reports 1949*, pp. 35, 36), and it will, as in that case, include such a declaration in the operative clause of the present Judgment. The Applicant acknowledges that this failure is no longer continuing, and accordingly has withdrawn the request made in the Reply that the Court declare that the Respondent "has violated *and is violating* the Convention" (emphasis added).

464. The Court now turns to the question of the appropriate reparation for the breach by the Respondent of its obligation under the Convention to punish acts of genocide; in this respect, the Applicant asserts the existence of a continuing breach, and therefore maintains *(inter alia)* its request for a declaration in that sense. As noted above (paragraph 440), the Applicant includes under this heading the failure "to transfer individuals accused of genocide or any other act prohibited by the Conven-

tion to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal"; and the Court has found that in that respect the Respondent is indeed in breach of Article VI of the Convention (paragraph 449 above). A declaration to that effect is therefore one appropriate form of satisfaction, in the same way as in relation to the breach of the obligation to prevent genocide. However, the Applicant asks the Court in this respect to decide more specifically that

> "Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal."

465. It will be clear from the Court's findings above on the question of the obligation to punish under the Convention that it is satisfied that the Respondent has outstanding obligations as regards the transfer to the ICTY of persons accused of genocide, in order to comply with its obligations under Articles I and VI of the Genocide Convention, in particular in respect of General Ratko Mladić (paragraph 448). The Court will therefore make a declaration in these terms in the operative clause of the present Judgment, which will in its view constitute appropriate satisfaction.

466. In its final submissions, the Applicant also requests the Court to decide "that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court". As presented, this submission relates to all the wrongful acts, i.e. breaches of the Genocide Convention, attributed by the Applicant to the Respondent, thus including alleged breaches of the Respondent's obligation not itself to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement. Insofar as the Court has not upheld these claims, the submission falls. There remains however the question whether it is appropriate to direct that the Respondent provide guarantees and assurances of non-repetition in relation to the established breaches of the obligations to prevent and punish genocide. The Court notes the reasons advanced by counsel for the Applicant at the hearings in support of the submission, which relate for the most part to "recent events [which] cannot fail to cause concern as to whether movements in Serbia and Montenegro calling for genocide have disappeared". It considers that these indications do not constitute sufficient grounds for requiring guarantees of non-repetition. The Applicant also referred in this connection to the question of non-compliance with provisional measures, but this matter has already been examined above (paragraphs 451 to 458), and will be mentioned further below. In

the circumstances, the Court considers that the declaration referred to in paragraph 465 above is sufficient as regards the Respondent's continuing duty of punishment, and therefore does not consider that this is a case in which a direction for guarantees of non-repetition would be appropriate.

467. Finally, the Applicant has presented the following submission:

> "That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court."

The provisional measures indicated by the Court's Order of 8 April 1993, and reiterated by the Order of 13 September 1993, were addressed specifically to the Respondent's obligation "to prevent commission of the crime of genocide" and to certain measures which should "in particular" be taken to that end (*I.C.J. Reports 1993*, p. 24, para. 52 (A) (1) and (2)).

468. Provisional measures under Article 41 of the Statute are indicated "pending [the] final decision" in the case, and the measures indicated in 1993 will thus lapse on the delivery of the present Judgment (cf. *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objections, Judgment, I.C.J. Reports 1952*, p. 114; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 442, para. 112). However, as already observed (paragraph 452 above), orders made by the Court indicating provisional measures under Article 41 of the Statute have binding effect, and their purpose is to protect the rights of either party, pending the final decision in the case.

469. The Court has found above (paragraph 456) that, in respect of the massacres at Srebrenica in July 1995, the Respondent failed to take measures which would have satisfied the requirements of paragraphs 52 (A) (1) and (2) of the Court's Order of 8 April 1993 (reaffirmed in the Order of 13 September 1993). The Court however considers that, for purposes of reparation, the Respondent's non-compliance with the provisional measures ordered is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment laid upon it by the Convention. The Court does not therefore find it appropriate to give effect to the Applicant's request for an order for symbolic compensation in this respect. The Court will however include in the operative clause of the present Judgment, by way of satisfaction, a declaration that the Respondent has failed to comply with the Court's Orders indicating provisional measures.

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470. The Court further notes that one of the provisional measures indicated in the Order of 8 April and reaffirmed in that of 13 September 1993 was addressed to both Parties. The Court's findings in paragraphs 456 to 457 and 469 are without prejudice to the question whether the Applicant did not also fail to comply with the Orders indicating provisional measures.

* * *

## XII. Operative Clause

471. For these reasons,

THE COURT,

(1) by ten votes to five,

*Rejects* the objections contained in the final submissions made by the Respondent to the effect that the Court has no jurisdiction; and *affirms* that it has jurisdiction, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, to adjudicate upon the dispute brought before it on 20 March 1993 by the Republic of Bosnia and Herzegovina;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; *Judge* ad hoc Mahiou;

AGAINST: *Judges* Ranjeva, Shi, Koroma, Skotnikov; *Judge* ad hoc Kreća;

(2) by thirteen votes to two,

*Finds* that Serbia has not committed genocide, through its organs or persons whose acts engage its responsibility under customary international law, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: *President* Higgins; *Judges* Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judge* ad hoc Kreća;

AGAINST: *Vice-President* Al-Khasawneh; *Judge* ad hoc Mahiou;

(3) by thirteen votes to two,

*Finds* that Serbia has not conspired to commit genocide, nor incited the commission of genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: *President* Higgins; *Judges* Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judge* ad hoc Kreća;

AGAINST: *Vice-President* Al-Khasawneh; *Judge* ad hoc Mahiou;

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(4) by eleven votes to four,

*Finds* that Serbia has not been complicit in genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: *President* Higgins; *Judges* Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Sepúlveda-Amor, Skotnikov; *Judge* ad hoc Kreća;

AGAINST: *Vice-President* Al-Khasawneh; *Judges* Keith, Bennouna; *Judge* ad hoc Mahiou;

(5) by twelve votes to three,

*Finds* that Serbia has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna; *Judge* ad hoc Mahiou;

AGAINST: *Judges* Tomka, Skotnikov; *Judge* ad hoc Kreća;

(6) by fourteen votes to one,

*Finds* that Serbia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia, and thus having failed fully to co-operate with that Tribunal;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judge* ad hoc Mahiou;

AGAINST: *Judge* ad hoc Kreća;

(7) by thirteen votes to two,

*Finds* that Serbia has violated its obligation to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; *Judge* ad hoc Mahiou;

AGAINST: *Judge* Skotnikov; *Judge* ad hoc Kreća;

(8) by fourteen votes to one,

*Decides* that Serbia shall immediately take effective steps to ensure full compliance with its obligation under the Convention on the Prevention

and Punishment of the Crime of Genocide to punish acts of genocide as defined by Article II of the Convention, or any of the other acts proscribed by Article III of the Convention, and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that Tribunal;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judge* ad hoc Mahiou;

AGAINST: *Judge* ad hoc Kreća;

(9) by thirteen votes to two,

*Finds* that, as regards the breaches by Serbia of the obligations referred to in subparagraphs (5) and (7) above, the Court's findings in those paragraphs constitute appropriate satisfaction, and that the case is not one in which an order for payment of compensation, or, in respect of the violation referred to in subparagraph (5), a direction to provide assurances and guarantees of non-repetition, would be appropriate.

IN FAVOUR: *President* Higgins; *Judges* Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judge* ad hoc Kreća;

AGAINST: *Vice-President* Al-Khasawneh; *Judge* ad hoc Mahiou.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of February, two thousand and seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Bosnia and Herzegovina and the Government of Serbia, respectively.

*(Signed)* Rosalyn HIGGINS,
President.

*(Signed)* Philippe COUVREUR,
Registrar.

Vice-President AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judges RANJEVA, SHI and KOROMA append a joint dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a separate opinion to the Judgment of the Court; Judges SHI and KOROMA append a joint declaration to the Judgment of the Court; Judges OWADA and TOMKA append separate opinions to the Judgment of the Court; Judges KEITH, BENNOUNA and SKOTNIKOV append declarations

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to the Judgment of the Court; Judge *ad hoc* MAHIOU appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* KREĆA appends a separate opinion to the Judgment of the Court.

*(Initialled)* R.H.

*(Initialled)* Ph.C.

United Nations S/PV.5158

# Security Council

Sixtieth year

*Provisional*

**5158**th meeting

Thursday, 31 March 2005, 10.30 p.m.

New York

| | | |
|---|---|---|
| *President:* | Mr. Sardenberg | (Brazil) |
| *Members:* | Algeria | Mr. Baali |
| | Argentina | Mr. Mayoral |
| | Benin | Mr. Adechi |
| | China | Mr. Wang Guangya |
| | Denmark | Ms. Løj |
| | France | Mr. De La Sablière |
| | Greece | Mr. Vassilakis |
| | Japan | Mr. Oshima |
| | Philippines | Mr. Baja |
| | Romania | Mr. Motoc |
| | Russian Federation | Mr. Denisov |
| | United Kingdom of Great Britain and Northern Ireland | Sir Emyr Jones Parry |
| | United Republic of Tanzania | Mr. Mahiga |
| | United States of America | Mrs. Patterson |

## Agenda

Reports of the Secretary-General on the Sudan

Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council (S/2005/60)

This record contains the text of speeches delivered in English and of the interpretation of speeches delivered in the other languages. The final text will be printed in the *Official Records of the Security Council*. Corrections should be submitted to the original languages only. They should be incorporated in a copy of the record and sent under the signature of a member of the delegation concerned to the Chief of the Verbatim Reporting Service, room C-154A.

05-29247 (E)

** 0529247 **

*The meeting was called to order at 10.35 p.m.*

**Adoption of the agenda**

*The agenda was adopted.*

**Reports of the Secretary-General on the Sudan**

**Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council (S/2005/60)**

**The President**: I should like to inform the Council that I have received a letter from the representative of the Sudan, in which he requests to be invited to participate in the consideration of the item on the Council's agenda. In conformity with the usual practice, I propose, with the consent of the Council, to invite that representative to participate in the discussion without the right to vote, in accordance with the relevant provisions of the Charter and rule 37 of the Council's provisional rules of procedure.

There being no objection, it is so decided.

*At the invitation of the President, Mr. Erwa (Sudan) took a seat at the Council table.*

**The President**: The Security Council will now resume its consideration of the item on its agenda.

I welcome the presence of the Secretary-General, Mr. Kofi Annan, at this meeting.

Members of the Council have before them document S/2005/60, containing a letter dated 31 January 2005 from the Secretary-General, transmitting the report of the International Commission of Inquiry on Darfur.

Members of the Council also have before them document S/2005/218, which contains the text of a draft resolution submitted by the United Kingdom of Great Britain and Northern Ireland.

It is my understanding that the Council is ready to proceed to the vote on the draft resolution before it. If I hear no objection, I shall now put the draft resolution to the vote.

There being no objection, it is so decided.

*A vote was taken by show of hands.*

*In favour*:

Argentina, Benin, Denmark, France, Greece, Japan, Philippines, Romania, Russian Federation, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania

*Against*:

None

*Abstaining*:

Algeria, Brazil, China, United States of America

**The President**: The result of the voting is as follows: 11 votes in favour, none against and 4 abstentions. The draft resolution has been adopted as resolution 1593 (2005).

I shall now give the floor to those members of the Council who wish to make statements following the voting.

**Mrs. Patterson** (United States of America): Allow me to thank you, Sir, and your delegation for your endeavours during your presidency of the Council this month.

The adoption this month of two resolutions on the Sudan — peacekeeping and sanctions — demonstrates the Council's strong commitment to fostering peace and stability throughout the Sudan. The Council has succeeded in keeping the momentum moving forward on international support for peace in the Sudan. The 10,000-strong peacekeeping force authorized by the Council will assist the parties to the Comprehensive Peace Agreement in implementing that historic peace accord.

The sanctions resolution recognizes that conflict, violence and atrocities in Darfur continue and that the Council must take steps now to pressure the parties to end the violence in Darfur and to conclude a political settlement peacefully. We strongly urge the parties to the conflict in Darfur to cease the violence and atrocities and to resume political negotiations immediately in order to reach a political settlement peacefully.

As we all know, the contributions of the African Union have been and remain integral to the peaceful resolution of the conflict in Darfur. We commend the African Union and its leadership for their continued mission in Darfur. We continue to encourage the African mission in the Sudan to quickly ramp up its authorized force level to enable it to expand its areas of

patrol. We continue to strongly support the African Union's efforts to resolve the conflict in Darfur and urge all Member States to contribute to the mission.

We strongly support bringing to justice those responsible for the crimes and atrocities that have occurred in Darfur and ending the climate of impunity there. Violators of international humanitarian law and human rights law must be held accountable. In September, we concluded that genocide had occurred in Darfur and we called for and supported the creation of the International Commission of Inquiry. United Nations estimates are that 180,000 people have died from violence, atrocities and the hunger and disease caused by the conflict. Justice must be served in Darfur.

By adopting this resolution, the international community has established an accountability mechanism for the perpetrators of crimes and atrocities in Darfur. The resolution will refer the situation in Darfur to the International Criminal Court (ICC) for investigation and prosecution. While the United States believes that the better mechanism would have been a hybrid tribunal in Africa, it is important that the international community speak with one voice in order to help promote effective accountability.

The United States continues to fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute. That strikes at the essence of the nature of sovereignty. Because of our concerns, we do not agree to a Security Council referral of the situation in Darfur to the ICC and abstained in the voting on today's resolution. We decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in the Sudan and because the resolution provides protection from investigation or prosecution for United States nationals and members of the armed forces of non-State parties.

The United States is and will continue to be an important contributor to the peacekeeping and related humanitarian efforts in the Sudan. The language providing protection for the United States and other contributing States is precedent-setting, as it clearly acknowledges the concerns of States not party to the Rome Statute and recognizes that persons from those States should not be vulnerable to investigation or prosecution by the ICC, absent consent by those States or a referral by the Security Council. We believe that, in the future, absent consent of the State involved, any investigations or prosecutions of nationals of non-party States should come only pursuant to a decision by the Security Council.

Consistent with our long-standing views about the appropriate role of the Security Council, we expect that, by having the Security Council refer the situation in Darfur to the ICC, firm political oversight of the process will be exercised. The Council's action today plays an important role in that regard. We expect that the Council will continue to exercise such oversight as investigations and prosecutions pursuant to the referral proceed.

Protection from the jurisdiction of the Court should not be viewed as unusual. Indeed, under article 124, even parties to the Rome Statute can opt out from the Court's jurisdiction over war crimes for a period of seven full years, and important supporters of the Court have in fact availed themselves of that opportunity to protect their own personnel. If it is appropriate to afford such protection from the jurisdiction of the Court to States that have agreed to the Rome Statute, it cannot be inappropriate to afford protection to those that have never agreed. It is our view that non-party States should be able to opt out of the Court's jurisdiction, as parties to the Statute can, and the Council should be prepared to take action to that effect as appropriate situations arise in the future.

Although we abstained on this Security Council referral to the ICC, we have not dropped, and indeed continue to maintain, our long-standing and firm objections and concerns regarding the ICC. We believe that the Rome Statute is flawed and does not have sufficient protections from the possibility of politicized prosecutions. We reiterate our fundamental objection to the Rome Statute's assertions that the ICC has jurisdiction over the nationals, including government officials, of States that have not become parties to the Rome Statute. Non-parties have no obligations in connection with that treaty unless otherwise decided by the Security Council, upon which Members of this Organization have conferred primary responsibility for the maintenance of international peace and security.

We are pleased that the resolution recognizes that none of the expenses incurred in connection with the referral will be borne by the United Nations and that,

instead, such costs will be borne by the parties to the Rome Statute and those that contribute voluntarily. That principle is extremely important and we want to be perfectly clear that any effort to retrench on that principle by this or other organizations to which we contribute could result in our withholding funding or taking other action in response. That is a situation that we must avoid.

As is well known, in connection with our concerns about the jurisdiction of the Court and the potential for politicized prosecutions, we have concluded agreements with 99 countries — over half the States Members of this Organization — since the entry into force of the Rome Statute to protect against the possibility of transfer or surrender of United States persons to the Court. We appreciate that the resolution takes note of the existence of those agreements and will continue to pursue additional such agreements with other countries as we move forward.

Recognizing that non-parties have no obligation under the Rome Statute, the resolution recognizes and accepts that the ability of some States to cooperate with the ICC investigation will be restricted in connection with applicable domestic law. For the United States, we are restricted by United States statutes that reflect deep concerns about the Court from providing assistance and support to the ICC.

In the Darfur case, the Council included, at our request, a provision that exempts persons of non-party States in the Sudan from ICC prosecution. We respect the position of those countries that are parties to the Rome Statute of the International Criminal Court, but persons from countries not party that are supporting the United Nations or the African Union's efforts should not be placed in jeopardy. This resolution provides clear protections for United States persons. No United States person supporting the operations in the Sudan will be subject to investigation or prosecution because of this resolution.

That does not mean that there will be immunity for American citizens who act in violation of the law. We will continue to discipline our own people when appropriate.

Let me conclude by reminding everyone that the point of these three resolutions is to help the people of the Sudan. They have suffered through appalling civil conflicts that have resulted in untold suffering. We cannot bring justice to all the victims. What we can do is help the people of the Sudan turn a historic page and enjoy a much, much better future. This month's three Sudan resolutions are designed to help reach that goal.

**Mr. Baali** (Algeria) (*spoke in French*): Algeria reaffirms its firm condemnation of the grave violations of human rights and international humanitarian law committed in Darfur. It also expresses its sympathy for and solidarity with the victims of that tragedy. From the outbreak of the crisis, Algeria has been involved in the international community's efforts to end the suffering of the civilian population and to find a political solution. In that regard, Algeria has spared no effort to support the effective measures taken by the African Union and its Chairman, President Obasanjo, to stabilize the situation and help the parties to find a peaceful solution to that fratricidal conflict.

Algeria firmly believes that fighting impunity is a crucial element for the entrenchment of peace and stability. That need is all the more essential in the case of Darfur because the conflict, which has raged for several years, has damaged relations between the communities. The process of fighting impunity must therefore also aim at restoring harmonious relations between the populations of Darfur and serve the cause of peace.

From our point of view, all steps taken by the international community must seek four equally important objectives. First, they must bring to justice those guilty of crimes through credible, fair and transparent trials. Secondly, they must render justice to the victims by restoring their rights and by compensating them for the moral and material damages they have suffered. Thirdly, the steps taken must promote national reconciliation, a political settlement of the crisis and the strengthening of peace and stability throughout the Sudan. Finally, they must gain the Sudanese people's support for a process in which they are the most important concern and that ensures, in particular, the Government's cooperation, which is essential for bringing that process to completion.

Taking those considerations into account, Algeria believes that the African Union is best placed to take charge of that sensitive and delicate undertaking. We are convinced that the African Union can satisfy the requirements for peace without sacrificing the requirement of justice that we all owe the victims. For, while it is true that there can be no peace without justice, it is equally true that without peace, there will be no justice.

On behalf of the African Union, President Obasanjo made a proposal founded precisely on the desire to reconcile those two fundamental requirements, mindful that utmost prudence must be exercised when taking action. We regret that the members of the Council have declined to study that proposal in depth or to assess it in the light of the possibilities it offers for attaining our common objective of placing the fight against impunity in the service of the strengthening of peace and national reconciliation.

We also underline that one cannot claim to support the African Union and leave to it the task of proposing African solutions suited to the various types of crises the continent has experienced, only to brush aside its proposals to the Council without even deigning to consider them.

In that context, I wish to recall that when the situation in Darfur erupted, only the African Union dared to send soldiers to monitor the ceasefire and protect the civilian population, and that, in the face of a complex crisis, only the African Union was able to persuade the parties to engage in negotiations for a peaceful solution to the conflict.

What is true of the situation in the Sudan is true of all conflicts in Africa, where African heads of State, through often intense mediation, have been able to put an end to conflicts. And it is the African approach, based on justice and reconciliation, that has enabled communities that have ripped one another apart to make the effort, once justice has been served, to learn how to live together once again.

The resolution that has just been adopted took a different approach. My delegation had no choice but to abstain.

I wish to conclude my statement by expressing a regret. I regret that, out of a concern for compromise at all costs and at whatever price, those defending the principle of universal justice have in fact ensured that, in this domain, the use of double standards — of which some have accused the Council — and a two-track justice were most unexpectedly demonstrated.

**Mr. Wang** Guangya (China) (*spoke in Chinese*): The Chinese delegation abstained in the voting on the resolution. We have always closely followed the situation in the Darfur region of the Sudan and support efforts to reach an agreement on an early political settlement of the question of Darfur through the negotiations held under the auspices of the African Union. At the same time, like other members of the international community, we deeply deplore the gross violations of international humanitarian and human rights law in Darfur.

Undoubtedly, the perpetrators must be brought to justice. The question is: What is the most effective and feasible approach in this connection? In addressing the issue of impunity, we believe that, when trying to ensure justice, it is also necessary to make every effort to avoid any negative impact on the political negotiations on Darfur. When punishing the perpetrators, it is also necessary to promote national reconciliation. When trying to solve the question of Darfur, it is also necessary to sustain the hard-won results in the North-South peace process.

Based on that position and out of respect for national judicial sovereignty, we would prefer to see perpetrators of gross violations of human rights stand trial in the Sudanese judicial system. We have noted that the Sudanese judiciary has recently taken legal action against individuals involved. In order to ensure the justice, transparency and credibility of the trials, the international community could provide appropriate technical assistance and necessary monitoring. Of course, the African panel for criminal justice and reconciliation, proposed by Nigeria on behalf of the African Union, could also serve as a way out. We are not in favour of referring the question of Darfur to the International Criminal Court (ICC) without the consent of the Sudanese Government, because we are afraid that that would not only severely complicate efforts to secure an early settlement of the Darfur issue, but also have unforeseeable consequences for the north-south peace process in the Sudan.

It should also be pointed out that China is not a State party to the Rome Statute and has major reservations with regard to certain of its provisions. We cannot accept any exercise of the ICC's jurisdiction against the will of non-State parties, and we would find it difficult to endorse any Security Council authorization of such an exercise of jurisdiction by the ICC.

For those reasons, China had no alternative but to abstain on the draft resolution sponsored by the United Kingdom.

**Ms. Løj** (Denmark): It has been two months since the Security Council received the report of the International Commission of Inquiry regarding the ongoing atrocities in Darfur. The report strongly recommended the referral of the crimes in Darfur to the International Criminal Court (ICC). Throughout the Council's long negotiation process, Denmark has supported that recommendation. The ICC has the mandate, the capacity and the funding necessary to ensure swift and cost-effective prosecution. From that perspective, we are indeed very encouraged that the Council has just adopted a resolution that will bring an internationally recognized follow-up to the reported crimes in Darfur. Any further postponement of this issue would only have weakened confidence in the resolve of the Council.

Denmark recognizes the difficulties that some members have in accepting the compromise text before us. We appreciate the flexibility shown by all parties. Furthermore, Denmark was able to vote in favour of the resolution only after careful consideration of some of the formulations in the text. With regard to the language on exclusive jurisdiction, it is our interpretation that it does not affect the universal jurisdiction of Member States in areas such as war crimes, torture and terrorism. As regards the formulation regarding the existence of the agreements referred to in article 98, paragraph 2, of the Rome Statute, Denmark would like to stress that that reference is purely factual; it is merely referring to the existence of such agreements. Thus, the reference in no way impinges on the integrity of the Rome Statute.

That having been said, we believe that the resolution is a genuine and valid compromise leading to the very first referral of a situation to the ICC by the Security Council. Denmark thus looks forward to seeing the Court take the first important steps towards ending the culture of impunity in Darfur.

**Mr. Baja** (Philippines): This is the third resolution — the third child born of the Security Council's consideration of the situation in the Sudan, in particular Darfur. At this late hour — in the twilight of the Brazilian presidency — we cannot but recall a story that originated in Wales, the home of the sponsor of resolution 1593 (2005). There was a middle-aged couple who had two stunningly beautiful teenage daughters, but who decided to try one last time for the son they had always wanted. After months of trying, the wife became pregnant, and, sure enough, delivered a healthy baby boy nine months later. The happy father rushed to the nursery to see his new son. He took one look at him, but was horrified to find that he was the ugliest child he had ever seen. He went to his wife and said that there was no way that he could have fathered the child. "Look at the two beautiful daughters I fathered", he cried. Then he gave her a stern look, and asked, "Have you been fooling around?" The wife smiled sweetly and said, "Not this time".

We voted for resolution 1593 (2005) in response to the urgency and the gravity of the crimes which the Security Council and the international community are expected and obliged to address. This is a case of choosing between the unborn and an infant whose legitimacy is still being questioned. Any further impasse — any further inaction — on the part of the Council, two months after the report of the Commission of Inquiry, would have reduced this august body to a nadir of irrelevance with regard to ending impunity and responding to the protection of human rights and humanitarian law. It would have been a simple case of copping out.

We do, however, share the concerns of some delegations about the manner in which resolution 1593 (2005) was arrived at. Once again, fault lines in the Council and potential veto threats prevented the emergence of a strong, robust and clear signal from this body — which the Council badly needs these days. Perhaps that is the reason why the call for Security Council reform grows louder as the days go by.

We also believe that the International Criminal Court (ICC) may be a casualty of resolution 1593 (2005). Operative paragraph 6 of the resolution is killing its credibility — softly, perhaps, but killing it nevertheless. We may ask whether the Security Council has the prerogative to mandate the limitation of the jurisdiction of the ICC under the Rome Statute once the exercise of its jurisdiction has advanced. Operative paragraph 6 subtly subsumed the independence of the ICC into the political and diplomatic vagaries of the Security Council. Nevertheless, that eventuality may well be worth the sacrifice if impunity is, indeed, ended in Darfur; if human rights are, indeed, finally protected and promoted; and if, indeed, the rule of law there is upheld. Thus, we voted in favour of resolution 1593 (2005).

**Mr. Oshima** (Japan): My delegation voted in favour of the draft resolution proposed by the United

Kingdom because impunity for serious violations of human rights and crimes against humanity committed in Darfur must not be allowed, and because, in order to bring the perpetrators to justice, Japan supports, in principle, the referral of the case of Darfur to the International Criminal Court (ICC) within the appropriate time frame, although Japan is not a party to the Rome Statute. We wish to record our position, however, that we would have much preferred a Council decision on this matter to have been taken with broader agreement.

Nonetheless, we welcome the fact that, in a spirit of compromise and flexibility, a decision has been taken to address the important issue of impunity. Now that this resolution has been adopted, my Government expects the parties concerned to abide by it and to cooperate in its implementation to bring those responsible to justice.

**Sir Emyr Jones Parry** (United Kingdom): Tonight, by this vote, the Security Council has acted to ensure accountability for the grave crimes committed in Darfur, and I hope to send a salutary warning to anyone intending to commit any further such atrocities.

The United Kingdom welcomes the Council's decision to refer the situation to the International Criminal Court, which is for us the most efficient and effective means available to deal with impunity and to ensure justice for the people of Darfur.

Council members have deeply held differences of view on the issue of the International Criminal Court, which makes the agreement reached today all the more welcome and important. Our discussions have been characterized on all sides by a high degree of commitment and mutual comprehension, and a readiness to cooperate. This outcome will, we hope, serve as a basis for Council decisions on future such occasions and will as such create a durable and generally acceptable basis on which to proceed.

The Council must continue tackling the conflict in Darfur as part of an integrated strategy for dealing with the Sudan as a whole. We therefore welcome the recent adoption of the resolutions on the peace support operation and on measures. We must increase our support for the African Union mission, which is playing such an important role in Darfur. The Secretary-General's report, requested by the Council in resolution 1590 (2005), will be an important element in taking forward this vital agenda.

We must redouble our efforts to ensure safety, security, political progress and peace for the people of Darfur and for the Sudan as a whole. They have suffered enough. They deserve our continuing interest, our help and our support. We believe that the three resolutions that the Council has adopted in the last week constitute a substantial contribution to that end.

**Mr. Mayoral** (Argentina) (*spoke in Spanish*): The Argentine Republic voted in favour of this resolution on the basis of the report submitted to the Security Council by the High Commissioner for Human Rights, which stated clearly that serious violations of human rights and crimes against humanity had been committed and verified in Darfur.

The report stated that there was irrefutable evidence in that respect and that the legal context for dealing with such serious human rights violations was the International Criminal Court, through a referral by the Council to the Court's Prosecutor. Argentina also understands that the International Criminal Court is the proper forum for the international community as a whole to combat impunity wherever it might occur and to bring to justice those responsible for the most serious crimes.

We believe that this resolution allows us to provide strong support to the Court and constitutes a significant step within the United Nations towards ensuring the proper functioning of the international human rights system, for which the Court is, and must be, an essential tool.

We wish to highlight the fact that this is the first time that the Security Council, making use of article 13 of the Rome Statute, has referred to the Prosecutor a situation in which — according to the report, whose veracity we do not doubt — it appears that one or more types of crimes over which the Court has jurisdiction have been committed. We believe that this is undoubtedly a crucial precedent.

We believe that the letter and spirit of the Rome Statute must be respected and that the balance of its provisions must be preserved, taking into account the legitimate concerns of States without weakening in any way the powers of the Court. For that reason, we regret that we had to adopt a text that establishes an exception to the jurisdiction of the Court. It is our hope that this will not become standard practice.

We would like to make it clear that the exception provided for in paragraph 6 should be limited exclusively to those nationals or members of the armed forces of a State that is not party to the Rome Statute that are participating in peacekeeping operations established or authorized by the Security Council.

Finally, we wish to establish clearly that we are against any position or agreement which generically would exclude the nationals of a State from the jurisdiction of the Court, because that would affect the basis for such jurisdiction and thwart the letter and the spirit of the Rome Statute.

**Mr. De La Sablière** (France) (*spoke in French*): France has long been drawing the attention of the Security Council to the situation in Darfur. The events in that region of the Sudan are deeply troubling, and our greatest concern is for the plight of the people there. They are, as we all are aware, the primary victims of this conflict. Furthermore, and this is even more serious, they are its primary targets.

The reports that the Secretary-General has been submitting every month to the Council have provided a detailed picture of those atrocities. Entire villages are being attacked, plundered and destroyed, and their inhabitants are being brutalized, massacred and forcibly driven from their homes.

The Security Council therefore is in duty bound to take action. As we have continually reiterated, its policy must include three elements.

First, there is a need to assist the African Union in strengthening its monitoring and protection system. That is what our Council began to do by adopting resolution 1590 (2005) last week, and that is what we must continue to do speedily and with resolve.

There is also a need to continue to exert pressure on the warring parties to make them fulfil their obligations and to ensure that they arrive at a political settlement of the conflict. That is what our Council did several days ago by adopting resolution 1591 (2005).

Finally, there is a need to put an end to impunity. That was the Council's remaining task.

Alarmed by the magnitude of the atrocities perpetrated in Darfur, the Council had asked an International Commission of Inquiry to investigate the situation. The Commission's report, made public two months ago, confirms that mass violations of human rights and international humanitarian law have taken place. It denounces the crimes against humanity and the war crimes that have occurred. It recommends, given the circumstances, the referral of the situation to the International Criminal Court, which is the sole body with jurisdiction which can impartially, effectively and rapidly bring to trial those who bear major responsibility for those crimes.

The Secretary-General and the High Commissioner for Human Rights pressed the Council to urgently provide a favourable outcome following that recommendation. France, too, believed that referral to the International Criminal Court was the only solution — both because we believe that it is our duty to do right by the victims and because taking such action will prevent the violations from continuing. That is why France took the initiative on this problem and voted in favour of the resolution just adopted by the Council.

France welcomes the historic resolution that has just been adopted. For the first time, the Security Council has referred a situation to the International Criminal Court. Thus, it has sent a twofold and very forceful message not only to all those who have committed or might be tempted to commit atrocities in Darfur, but also to the victims: the international community will not allow those crimes to go unpunished.

The resolution also marks a turning point, for it sends the same message beyond Darfur to the perpetrators of crimes against humanity and war crimes, who until now have all too often escaped justice. The Security Council will remain vigilant to ensure that there is no impunity.

To achieve that result, my country was prepared to recognize — regarding the situation in Darfur and under certain conditions — a jurisdictional immunity vis-à-vis the International Criminal Court for certain nationals or personnel of States not parties to the Rome Statute. Here, I must emphasize that the jurisdictional immunity provided for in the text we have just adopted obviously cannot run counter to other international obligations of States and will be subject, where appropriate, to the interpretation of the courts of my country.

In conclusion, I should like to reaffirm France's confidence in the International Criminal Court and to express the hope that the suspicions — which we

believe to be unfounded — will soon fall away regarding that institution, the symbol of such hope for the victims of atrocities.

**Mr. Vassilakis** (Greece) (*spoke in French*): In the first three months of the year, the Security Council addressed the issue of the Sudan on several occasions. The collective wish of the Council was to see the implementation of the Naivasha Comprehensive Peace Agreement as swiftly as possible. We also succeeded in adopting the resolution establishing the United Nations force to monitor the implementation of the Agreement. In addition, the Security Council reached agreement with regard to the situation in Darfur. Thus, we adopted a resolution on specific measures that, we hope, will help to find a political solution in that region, which has suffered enough.

The last issue that the Security Council had to address was the violation of humanitarian law. It is the issue of impunity, which we must never allow to go unpunished. The issue of violations of humanitarian law is one to which my country attaches very great importance; that is why we are a party to the International Criminal Court. We would have preferred a resolution text without exceptions, but we were guided by our concern that it would be far more important to have a resolution that took into account certain differing views than to have no resolution at all and to allow violations of humanitarian law to go unpunished.

When we address issues in which moderation is given top priority, we achieve positive results. It is in that spirit that we voted in favour of the resolution. We believe that it strengthens the authority of the Security Council in its efforts to promote peace, security, international justice and law in all societies, particularly those in conflict. The resolution also strengthens the authority of the International Criminal Court, which will have the chance to prove itself and show what it can do.

The resolution creates certain exceptions for the specific case of the Sudan for countries not parties to the Statute of the International Criminal Court. That will create certain problems of interpretation regarding the application of the principle of exclusive international jurisdiction. In our view, the resolution does not infringe on that principle, which is firmly rooted in the Statute of the Court and in other international agreements. Despite that, we preferred to vote in favour rather than to allow violations of humanitarian law to go unpunished.

We are sure that the three resolutions adopted by the Security Council this month will help to restore peace in the Sudan and the prosperity of its people.

**Mr. Mahiga** (United Republic of Tanzania): The United Republic of Tanzania voted in favour of the resolution we have just adopted with considerable reservations. The human tragedy in Darfur is a matter of serious concern to us and to Africa, as it is to the international community. In that regard, in the interest of justice and accountability, we believe that further delay in reaching an agreement in the hope of a more desirable outcome would not serve the ends of justice or the aspirations of the people of Darfur to peace, justice and reconciliation. Regrettably, the delay in addressing those expectations has been the result of an undue focus on the mechanism at the expense of addressing urgently the plight of the people of Darfur.

We are relieved that the Council has ultimately taken action on the matter. Tanzania is a State party to the International Criminal Court — a Court established to bring to justice those accused of genocide and other serious crimes against humanity. We strongly believe that the Court is the most appropriate international organ for dealing with the situation in Darfur, as recommended by the Commission of Inquiry. However, we are concerned that the resolution also addresses other issues that are, in our view, extraneous to the imperative at hand. We are therefore unable to accept that the resolution should in any way be interpreted as seeking to circumvent the jurisdiction of the Court. In spite of those shortcomings, it is our hope that the resolution will assist in addressing the issue of impunity in Darfur.

We are gratified that the resolution provides for the possibility of conducting proceedings in Africa as a way of contributing to Africa's efforts to dispense justice and to fight impunity. We also welcome the fact that the resolution recognizes the proposal by Nigeria regarding the need to provide national healing and reconciliation in the Sudan, in cooperation with the African Union and the international community, as appropriate.

It is our hope that the international community will not fail the people of the Sudan as a whole and of Darfur in particular.

**Mr. Motoc** (Romania): I will be brief, not only because we are nearing exhaustion and the hour is late, but also because I feel there is little to add to a vote that speaks for itself in terms of the Council's ability to come together and find solutions to the most intricate matters submitted for its consideration — solutions that are in harmony with our peoples' expectations of a fairer, and hence safer, world at the dawn of the twenty-first century.

Romania deems the adoption of resolution 1593 (2005) at the very end — indeed, at the last minute — of a thoroughly successful Brazilian presidency for the month as a stand against impunity; as an expression of confidence in the ICC's ability effectively to handle complex cases like that which the Council has today referred to it; and as proof that our common resolve to bring an end to impunity in the Sudan and Darfur has ultimately proved stronger than the differences members might have. At the end of the day, what the Council said today is that there is no way, in our times, that anyone, anywhere in the world, can get away without just retribution for the commission of serious crimes.

Like my Greek colleague, we also hold it manifest that, by deciding to refer the case of reported crimes in Darfur to the ICC, the Security Council enhances its conflict prevention and resolution capabilities.

There are two things I consider it important to recall tonight. The first is the debt we owe to the Cassese Commission for making it possible for us to reach this point. The second is that upholding the ICC as we have, by adopting resolution 1593 (2005), will be to no avail unless we remain supportive of the Court as it exercises its prerogatives upon our referral.

**Mr. Denisov** (Russian Federation) (*spoke in Russian*): The members of the Security Council have frequently reaffirmed that the struggle against impunity is one of the most important elements of a long-term political settlement in Darfur and the Sudan as a whole. All who are guilty of gross violations of human rights in Darfur must be duly punished, as is rightly pointed out in the report of the International Commission of Inquiry.

We believe that the resolution adopted today by the Security Council will contribute to an effective solution in the fight against impunity in Darfur in the context of providing for the normalization and stability of the situation in that region of the Sudan.

**Mr. Adechi** (Benin) (*spoke in French*): The vote just taken by the Security Council is a major event in the context of the tireless efforts of the international community to promote the rule of law and to protect humanity against the terrible events witnessed in recent decades. The vote was also in keeping with action by the Council to find a solution to the lethal conflict under way in Darfur.

We regret the fact that the text we have adopted contains a provision of immunity from jurisdiction, which runs counter to the spirit of the Rome Statute.

However, Benin had four reasons for voting in favour of the resolution. First, Benin is party to the treaty establishing the International Criminal Court. Secondly, the ongoing deterioration of the situation in Darfur requires the Security Council to take urgent action to end violations against civilians there. One prerequisite of such action is to end the reign of impunity by providing impartial justice. Thirdly, referring the matter to the International Criminal Court ensures that credible and timely action will be taken against persons charged with atrocities and serious crimes. Fourthly, Benin voted in support of the resolution out of respect for human dignity and the right to life that has been denied to thousands of people in Darfur, to whom the international community owes protection in view of their vulnerability. That obligation has been recognized by the African Union in the Ezulwini Consensus adopted by its Executive Council, meeting in extraordinary session on 7 and 8 March this year. In the Ezulwini Consensus, the African Union recognizes the Security Council's right to exercise its international responsibility to protect a population when that population's Government either cannot or will not do so. The rendering of justice is an element of that obligation.

It is of the highest importance to provide reliable and fair justice that offers equal respect for the rights of victims and their victimizers. We can thereby help the people of the Sudan to achieve their legitimate dream of putting an end to the bloodthirsty conflict as soon as possible and to look to the future with serenity and hope. We can also thereby offer a good foundation for national reconciliation, because the national reconciliation we all wish to see in the Sudan can succeed only if impartial justice is done. In that

respect, we agree with the Commission of Inquiry that it will be up to the Sudanese parties themselves to decide, after broad consultations, on the appropriate mechanism to promote national reconciliation.

**The President**: I shall now make a statement in my capacity as representative of Brazil.

Brazil is in favour of the referral of the situation in Darfur to the International Criminal Court (ICC). Nevertheless, Brazil was not able to join those members that voted in favour of the resolution. We remain committed to bringing to justice those accused of the crimes mentioned in the report of the Commission of Inquiry, and in that sense we are ready to fully cooperate whenever necessary with the International Criminal Court.

The maintenance of international peace and the fight against impunity cannot be viewed as conflicting objectives. Brazil reiterates that the ICC provides all the necessary checks and balances to prevent possible abuses and politically motivated misuse of its jurisdiction. Thus, efforts to secure broader immunities from the jurisdiction of the Court are both unwarranted and unhelpful, in our view.

This is the first time the Council has approved a referral of criminal matters to the International Criminal Court, and that approval offers a rare opportunity for the Council to act promptly in one of the most important issues on the international agenda. However, from our point of view, the referral should not be approved at any cost. Brazil understands that there are limits to negotiating the approval of the referral within the Council, and they refer, first, to the responsibilities of the Council vis-à-vis an international instrument; secondly, to the integrity of the Rome Statute, which now has 98 ratifications; and thirdly, to the consistency of the position we have sustained since the negotiations on the Rome Statute. For those reasons, Brazil abstained in the voting on the resolution on the referral.

As recommended by the report of the International Commission of Inquiry, the ICC remains the only acceptable instance of criminal law for dealing with the issue of accountability in the Sudan. We have exhaustively negotiated a text that could better reflect both the concerns of countries non-parties to the Rome Statute, as well as the commitments of those countries that have ratified that instrument.

For the sake of the referral, Brazil painstakingly agreed during the negotiations upon provisions that presented a serious level of difficulty for my Government, such as the exemption from jurisdiction for nationals of those countries not parties to the Statute, even though — considering the need to approve the referral — Brazil acceded to such a limited immunity. To go further would constitute an inadequate and risky interference of the Council in the constitutional basis of an independent judicial body and a position inconsistent with the principles we have defended in the past on this issue. The text just approved contains a preambular paragraph through which the Council takes note of the existence of agreements referred to in article 98-2 of the Rome Statute. My delegation has difficulty in supporting a reference that not only does not favour the fight against impunity but also stresses a provision whose application has been a highly controversial issue. We understand that it would be a contradiction to mention, in the very text of a referral by the Council to the ICC, measures that limit the jurisdictional activity of the Court.

In addition, Brazil also was not in a position to support operative paragraph 6, through which the Council recognizes the existence of exclusive jurisdiction, a legal exception that is inconsistent in international law.

These are substantial issues that, in our view, will not contribute to strengthening the role of the ICC — which is our aspiration. Brazil has consistently rejected initiatives aimed at extending exemptions of certain categories of individuals from ICC jurisdiction, and we maintain our position to prevent efforts that may have the effect of dismantling the achievements reached in the field of international criminal justice. Both the acceleration and the format of negotiations during the last few days have prevented some delegations from balancing the clear objective of referral to the ICC against the hindrances imposed thereon. Insurmountable constraints thus prevented Brazil from voting in favour of a proposal that we have always understood would be the appropriate instrument to help curb violence and end impunity in Darfur.

I now resume my function as President of the Council.

I give the floor to the representative of the Sudan.

**Mr. Erwa** (Sudan) (*spoke in Arabic*): Once more the Council has persisted in adopting further unwise decisions against my country, which is rewarded for putting an end to the longest conflict in Africa with further sanctions and procedures, which only serve to further complicate the situation on the ground.

The world in its entirety knows full well that the differences that lasted for about two months within the Council over the question of accountability have nothing whatsoever to do with the achievement of stability in Darfur. The disagreement over the International Criminal Court (ICC) is long-standing and well known. There are resolutions regarding the ICC that have been stalled for years. Then the Darfur question came to be used in order to endorse this principle, which has been the subject of controversy for years — and not for the sake of justice. It is a paradox that the language used in bargaining over this resolution was the same language that buffeted the Council before, in another African question, and everyone knows that full well. Justice here is a great good used in the service of evil.

Moreover, the resolution just adopted is full of exceptions, in view of the fact that the State concerned with these exceptions is not party to the ICC. By the same token, we would like to remind the Council that the Sudan also is not party to the ICC. This makes the implementation of a resolution like this fraught with a series of procedural impediments and legitimate reservations as long as the Council believes that the scales of justice and law are based on exceptions and the exploitation of the crises of the developing countries and their affliction with conflicts and civil wars in the settlement of political positions and bargaining among major Powers. The fact remains that the Council today did not settle the question of accountability in Darfur. Rather, it exposed the fact that this Criminal Court was originally intended for developing and weak States, and that it is a tool for the exercise of the culture of superiority and to impose cultural superiority. It is a tool for those who believe that they have a monopoly on virtues on this world, rife with injustice and tyranny.

This august Council, by adopting this resolution, has once again ridden roughshod over the African position. The initiative by Nigeria, in its position as Chair of the African Union, was not even the subject of consideration, let alone the subject of interest, or of consultations — even brief consultations — to evaluate it; this while the African Union is present on the ground in Darfur, where it is playing a role whose effectiveness and efficiency were affirmed by the representative of this Organization in all of his reports. Moreover, this resolution was adopted at a time when the Sudanese judiciary has gone a long way in holding trials. This judiciary is capable and qualified and is resolved to uphold accountability and enforce verdicts, without exception.

We thank those countries that colonized us earlier and taught us laws. But some here wanted to activate the ICC and exploit the question of Darfur as a mere pretext, in spite of knowing that such exploitation of the issues of concern to people and profiting from crises and conflicts simply for political gain and bargaining has nothing to do with justice and humanity, let alone the preservation of international legitimacy and international peace and security, and other such slogans and titles.

Everyone knows that the question of accountability is a long and complicated process that cannot be concluded overnight. While the Council is keen on holding my country to account and to urge it to hold trials and achieve security and stability overnight, in a territory whose area approximates that of Iraq, we find that very same Council continuing to use the policy of double standards. The Council even goes so far as to affirm that exceptions are only for major Powers and that this Court is simply a stick used for weak States and that it is an extension of this Council of yours, which has always adopted resolutions and sanctions only against weak countries, while major Powers and those under their protection ride roughshod over the resolutions of this Council, cynically disregard them and consider them a dead letter.

We hear many expressions here such as “the accountability of the Council” and “confidence in the Council” from the members of this Council. Is there any credibility or confidence left in this Chamber? To the claim made by some that this resolution sends a message to all the parties that no one will now enjoy impunity, I would add — in order to avoid hypocrisy — “Except if he belongs to a certain category of States”.

History is replete with examples of former empires that exercised hegemony and practised colonialism. This Organization was born out of the ruins of the empire of the Third Reich. Perhaps we are

witnessing a new age of hegemony in a new guise — and perhaps history will once again spawn a new international organization out of the ruins of a new empire.

In conclusion, I would like to reiterate — as I indicated in my previous statement — that such unwise resolutions contain provisions that make their implementation practically difficult. Such resolutions will only serve to weaken the prospects for settlement and further complicate an already complex situation.

**The President**: There are no further speakers inscribed on my list.

The Security Council has thus concluded the present stage of its consideration of the item on its agenda. The Council will remain seized of the matter.

*The meeting rose at 11.55 p.m.*

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# AFFAIRE RELATIVE AU MANDAT D'ARRÊT DU 11 AVRIL 2000

(RÉPUBLIQUE DÉMOCRATIQUE DU CONGO c. BELGIQUE)

**ARRÊT DU 14 FÉVRIER 2002**

# 2002

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

(DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM)

**JUDGMENT OF 14 FEBRUARY 2002**

Mode officiel de citation:
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ARRÊT

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# ARREST WARRANT OF 11 APRIL 2000
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14 FEBRUARY 2002

JUDGMENT

INTERNATIONAL COURT OF JUSTICE

YEAR 2002

2002
14 February
General List
No. 121

**14 February 2002**

# CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

## (DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM)

*Facts of the case — Issue by a Belgian investigating magistrate of "an international arrest warrant* in absentia *" against the incumbent Minister for Foreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity — International circulation of arrest warrant through Interpol — Person concerned subsequently ceasing to hold office as Minister for Foreign Affairs.*

* *

*First objection of Belgium — Jurisdiction of the Court — Statute of the Court, Article 36, paragraph 2 — Existence of a "legal dispute" between the Parties at the time of filing of the Application instituting proceedings — Events subsequent to the filing of the Application do not deprive the Court of jurisdiction.*

*Second objection of Belgium — Mootness — Fact that the person concerned had ceased to hold office as Minister for Foreign Affairs does not put an end to the dispute between the Parties and does not deprive the Application of its object.*

*Third objection of Belgium — Admissibility — Facts underlying the Application instituting proceedings not changed in a way that transformed the dispute originally brought before the Court into another which is different in character.*

*Fourth objection of Belgium — Admissibility — Congo not acting in the context of protection of one of its nationals — Inapplicability of rules relating to exhaustion of local remedies.*

*Subsidiary argument of Belgium —* Non ultra petita *rule — Claim in Application instituting proceedings that Belgium's claim to exercise a universal jurisdiction in issuing the arrest warrant is contrary to international law — Claim not made in final submissions of the Congo — Court unable to rule on that ques-*

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*tion in the operative part of its Judgment but not prevented from dealing with certain aspects of the question in the reasoning of its Judgment.*

* *

*Immunity from criminal jurisdiction in other States and also inviolability of an incumbent Minister for Foreign Affairs — Vienna Convention on Diplomatic Relations of 18 April 1961, preamble, Article 32 — Vienna Convention on Consular Relations of 24 April 1963 — New York Convention on Special Missions of 8 December 1969, Article 21, paragraph 2 — Customary international law rules — Nature of the functions exercised by a Minister for Foreign Affairs — Functions such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability — No distinction in this context between acts performed in an "official" capacity and those claimed to have been performed in a "private capacity".*

*No exception to immunity from criminal jurisdiction and inviolability where an incumbent Minister for Foreign Affairs suspected of having committed war crimes or crimes against humanity — Distinction between jurisdiction of national courts and jurisdictional immunities — Distinction between immunity from jurisdiction and impunity.*

*Issuing of arrest warrant intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs — Mere issuing of warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs — Purpose of the international circulation of the arrest warrant to establish a legal basis for the arrest of Minister for Foreign Affairs abroad and his subsequent extradition to Belgium — International circulation of the warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs.*

* *

*Remedies sought by the Congo — Finding by the Court of international responsibility of Belgium making good the moral injury complained of by the Congo — Belgium required by means of its own choosing to cancel the warrant in question and so inform the authorities to whom it was circulated.*

## JUDGMENT

*Present:* *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL; *Judges* ad hoc BULA-BULA, VAN DEN WYNGAERT; *Registrar* COUVREUR.

In the case concerning the arrest warrant of 11 April 2000,

*between*

the Democratic Republic of the Congo,

represented by

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Ngele Masudi, Minister of Justice and Keeper of the Seals,
Maître Kosisaka Kombe, Legal Adviser to the Presidency of the Republic,
Mr. François Rigaux, Professor Emeritus at the Catholic University of Louvain,
Ms Monique Chemillier-Gendreau, Professor at the University of Paris VII (Denis Diderot),
Mr. Pierre d'Argent, Chargé de cours, Catholic University of Louvain,
Mr. Moka N'Golo, Bâtonnier,
Mr. Djeina Wembou, Professor at the University of Abidjan,

as Counsel and Advocates;

Mr. Mazyambo Makengo, Legal Adviser to the Ministry of Justice,

as Counsellor,

*and*

the Kingdom of Belgium,

represented by

Mr. Jan Devadder, Director-General, Legal Matters, Ministry of Foreign Affairs,

as Agent;

Mr. Eric David, Professor of Public International Law, Université libre de Bruxelles,
Mr. Daniel Bethlehem, Barrister, Bar of England and Wales, Fellow of Clare Hall and Deputy Director of the Lauterpacht Research Centre for International Law, University of Cambridge,

as Counsel and Advocates;

H.E. Baron Olivier Gilles de Pélichy, Permanent Representative of the Kingdom of Belgium to the Organization for the Prohibition of Chemical Weapons, responsible for relations with the International Court of Justice,
Mr. Claude Debrulle, Director-General, Criminal Legislation and Human Rights, Ministry of Justice,
Mr. Pierre Morlet, Advocate-General, Brussels Cour d'Appel,
Mr. Wouter Detavernier, Deputy Counsellor, Directorate-General Legal Matters, Ministry of Foreign Affairs,
Mr. Rodney Neufeld, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge,
Mr. Tom Vanderhaeghe, Assistant at the Université libre de Bruxelles,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

1. On 17 October 2000 the Democratic Republic of the Congo (hereinafter referred to as "the Congo") filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter referred to as "Belgium") in respect of a dispute concerning an "international arrest warrant issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi".

In that Application the Congo contended that Belgium had violated the "principle that a State may not exercise its authority on the territory of another State", the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations", as well as "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

In order to found the Court's jurisdiction the Congo invoked in the aforementioned Application the fact that "Belgium ha[d] accepted the jurisdiction of the Court and, in so far as may be required, the [aforementioned] Application signifie[d] acceptance of that jurisdiction by the Democratic Republic of the Congo".

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of Belgium by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case; the Congo chose Mr. Sayeman Bula-Bula, and Belgium Ms Christine Van den Wyngaert.

4. On 17 October 2000, the day on which the Application was filed, the Government of the Congo also filed in the Registry of the Court a request for the indication of a provisional measure based on Article 41 of the Statute of the Court. At the hearings on that request, Belgium, for its part, asked that the case be removed from the List.

By Order of 8 December 2000 the Court, on the one hand, rejected Belgium's request that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. In the same Order, the Court also held that "it [was] desirable that the issues before the Court should be determined as soon as possible" and that "it [was] therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition"

5. By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. By Orders of 14 March 2001 and 12 April 2001, these time-limits, taking account of the reasons given by the Congo and the agreement of the Parties, were successively extended. The Memorial of the Congo was filed on 16 May 2001 within the time-limit thus finally prescribed.

6. By Order of 27 June 2001, the Court, on the one hand, rejected a request

by Belgium for authorization, in derogation from the previous Orders of the President of the Court, to submit preliminary objections involving suspension of the proceedings on the merits and, on the other, extended the time-limit prescribed in the Order of 12 April 2001 for the filing by Belgium of a Counter-Memorial addressing both questions of jurisdiction and admissibility and the merits. The Counter-Memorial of Belgium was filed on 28 September 2001 within the time-limit thus extended.

7. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

8. Public hearings were held from 15 to 19 October 2001, at which the Court heard the oral arguments and replies of:

*For the Congo:* H.E. Mr. Jacques Masangu-a-Mwanza,
H.E. Mr. Ngele Masudi,
Maître Kosisaka Kombe,
Mr. François Rigaux,
Ms Monique Chemillier-Gendreau,
Mr. Pierre d'Argent.

*For Belgium:* Mr. Jan Devadder,
Mr. Daniel Bethlehem,
Mr. Eric David.

9. At the hearings, Members of the Court put questions to Belgium, to which replies were given orally or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. The Congo provided its written comments on the reply that was given in writing to one of these questions, pursuant to Article 72 of the Rules of Court.

*

10. In its Application, the Congo formulated the decision requested in the following terms:

> "The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels Tribunal de première instance against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law', that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000."

11. In the course of the written proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of the Congo,*

in the Memorial:

> "In light of the facts and arguments set out above, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

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1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC;
3. the violation of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 precludes any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that, following the Court's Judgment, Belgium renounces its request for their co-operation in executing the unlawful warrant."

*On behalf of the Government of Belgium,*

in the Counter-Memorial:

"For the reasons stated in Part II of this Counter-Memorial, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the preceding submission, the Court concludes that it does have jurisdiction in this case and that the application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the application."

12. At the oral proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of the Congo,*

"In light of the facts and arguments set out during the written and oral proceedings, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the war-

rant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

*On behalf of the Government of Belgium,*

"For the reasons stated in the Counter-Memorial of Belgium and in its oral submissions, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the Application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the submissions of Belgium with regard to the Court's jurisdiction and the admissibility of the Application, the Court concludes that it does have jurisdiction in this case and that the Application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the Application."

* * *

13. On 11 April 2000 an investigating judge of the Brussels Tribunal de première instance issued "an international arrest warrant *in absentia*" against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.

At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo.

14. The arrest warrant was transmitted to the Congo on 7 June 2000, being received by the Congolese authorities on 12 July 2000. According to Belgium, the warrant was at the same time transmitted to the International Criminal Police Organization (Interpol), an organization whose function is to enhance and facilitate cross-border criminal police co-operation worldwide; through the latter, it was circulated internationally.

15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", as amended by the Law of 10 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law" (hereinafter referred to as the "Belgian Law").

Article 7 of the Belgian Law provides that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed". In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which

the arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia's alleged offences was also uncontested.

Article 5, paragraph 3, of the Belgian Law further provides that "[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law".

16. At the hearings, Belgium further claimed that it offered "to entrust the case to the competent authorities [of the Congo] for enquiry and possible prosecution", and referred to a certain number of steps which it claimed to have taken in this regard from September 2000, that is, before the filing of the Application instituting proceedings. The Congo for its part stated the following: "We have scant information concerning the form [of these Belgian proposals]." It added that "these proposals . . . appear to have been made very belatedly, namely *after* an arrest warrant against Mr. Yerodia had been issued".

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings (see paragraph 1 above), in which the Court was requested "to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000". The Congo relied in its Application on two separate legal grounds. First, it claimed that "[t]he *universal jurisdiction* that the Belgian State attributes to itself under Article 7 of the Law in question" constituted a

> "[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations".

Secondly, it claimed that "[t]he non-recognition, on the basis of Article 5 . . . of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office" constituted a "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

18. On the same day that it filed its Application instituting proceedings, the Congo submitted a request to the Court for the indication of a provisional measure under Article 41 of the Statute of the Court. During the hearings devoted to consideration of that request, the Court was informed that in November 2000 a ministerial reshuffle had taken place in the Congo, following which Mr. Yerodia had ceased to hold office as Minister for Foreign Affairs and had been entrusted with the portfolio of Minister of Education. Belgium accordingly claimed that the Congo's Application had become moot and asked the Court, as has already been

recalled, to remove the case from the List. By Order of 8 December 2000, the Court rejected both Belgium's submissions to that effect and also the Congo's request for the indication of provisional measures (see paragraph 4 above).

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today.

20. On 12 September 2001, the Belgian National Central Bureau of Interpol requested the Interpol General Secretariat to issue a Red Notice in respect of Mr. Yerodia. Such notices concern individuals whose arrest is requested with a view to extradition. On 19 October 2001, at the public sittings held to hear the oral arguments of the Parties in the case, Belgium informed the Court that Interpol had responded on 27 September 2001 with a request for additional information, and that no Red Notice had yet been circulated.

21. Although the Application of the Congo originally advanced two separate legal grounds (see paragraph 17 above), the submissions of the Congo in its Memorial and the final submissions which it presented at the end of the oral proceedings refer only to a violation "in regard to the . . . Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers" (see paragraphs 11 and 12 above).

* * *

22. In their written pleadings, and in oral argument, the Parties addressed issues of jurisdiction and admissibility as well as the merits (see paragraphs 5 and 6 above). In this connection, Belgium raised certain objections which the Court will begin by addressing.

* *

23. The first objection presented by Belgium reads as follows:

> "That, in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], there is no longer a 'legal dispute' between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case."

24. Belgium does not deny that such a legal dispute existed between the Parties at the time when the Congo filed its Application instituting proceedings, and that the Court was properly seised by that Application. However, it contends that the question is not whether a legal dispute

existed at that time, but whether a legal dispute exists at the present time. Belgium refers in this respect *inter alia* to the *Northern Cameroons* case, in which the Court found that it "may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties" (*I.C.J. Reports 1963*, pp. 33-34), as well as to the *Nuclear Tests* cases (*Australia* v. *France*) (*New Zealand* v. *France*), in which the Court stated the following: "The Court, as a court of law, is called upon to resolve existing disputes between States . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision" (*I.C.J. Reports 1974*, pp. 270-271, para. 55; p. 476, para. 58). Belgium argues that the position of Mr. Yerodia as Minister for Foreign Affairs was central to the Congo's Application instituting proceedings, and emphasizes that there has now been a change of circumstances at the very heart of the case, in view of the fact that Mr. Yerodia was relieved of his position as Minister for Foreign Affairs in November 2000 and that, since 15 April 2001, he has occupied no position in the Government of the Congo (see paragraphs 18 and 19 above). According to Belgium, while there may still be a difference of opinion between the Parties on the scope and content of international law governing the immunities of a Minister for Foreign Affairs, that difference of opinion has now become a matter of abstract, rather than of practical, concern. The result, in Belgium's view, is that the case has become an attempt by the Congo to "[seek] an advisory opinion from the Court", and no longer a "concrete case" involving an "actual controversy" between the Parties, and that the Court accordingly lacks jurisdiction in the case.

25. The Congo rejects this objection of Belgium. It contends that there is indeed a legal dispute between the Parties, in that the Congo claims that the arrest warrant was issued in violation of the immunity of its Minister for Foreign Affairs, that that warrant was unlawful *ab initio*, and that this legal defect persists despite the subsequent changes in the position occupied by the individual concerned, while Belgium maintains that the issue and circulation of the arrest warrant were not contrary to international law. The Congo adds that the termination of Mr. Yerodia's official duties in no way operated to efface the wrongful act and the injury that flowed from it, for which the Congo continues to seek redress.

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26. The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently

become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction (see *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122; *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 23-24, para. 38; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 129, para. 37).

27. Article 36, paragraph 2, of the Statute of the Court provides:

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> *(a)* the interpretation of a treaty;
> *(b)* any question of international law;
> *(c)* the existence of any fact which, if established, would constitute a breach of an international obligation;
> *(d)* the nature or extent of the reparation to be made for the breach of an international obligation."

On 17 October 2000, the date that the Congo's Application instituting these proceedings was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with the above provision: Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case.

Moreover, it is not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. Such a dispute was clearly a legal dispute within the meaning of the Court's jurisprudence, namely "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" in which "the claim of one party is positively opposed by the other" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 22; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Juagment, I.C.J. Reports 1998*, pp. 122-123, para. 21).

28. The Court accordingly concludes that at the time that it was seised

of the case it had jurisdiction to deal with it, and that it still has such jurisdiction. Belgium's first objection must therefore be rejected.

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29. The second objection presented by Belgium is the following:

> "That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . Government [of the Congo], the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case."

30. Belgium also relies in support of this objection on the *Northern Cameroons* case, in which the Court considered that it would not be a proper discharge of its duties to proceed further in a case in which any judgment that the Court might pronounce would be "without object" (*I.C.J. Reports 1963*, p. 38), and on the *Nuclear Tests* cases, in which the Court saw "no reason to allow the continuance of proceedings which it knows are bound to be fruitless" (*I.C.J. Reports 1974*, p. 271, para. 58; p. 477, para. 61). Belgium maintains that the declarations requested by the Congo in its first and second submissions would clearly fall within the principles enunciated by the Court in those cases, since a judgment of the Court on the merits in this case could only be directed towards the clarification of the law in this area for the future, or be designed to reinforce the position of one or other Party. It relies in support of this argument on the fact that the Congo does not allege any material injury and is not seeking compensatory damages. It adds that the issue and transmission of the arrest warrant were not predicated on the ministerial status of the person concerned, that he is no longer a minister, and that the case is accordingly now devoid of object.

31. The Congo contests this argument of Belgium, and emphasizes that the aim of the Congo — to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered — remains unachieved at the point in time when the Court is called upon to decide the dispute. According to the Congo, in order for the case to have become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have to have been obtained.

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32. The Court has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon (see *Questions of Interpretation and Application of the 1971 Mont-*

*real Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 46; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 131, para. 45).

However, it considers that this is not such a case. The change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo's submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium's second objection must accordingly be rejected.

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33. The third Belgian objection is put as follows:

> "That the case as it now stands is materially different to that set out in the [Congo]'s Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

34. According to Belgium, it would be contrary to legal security and the sound administration of justice for an applicant State to continue proceedings in circumstances in which the factual dimension on which the Application was based has changed fundamentally, since the respondent State would in those circumstances be uncertain, until the very last moment, of the substance of the claims against it. Belgium argues that the prejudice suffered by the respondent State in this situation is analogous to the situation in which an applicant State formulates new claims during the course of the proceedings. It refers to the jurisprudence of the Court holding inadmissible new claims formulated during the course of the proceedings which, had they been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (see *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 447-448, para. 29). In the circumstances, Belgium contends that, if the Congo wishes to maintain its claims, it should be required to initiate proceedings afresh or, at the very least, apply to the Court for permission to amend its initial Application.

35. In response, the Congo denies that there has been a substantial amendment of the terms of its Application, and insists that it has presented no new claim, whether of substance or of form, that would have transformed the subject-matter of the dispute. The Congo maintains that it has done nothing through the various stages in the proceedings but "condense and refine" its claims, as do most States that appear before the Court, and that it is simply making use of the right of parties to amend their submissions until the end of the oral proceedings.

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36. The Court notes that, in accordance with settled jurisprudence, it "cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character" (*Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173; cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80; see also *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 264-267, in particular paras. 69 and 70). However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international law. The Congo's final submissions arise "directly out of the question which is the subject-matter of that Application" (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72; see also *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 36).

In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence, or that the requirements of the sound administration of justice were infringed. Belgium's third objection must accordingly be rejected.

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37. The fourth Belgian objection reads as follows:

> "That, in the light of the new circumstances concerning Mr. Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being pro-

tected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

38. In this respect, Belgium accepts that, when the case was first instituted, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name in respect of the alleged violation by Belgium of the immunity of the Congo's Foreign Minister. However, according to Belgium, the case was radically transformed after the Application was filed, namely on 15 April 2001, when Mr. Yerodia ceased to be a member of the Congolese Government. Belgium maintains that two of the requests made of the Court in the Congo's final submissions in practice now concern the legal effect of an arrest warrant issued against a private citizen of the Congo, and that these issues fall within the realm of an action of diplomatic protection. It adds that the individual concerned has not exhausted all available remedies under Belgian law a necessary condition before the Congo can espouse the cause of one of its nationals in international proceedings.

39. The Congo, on the other hand, denies that this is an action for diplomatic protection. It maintains that it is bringing these proceedings in the name of the Congolese State, on account of the violation of the immunity of its Minister for Foreign Affairs. The Congo further denies the availability of remedies under Belgian law. It points out in this regard that it is only when the Crown Prosecutor has become seised of the case file and makes submissions to the Chambre du conseil that the accused can defend himself before the Chambre and seek to have the charge dismissed.

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40. The Court notes that the Congo has never sought to invoke before it Mr. Yerodia's personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies.

In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application (see *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 26; *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 42, para. 49). Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed

(see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 43-44; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-43). Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium's fourth objection must accordingly be rejected.

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41. As a subsidiary argument, Belgium further contends that "[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, . . . the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo]'s final submissions". Belgium points out that, while the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge's lack of jurisdiction, and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs, the Congo no longer claims in its final submissions that Belgium wrongly conferred upon itself universal jurisdiction *in absentia*. According to Belgium, the Congo now confines itself to arguing that the arrest warrant of 11 April 2000 was unlawful because it violated the immunity from jurisdiction of its Minister for Foreign Affairs, and that the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

42. The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the "exercise of an excessive universal jurisdiction" being in this connection only a secondary consideration. The Congo asserts that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at the request of the Congo but, rather, by virtue of the defence strategy adopted by Belgium, which appears to maintain that the exercise of such jurisdiction can "represent a valid counterweight to the observance of immunities".

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43. The Court would recall the well-established principle that "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (*Asylum, Judgment, I.C.J. Reports 1950*,

p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

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44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo's Application, that the Application is not without object and that accordingly the case is not moot and that the Application is admissible. Thus, the Court now turns to the merits of the case.

* * *

45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo's submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

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47. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability

and to immunity from criminal process being "absolute or complete", that is to say, they are subject to no exception. Accordingly, the Congo contends that no criminal prosecution may be brought against a Minister for Foreign Affairs in a foreign court as long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under customary international law simply in order to enable the foreign State representative enjoying such immunity to perform his or her functions freely and without let or hindrance. The Congo adds that the immunity thus accorded to Ministers for Foreign Affairs when in office covers *all* their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterized or not as "official acts".

48. The Congo states further that it does not deny the existence of a principle of international criminal law, deriving from the decisions of the Nuremberg and Tokyo international military tribunals, that the accused's official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a "ground of exemption from his criminal responsibility or a ground for mitigation of sentence". The Congo then stresses that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. It concludes that immunity does not mean impunity.

49. Belgium maintains for its part that, while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.

50. Belgium further states that, in the circumstances of the present case, Mr. Yerodia enjoyed no immunity at the time when he is alleged to have committed the acts of which he is accused, and that there is no evidence that he was then acting in any official capacity. It observes that the arrest warrant was issued against Mr. Yerodia personally.

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51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain

holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

52. A certain number of treaty instruments were cited by the Parties in this regard. These included, first, the Vienna Convention on Diplomatic Relations of 18 April 1961, which states in its preamble that the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing States". It provides in Article 32 that only the sending State may waive such immunity. On these points, the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations of 24 April 1963, to which the Congo and Belgium are also parties.

The Congo and Belgium further cite the New York Convention on Special Missions of 8 December 1969, to which they are not, however, parties. They recall that under Article 21, paragraph 2, of that Convention:

> "The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law."

These conventions provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, for

example, Article 7, paragraph 2 *(a)*, of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that chargés d'affaires are accredited.

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

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56. The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the *Pinochet* and *Qaddafi* cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the *Pinochet* decision recognizes an exception to the immunity rule when Lord Millett stated that "[i]nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose", or when Lord Phillips of Worth Matravers said that "no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime". As to the French Court of Cassation, Belgium contends that, in holding that, "under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State", the Court explicitly recognized the existence of such exceptions.

57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the *Pinochet* and *Qaddafi* cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the *Pinochet* case, the Congo cites Lord Browne-Wilkinson's statement that "[t]his immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . .". According to the Congo, the

French Court of Cassation adopted the same position in its *Qaddafi* judgment, in affirming that "international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State".

As regards the instruments creating international criminal tribunals and the latter's jurisprudence, these, in the Congo's view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

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58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus,

although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the

official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

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62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and declare that:

> "[B]y issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States."

63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a "coercive legal act" which violates the Congo's immunity and sovereign rights, inasmuch as it seeks to "subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach" and is fully enforceable without special formality in Belgium.

The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.

64. As regards the international circulation of the said arrest warrant, this, in the Congo's view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium "thus cast upon one of the most prominent members of its Government". The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo's former President. In the Congo's view, Belgium "[thus] manifests an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition". The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly

"no further consideration need be given to the specific responsibility which a State executing it might incur, or to the way in which that responsibility should be related" to that of the Belgian State. The Congo observes that, in such circumstances, "there [would be] a direct causal relationship between the arrest warrant issued in Belgium and any act of enforcement carried out elsewhere".

65. Belgium rejects the Congo's argument on the ground that "the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the [Congo]".

With regard to the legal effects under Belgian law of the arrest warrant of 11 April 2000, Belgium contends that the clear purpose of the warrant was to procure that, if found in Belgium, Mr. Yerodia would be detained by the relevant Belgian authorities with a view to his prosecution for war crimes and crimes against humanity. According to Belgium, the Belgian investigating judge did, however, draw an explicit distinction in the warrant between, on the one hand, immunity from jurisdiction and, on the other hand, immunity from enforcement as regards representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium. Belgium further contends that, in its effect, the disputed arrest warrant is national in character, since it requires the arrest of Mr. Yerodia if he is found in Belgium but it does not have this effect outside Belgium.

66. In respect of the legal effects of the arrest warrant outside Belgium, Belgium maintains that the warrant does not create any obligation for the authorities of any other State to arrest Mr. Yerodia in the absence of some further step by Belgium completing or validating the arrest warrant (such as a request for the provisional detention of Mr. Yerodia), or the issuing of an arrest warrant by the appropriate authorities in the State concerned following a request to do so, or the issuing of an Interpol Red Notice. Accordingly, outside Belgium, while the purpose of the warrant was admittedly "to establish a legal basis for the arrest of Mr. Yerodia . . . and his subsequent extradition to Belgium", the warrant had no legal effect unless it was validated or completed by some prior act "requiring the arrest of Mr. Yerodia by the relevant authorities in a third State". Belgium further argues that "[i]f a State had executed the arrest warrant, it might infringe Mr. [Yerodia's] criminal immunity", but that "the Party directly responsible for that infringement would have been that State and not Belgium".

*

67. The Court will first recall that the "international arrest warrant *in absentia*", issued on 11 April 2000 by an investigating judge of the Brussels Tribunal de première instance, is directed against Mr. Yerodia,

stating that he is "currently Minister for Foreign Affairs of the Democratic Republic of the Congo, having his business address at the Ministry of Foreign Affairs in Kinshasa". The warrant states that Mr. Yerodia is charged with being "the perpetrator or co-perpetrator" of:

"— Crimes under international law constituting grave breaches causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)
— Crimes against humanity (Article 1, paragraph 2, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)."

The warrant refers to "various speeches inciting racial hatred" and to "particularly virulent remarks" allegedly made by Mr. Yerodia during "public addresses reported by the media" on 4 August and 27 August 1998. It adds:

> "These speeches allegedly had the effect of inciting the population to attack Tutsi residents of Kinshasa: there were dragnet searches, manhunts (the Tutsi enemy) and lynchings.
>
> The speeches inciting racial hatred thus are said to have resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials."

68. The warrant further states that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The investigating judge does, however, observe in the warrant that "the rule concerning the absence of immunity under humanitarian law would appear . . . to require some qualification in respect of immunity from enforcement" and explains as follows:

> "Pursuant to the general principle of fairness in judicial proceedings, immunity from enforcement must, in our view, be accorded to all State representatives welcomed as such onto the territory of Belgium (on 'official visits'). Welcoming such foreign dignitaries as official representatives of sovereign States involves not only relations between individuals but also relations between States. This implies that such welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against its guest and the invitation cannot become a pretext for ensnaring the individual concerned in what would then have to be labelled a trap. In the contrary case, failure to respect this

undertaking could give rise to the host State's international responsibility."

69. The arrest warrant concludes with the following order:

"We instruct and order all bailiffs and agents of public authority who may be so required to execute this arrest warrant and to conduct the accused to the detention centre in Forest;

We order the warden of the prison to receive the accused and to keep him (her) in custody in the detention centre pursuant to this arrest warrant;

We require all those exercising public authority to whom this warrant shall be shown to lend all assistance in executing it."

70. The Court notes that the *issuance*, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The fact that the warrant is enforceable is clearly apparent from the order given to "all bailiffs and agents of public authority . . . to execute this arrest warrant" (see paragraph 69 above) and from the assertion in the warrant that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The Court is bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

71. The Court also notes that Belgium admits that the purpose of the international *circulation* of the disputed arrest warrant was "to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium". The Respondent maintains, however, that the enforcement of the warrant in third States was "dependent on some further preliminary steps having been taken" and that, given the "inchoate" quality of the warrant as regards third States, there was no "infringe[ment of] the sovereignty of the [Congo]". It further points out that no Interpol Red Notice was requested until 12 September 2001, when Mr. Yerodia no longer held ministerial office.

The Court cannot subscribe to this view. As in the case of the warrant's issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed Mr. Yero-

dia's immunity as the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo's conduct of its international relations. Since Mr. Yerodia was called upon in that capacity to undertake travel in the performance of his duties, the mere international circulation of the warrant, even in the absence of "further steps" by Belgium, could have resulted, in particular, in his arrest while abroad. The Court observes in this respect that Belgium itself cites information to the effect that Mr. Yerodia, "on applying for a visa to go to two countries, [apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium", adding that "[t]his, moreover, is what the [Congo] . . . hints when it writes that the arrest warrant 'sometimes forced Minister Yerodia to travel by roundabout routes'". Accordingly, the Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

* * *

72. The Court will now address the issue of the remedies sought by the Congo on account of Belgium's violation of the above-mentioned rules of international law. In its second, third and fourth submissions, the Congo requests the Court to adjudge and declare that:

> "A formal finding by the Court of the unlawfulness of [the issue and international circulation of the arrest warrant] constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
>
> The violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
>
> Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

73. In support of those submissions, the Congo asserts that the termination of the official duties of Mr. Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continue to exist. It argues that the warrant is unlawful *ab initio*, that "[i]t is fundamentally flawed" and that it cannot therefore have any legal effect today. It points

out that the purpose of its request is reparation for the injury caused, requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It states that, inasmuch as the wrongful act consisted in an internal legal instrument, only the "withdrawal" and "cancellation" of the latter can provide appropriate reparation.

The Congo further emphasizes that in no way is it asking the Court itself to withdraw or cancel the warrant, nor to determine the means whereby Belgium is to comply with its decision. It explains that the withdrawal and cancellation of the warrant, by the means that Belgium deems most suitable, "are not means of enforcement of the judgment of the Court but the requested measure of legal reparation/restitution itself". The Congo maintains that the Court is consequently only being requested to declare that Belgium, by way of reparation for the injury to the rights of the Congo, be required to withdraw and cancel this warrant by the means of its choice.

74. Belgium for its part maintains that a finding by the Court that the immunity enjoyed by Mr. Yerodia as Minister for Foreign Affairs had been violated would in no way entail an obligation to cancel the arrest warrant. It points out that the arrest warrant is still operative and that "there is no suggestion that it presently infringes the immunity of the Congo's Minister for Foreign Affairs". Belgium considers that what the Congo is in reality asking of the Court in its third and fourth final submissions is that the Court should direct Belgium as to the method by which it should give effect to a judgment of the Court finding that the warrant had infringed the immunity of the Congo's Minister for Foreign Affairs.

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75. The Court has already concluded (see paragraphs 70 and 71) that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

> "[t]he essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the conse-

quences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47).

In the present case, "the situation which would, in all probability, have existed if [the illegal act] had not been committed" cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy: in particular, the Court cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment's implications might be for third States, and the Court cannot therefore accept the Congo's submissions on this point.

* * *

78. For these reasons,

THE COURT,

(1) (A) By fifteen votes to one,

*Rejects* the objections of the Kingdom of Belgium relating to jurisdiction, mootness and admissibility;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(B) By fifteen votes to one,

*Finds* that it has jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 17 October 2000;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(C) By fifteen votes to one,

*Finds* that the Application of the Democratic Republic of the Congo is not without object and that accordingly the case is not moot;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren,

Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(D) By fifteen votes to one,

*Finds* that the Application of the Democratic Republic of the Congo is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(2) By thirteen votes to three,

*Finds* that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Al-Khasawneh; *Judge* ad hoc Van den Wyngaert;

(3) By ten votes to six,

*Finds* that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated.

IN FAVOUR: *President* Guillaume; *Vice-President* Shi *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; *Judge* ad hoc Van den Wyngaert.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourteenth day of February, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Demo-

cratic Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

*(Signed)* Gilbert GUILLAUME,
President.

*(Signed)* Philippe COUVREUR,
Registrar.

President GUILLAUME appends a separate opinion to the Judgment of the Court; Judge ODA appends a dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a declaration to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judges HIGGINS, KOOIJMANS and BUERGENTHAL append a joint separate opinion to the Judgment of the Court; Judge REZEK appends a separate opinion to the Judgment of the Court; Judge AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* BULA-BULA appends a separate opinion to the Judgment of the Court; Judge *ad hoc* VAN DEN WYNGAERT appends a dissenting opinion to the Judgment of the Court.

*(Initialled)* G.G.

*(Initialled)* Ph.C.

exercise of jurisdiction to inquire into the individual criminal responsibility of the office holder'.[26]

Judge Carbuccia, dissenting, supported the Prosecutor's position. She wrote that '[t]he Chamber has the duty to ensure that all accused are treated fairly and impartially'. She referred to article 21(3), but also cited article 27(1): 'Moreover, the first sentence of Article 27 of the Statute clearly states that the 'Statute shall apply equally to all persons without any [favourable or unfavourable] distinction based on official capacity'. The words 'favourable or unfavourable', in square brackets, were inserted by the Judge without explanation as to their origin.[27]

The Prosecutor returned to article 27(1) after Rule 134*quater* was adopted, permitting senior officials to be absent from trial proceedings. She claimed that the new Rule was not compatible with the opening words of article 27(1). The Trial Chamber said it did not consider that 'the object of Article 27 of the Statute is offended or defeated by Rule 134*quater* of the Rules, or by the Chamber's decision to allow Mr Ruto, pursuant to the said rule, to be excused from continuous presence at his trial in order to permit him to carry out the functions as contemplated in Rule 134*quater* of the Rules'.[28] Judge Eboe-Osuji criticized the Prosecutor's argument about the scope of article 27(1) in considerable detail in a separate opinion.[29]

Article 27(1) was invoked by the Appeals Chamber in its seminal ruling on the concept of 'gravity', as this term is used in article 17(1)(d) of the *Statute*. According to the Appeals Chamber, article 27(1) provides support for the view that the *Statute* applies not only to 'senior leaders'.[30] The reference suggests a misunderstanding of article 27(1), whose purpose is to ensure that senior leaders do not evade responsibility by arguing that they were acting not as individuals, but on behalf of the State. It is addressed to senior leaders, whereas the Appeals Chamber thought it was a message to those who are not in that category.

## Head of State Immunity (Art. 27(2))

The second paragraph of article 27 concerns the immunities that exist by virtue of customary international law. These protect Heads of States, but also extend to other senior officials such as heads of government and foreign ministers. The definitive statement on immunities is found in the February 2002 ruling of the International Court of Justice. In that case, it was argued that article 27(2) of the *Rome Statute* as well as the relevant provisions of the statutes of the ad hoc tribunals support the existence of a rule of customary law applicable before national courts, but the Court rejected the suggestion.[31] At the same time, the Court confirmed that both a former as well as an incumbent Head of State may

[26] Ibid., para. 98.
[27] *Ruto* et al. (ICC-01/09-01/11), Dissenting Opinion of Judge Herrera Carbuccia, 18 June 2013, para. 7.
[28] *Ruto* et al. (ICC-01/09-01/11), Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, 18 February 2014, para. 61.
[29] *Ruto* et al. (ICC-01/09-01/11), Separate Further Opinion of Judge Eboe-Osuji to the 'Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*', 18 February 2014, paras 41–60.
[30] Situation in the Democratic Republic of the Congo (ICC-01/04), Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I Entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', 13 July 2006, para. 78; See also Situation in the Democratic Republic of the Congo (ICC-01/04), Separate and partly dissenting opinion of Judge Georghios M. Pikis, 13 July 2006, para. 35.
[31] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, Judgment, ICJ Reports 2002, p. 3, para. 58.

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be subject to 'certain international criminal courts, where they have jurisdiction', giving as examples of such tribunals the International Criminal Court and the ad hoc tribunals for the former Yugoslavia and Rwanda.[32]

The language of the International Court of Justice judgment is quite broad. By its association of the legal regime under the *Rome Statute* with that of the ad hoc tribunals, it implies that the same norms apply. But although the statutes of the ad hoc tribunals have texts corresponding to article 27(1), on the defence of official capacity, they have no provision equivalent to that of article 27(2). To the extent that there is no immunity for a Head of State before the ad hoc tribunals, it can only be by implication. Justification for this is in the establishment of the tribunals by the UN Security Council. Sovereign immunity applies to relations *between* States, and arguably it is not relevant when a UN-created tribunal is involved.

Confusion on this issue has been accentuated by the ruling of the Special Court for Sierra Leone applying a provision identical to that in the other ad hoc tribunal statutes.[33] After reviewing the International Court of Justice opinion concerning immunity, the Appeals Chamber of the Special Court responded to an immunity plea from Charles Taylor, who had been president of Liberia at the time the alleged crimes were committed, by answering that there was no peremptory norm contrary to article 6(2) of the *Statute of the Court*.[34] But article 6(2) of the Statute of the Special Court for Sierra Leone concerns 'official capacity', not immunity, which was Taylor's plea. It may be that Taylor had no claim to sovereign immunity before the Special Court, but this was not the consequence of article 6(2) of its *Statute*.

As for the International Criminal Court, there is no doubt that article 27(2) makes any plea of immunity unavailable to relevant officials of States Parties to the *Rome Statute*, up to and including the Head of State. The more difficult issue is the effect of article 27(2) with respect to Heads of State of non-party States. Because this immunity exists by virtue of customary international law rather than principles enshrined in some national legislation (a matter dealt with in article 27(1)), by ratifying or acceding to the *Rome Statute* States renounce their right to invoke immunity on behalf of their leaders. This they are free to do under international law. But they cannot by treaty deny it to third States that have not renounced such immunity. For this reason, article 27(2) should not apply to Heads of State of non-party States. They retain their immunity under customary international law.

Such an interpretation of article 27(2) is confirmed in the negotiations of the Relationship Agreement between the International Criminal Court and the United Nations. The Government of Belgium, which for many years adopted a rather extreme position on immunities, reflected in the dissenting opinion of ad hoc judge Van den Wyngaert in the *Arrest Warrant* case,[35] proposed the following provision: 'Paragraph 1 of this article shall be without prejudice to the relevant norms of international law, particularly article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide and article 27 of the Statute, in respect of the crimes that come under the

[32] Ibid., para. 61.

[33] Statute of the Special Court for Sierra Leone, (2002) 2178 UNTS 138, Annex, art. 6(2).

[34] *Taylor* (SCSL-2003-01-I), Decision on Immunity from Jurisdiction, 31 May 2004, paras 43–53.

[35] Proposal submitted by Belgium concerning document PCNICC/2000/WGICC-UN/L.1, PCNICC/2000/WGICC-UN/DP.18.

jurisdiction of the Court.' When the text of the Relationship Agreement was being prepared, Belgium was embroiled in litigation before the International Court of Justice, and obviously understood that recognition of immunity for UN officials in that text would seem incompatible with its claim that there was no immunity at all for the core crimes of international law. Belgium's provision was rejected during the drafting. The final version of the Agreement confirms the immunities to which UN officials are entitled. According to article 19 of the Relationship Agreement, the United Nations agrees to waive these immunities. But if article 27(2) had already removed such immunity, there would be no need for any such provision, and this was precisely the point that Belgium unsuccessfully tried to confirm. If UN officials benefit from immunity vis-à-vis the *Rome Statute*, subject of course to the United Nations agreeing to waive such immunity, why should Heads of State of non-party States not be in a similar position? Like the United Nations, their governments may choose to waive immunity before the Court, but absent such waiver the customary law of immunity should remain in full force. But this is not the conclusion that several chambers of the International Criminal Court have reached.

Pre-Trial Chamber I, in *Bashir*, held that the position of the accused person as head of State of a non-party State 'has no effect on the Court's jurisdiction over the present case'.[36] It said this conclusion was based upon four considerations.[37] The first was a rather gratuitous and unhelpful reference in the Preamble to the core goals of the *Statute*, which are 'to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which "must not go unpunished" '.[38] The second consisted of an equally gratuitous and unhelpful recital of the terms of article 27.[39] The third was more compelling: a reference to article 21 of the *Statute*, and the observation that unless there is a lacuna in the *Statute* the Court is not to apply other sources of law.[40] The message was that even if general public international law provides for Head of State immunity, it is not formally contemplated by article 27 and therefore cannot be invoked in proceedings before the Court. Finally, the Pre-Trial Chamber said that by referring the Darfur situation to the Court in accordance with article 13(b) of the *Statute*, the Security Council 'accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole'.[41]

The reasoning of the Pre-Trial Chamber rested upon an interpretation of article 27(2) by which it applies to Heads of State of non-party States because the provision does not state to the contrary. But a construction by which article 27(2) only applies to States Parties is certainly equally plausible, if not more so. To start with, the Chamber might have considered article 34 of the Vienna Convention on the Law of Treaties: 'A treaty does not create either obligations or rights for a third State without its consent.'[42] Given the fourth argument proposed by the Chamber, is it not logical to presume that the Security Council, in referring the situation in Darfur to the Court, assumed that not

[36] *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 41.
[37] For academic critique of this aspect of the decision, see Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *JICJ* 315, at 323–5.
[38] *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 42.
[39] Ibid., para. 43. [40] Ibid., para. 44. [41] Ibid., para. 45.
[42] Vienna Convention on the Law of Treaties, (1980) 1155 UNTS 331, art. 34.

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only article 34 of the Vienna Convention remained applicable, but also that the Court would apply article 27 within the framework of customary international law concerning immunities of Heads of State?

The same Pre-Trial Chamber, although with a different composition, developed its reasoning in a subsequent decision. It referred to several historic authorities, but somewhat carelessly. Thus, it began by invoking the Commission on Responsibilities at the Paris Peace Conference, stating that it rejected 'the idea of immunities even for Heads of State'.[43] A paragraph from the report of the Commission was cited that when read in isolation appears to confirm this statement. However, the subsequent paragraph, which was not cited by the Pre-Trial Chamber, explained that the Commission had proposed establishment of a tribunal 'and included the possibility of the trial before that tribunal of a former head of a state with the consent of that state itself secured by articles in the Treaty of Peace'.[44] If the Commission had really meant to say that there were no immunities for a Head of State before an international tribunal, why would it have required the consent of the State in question? Not only was the reference rather inexact, when the report is read as a whole it is actually rather more supportive of the position opposite to that taken by the Pre-Trial Chamber. Several of the other references by the Pre-Trial Chamber are to declarations regarding the defence of official capacity, at Nuremberg, Tokyo and before the ad hoc tribunals. Indeed, these are the ancestors of article 27(1) of the *Rome Statute*. However, it is article 27(2) that is at issue when Head of State immunity is concerned. The Pre-Trial Chamber failed to explain the distinct role of article 27(2) and instead simply conflated it with article 27(1).

The Pre-Trial Chamber distinguished the judgment of the International Court of Justice, stating that it applied only to immunities before national courts and not to international courts.[45] Other members of the Court have reasoned along similar lines. Judge Eboe-Osuji explained, in a separate opinion, that the immunity granted to heads of State and government and other senior officials by customary international law 'was only to protect them from prosecution before the domestic courts of other states'. He said it was 'incorrect to say that Article 27 of the Rome Statute had refused to recognize immunity that was recognized all along in customary international law'. Rather, article 27 receives into the framework of the Rome Statute 'a norm of customary international law that had evolved since World War II—to the effect that the office of head of state does not cloak an individual with immunity from prosecution before an international tribunal'.[46]

[43] *Bashir* (ICC-02/05-01/09), Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011, para. 23.

[44] 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties' (1920) 14 *AJIL* 95, at 116. In another unfortunate error, in para. 28, the Pre-Trial Chamber referred to the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, asserting that these had been adopted by the UN General Assembly. In fact, after a rather excruciating debate in the Sixth Committee during which much criticism was levelled at the Principles (see UN Doc. A/C.6/SR.232-238), the General Assembly referred the Principles back to the International Law Commission, never to return (see Formulation of the Nürnberg Principles, GA Res. 488 (V)).

[45] *Bashir* (ICC-02/05-01/09), Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011, para. 34.

[46] *Ruto* et al. (ICC-01/09-01/11), Separate further opinion of Judge Eboe-Osuji, 23 October 2013, para. 33.

However, unlike the ad hoc tribunals for the former Yugoslavia and Rwanda, the International Criminal Court is established by treaty. The seven most populous States in the world have not ratified or acceded to the *Rome Statute*. The Court can claim to be an 'international tribunal' to the extent that it unites many States in a commitment to international justice and accountability, but care should be taken in assuming that because an organization is 'international' it possesses a level of universality comparable to that of the United Nations. The States that have ratified the treaty are free to abandon the immunities to which they are otherwise entitled under customary international law. But can they also deprive States that have not accepted the *Rome Statute* of their immunity by the somewhat simplistic proposition that by acting collectively instead of individually the customary law rules they would otherwise be obliged to respect no longer apply? If Belgium cannot prosecute the head of State or the foreign minister of another State, as the International Court of Justice said in its 2002 decision, why is the situation changed because Belgium has joined forces with many other States?

Only in 2014 did another Pre-Trial Chamber directly confront the issue of the application of article 27(2) to heads of State of non-party States. Visibly distancing itself from the extreme views in the earlier decisions, it acknowledged that 'when the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-State Party, the question of personal immunities might validly arise'.[47] The Pre-Trial Chamber then developed an entirely different argument by which the immunity of the head of State of Sudan was 'implicitly waived' by the Security Council resolution that referred the situation to the Court and not by the simple application of article 27. The governments of the United States, Russia, and China must have breathed a sigh of relief. If the reasoning of Pre-Trial Chamber II prevailed over the earlier arguments of Pre-Trial Chamber I, then they continue to be protected from article 27(2) unless they are targeted by a Security Council resolution—an unlikely occurrence. Pre-Trial Chamber II reasoned as follows:

> [B]y issuing Resolution 1593(2005) the SC decided that the 'Government of Sudan … shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'. Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan 'cooperate fully' and 'provide any necessary assistance to the Court' senseless. Accordingly, the 'cooperation of that third State [Sudan] for the waiver of the immunity', as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of SC Resolution 1593(2005). By virtue of said paragraph, the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State. Consequently, there also exists no impediment at the horizontal level between the DRC and Sudan as regards the execution of the 2009 and 2010 Requests.[48]

In effect, then, the Pre-Trial Chamber conceded that immunity of heads of State recognized under customary international law remains in force for the heads of State of non-party States before the International Criminal Court unless it has been waived. The Chamber considered that the Security Council could do this implicitly by referring a situation to the Court.

[47] *Bashir* (ICC-02/05-01/09), Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, 9 April 2014, para. 27.
[48] Ibid., para. 29.

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This creates a very important distinction between the three modes of triggering the jurisdiction of the Court. Following the reasoning of the Pre-Trial Chamber, the Security Council referral under article 13(b) can remove the immunity of a head of State of a non-Party State ,whereas referral by a State Party under article 14 or by the Prosecutor acting *proprio motu* under article 15 cannot. For the Court to interpret the *Statute* in such a way as to give the Security Council powers that are not set out explicitly, in articles 13(b), 15*ter*, and 16, is a dangerous precedent. There is little dispute that under the *Statute* the Security Council is without authority to add new crimes, or alter the temporal jurisdiction of the Court, or lower the age of criminal responsibility. Why then should it have the power to make article 27(2) applicable when it is otherwise inapplicable?

The authority of the Security Council should be confined to the possibility of referring a situation under article 13(b), subject of course to the decision of the Prosecutor to proceed in accordance with article 15 and judicial review under article 53. The Security Council has no additional powers, whether they be express or implied. Indeed, it should make no difference at all if the Security Council were to lift the immunity under international law through an express provision in its referral resolution rather than by the rather contrived theory of the Pre-Trial Chamber about implied removal of immunity. This is because Security Council referral cannot create a different legal regime that resulting from State Party referral or *proprio motu* triggering by the Prosecutor. And under no circumstances can a State Party referral or the Prosecutor acting *proprio motu* remove the immunity of a head of State of a non-party State.

Immunities are also considered in article 98 of the *Rome Statute*. Article 98 concerns obligations that States Parties assume under the *Statute* with respect to surrender of accused persons and other forms of cooperation. Paragraph 1 grants an exemption from these undertakings to the extent that they may conflict with immunities granted under 'international law with respect to the State or diplomatic immunity'. Paragraph 2 grants an exemption from surrender obligations where these conflict with 'international agreements', of which so-called 'status of forces agreements' governing foreign military personnel are the classic example. Article 98 should not be confused with article 27, whose provisions concern the renunciation of immunity by States Parties. Professor Bassiouni, who chaired the Drafting Committee at the Rome Conference, has written that articles 98 and 27 should have been joined in a single provision, so as to avoid problems of interpretation.[49] Nevertheless, there is no incompatibility or inconsistency between the two provisions, given that article 27 governs the exercise of jurisdiction over an accused before the Court, whereas article 98 applies solely to obligations of cooperation.

In their implementing legislation, some States have provided that in the case of a national of a State Party to the *Rome Statute*, immunity may not be raised as a bar to surrender.[50] The limited application to nationals of States Parties indicates an understanding that article 27(2) does not apply to nationals of non-party States. Other States, however, have simply prohibited the application of immunities 'under common law or by statute'.[51]

[49] M. Cherif Bassiouni, 'International Criminal Justice in Historical Perspective', in M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, Vol. I, Ardsley, NY: Transnational, 2005, p. 84.

[50] International Criminal Court Act 2001, 2001, ch. 17, s. 23 (United Kingdom).

[51] Crimes against Humanity and War Crimes Act, SC 2000, c. 24, s. 48 (Canada).